FORGOTTEN LIMITS ON THE POWER TO AMEND
STATE CONSTITUTIONS

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ABSTRACT—There seem to be no limits on what can pass through state constitutional amendment procedures. State amendments have targeted vulnerable minorities, deeply entrenched specific fiscal strategies, and profoundly restructured institutions. The malleability of state constitutions is significant because in many states there are legitimate fears that special interests dominate amendment politics, and that fundamental change is occurring with minimal opportunities for constructive deliberation or inclusive participation. The state doctrine of “referendum sovereignty” is a key condition fueling this dynamic. The doctrine holds that there are no substantive limits on any state amendment processes so long as amendments comply with federal law, explicit state procedural requirements, and are subject to a referendum. The doctrine assumes that a referendum is the full institutional embodiment of the people’s sovereignty, and it has led courts to uphold amendments that strip minorities of deeply embedded rights and even replace constitutions wholesale.

This article provides the first systematic assessment of the doctrine of referendum sovereignty. To do this, it relies on a set of largely neglected sources: the debates of all known state constitutional conventions where state amendment processes were forged (ninety-one conventions from 1818 to 1984). These sources suggest that the underlying logic of state constitutionalism is inconsistent with the presumption of a limitless amendment power. Properly understood, state amendment processes are built on the assumption that only a constitutional convention of specially elected delegates is presumed to have inherent power to create or destroy a constitution. Extra-conventional amendment actors, on the other hand, are presumed to be subordinate creations of the existing constitution with the limited authority to propose modifications and without authority to destroy the constitution’s fundamentals. This distinction came from a deep distrust of existing officials and private groups. My findings are important in light of the ever-expanding use of extra-conventional amendment processes to effectuate large-scale change. They provide a coherent framework for state courts to assess whether a reform is an appropriate use of the amendment power or an unauthorized intrusion on the role of the convention.
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INTRODUCTION

In 2018, venture capitalist Tim Draper financed an effort to amend the California Constitution to dissolve California into several entirely new states.1 Although Mr. Draper’s effort was ultimately stymied on procedural grounds, he is not alone in his perception that there are no meaningful limits on what can pass through state constitutional amendment procedures. Other successful state amendments have targeted vulnerable political minorities,2 deeply entrenched specific fiscal strategies,3 and fundamentally restructured government institutions.4 Singular amendments have even been used to replace entire state constitutions. To be sure, state amendments must satisfy explicit state procedural requirements and comply with federal law, but those

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1 Draper’s first initiative was a constitutional amendment to split California into six states. See Katy Steinmetz, Proposal to Split California into Six States Moves Forward, TIME (July 15, 2014), https://time.com/2983496/california-six-state-proposal-vote/ [https://perma.cc/4BXK-9F45]. He restyled that amendment as a statutory initiative proposing three states, presumably to avoid California’s non-revision rule. See Tim Draper, Dear Fellow Californians: You Don’t Get to Vote!, CAL3, http://cal3.com [https://perma.cc/79J3-H3PM]; see also Richard L. Hasen, California’s Supreme Court Can Kill Cal-3 Quickly and Save Us All a Lot of Trouble, L.A. TIMES (June 25, 2018, 4:15 AM), https://www.latimes.com/opinion/op-ed/la-oe-hasen-split-california-proposition-legal-problems-20180625-story.html [https://perma.cc/EHV4-HH2N] (explaining the history of Draper’s project). Although the second measure qualified for the ballot, the California Supreme Court recently enjoined the Secretary of State from placing it on the ballot “[b]ecause significant questions have been raised regarding the proposition’s validity, and because we conclude that the potential harm in permitting the measure to remain on the ballot outweighs the potential harm in delaying the proposition to a future election . . . .” Planning & Conservation League v. Padilla, No. S249859, 2018 Cal. LEXIS 5200 (July 18, 2018) (order to show cause issued).


3 See, e.g., CAL. CONST. art. XVI, § 1 (amended 1970) (setting a maximum interest rate on all general-obligation bonds and limiting the legislature’s ability to incur debts over $300,000); COLO. CONST. art. XXVII, §§ 1, 3 (1993) (creating “Great Outdoors Colorado” program and requiring certain lottery revenues be allocated to environmental, wildlife, and parks programs); MINN. CONST. art. 14, § 10 (authorizing fuel taxes and fees to be allocated for road re-construction). See generally John Kincaid, The Constitutional Frameworks of State and Local Government Finance, in THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT FINANCE 45, 71–72 (Robert D. Ebel & John E. Petersen eds., 2012) (explaining the role that constitutional amendments have played in regulating state and local finance).

limitations leave wide latitude for constitutional reformers seeking to remake a state’s highest law.\(^5\)

The malleability and increasing significance of state constitutions raise the important question of whether there are any inherent substantive limits on state amendment processes.\(^4\) This is a question of mounting consequence because, as state amendment practice has accelerated and expanded, concerns about democratic defects in amendment processes have heightened.\(^7\) In many states, there are legitimate fears that well-financed special interests dominate amendment politics, and that fundamental change is occurring with minimal opportunities for constructive deliberation or inclusive participation. These fears are especially poignant because spending limits and regulation of referenda campaigns are ineffective or nonexistent.\(^8\)

Notwithstanding these concerns, contemporary state judicial review of amendments has been almost universally deferential.\(^9\) Provided that an amendment complies with federal law and explicit state amendment rules, state courts generally uphold even the most sweeping changes as valid uses of the state amendment power.\(^10\) The prevailing justification for these rulings

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\(^5\) Some state amendment rules impose explicit substantive limitations on amendment in the form of single-subject requirements, non-revision rules, and subject-matter restrictions on initiative amendments. A few state constitutions also purport to make particular provisions unamendable. In general, however, state amendment processes place few explicit, substantive limitations on amendment.


\(^8\) Long before Citizens United v. FEC, 558 U.S. 310 (2010), the Supreme Court held that states cannot impose individual or corporate contribution limits on ballot question campaigns. See Citizens Against Rent Control/Ca,l. For Fair Hous. v. City of Berkeley, 454 U.S. 290 (1981); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978). Thus, there are minimal restrictions on how special interest groups spend money related to state constitutional amendment proposals, although some states impose disclosure requirements for ballot question spending. See, e.g., MASS. GEN. LAWS ANN. ch. 55, § 22A (West 2019).

\(^9\) See ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 402 (2009) (explaining that courts impose “virtually no substantive restrictions on state constitutional amendment and revision (other than federal constitutional constraints”)]. Unlike disputes under Article V, which the Supreme Court has declared nonjusticiable political questions in Coleman v. Miller, 307 U.S. 433 (1939), state courts will resolve disputes under state amendment rules. See id; see also G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 26 (1998).

\(^10\) See, e.g., Omaha Nat’l Bank v. Spire, 389 N.W.2d 269, 273 (Neb. 1986) (refusing to consider the argument that an amendment was invalid because it conflicted with core of the existing constitution); Assoc. Indus. of Okla. v. Okla. Tax Comm’n, 55 P.2d 79, 82 (Okla. 1936) (“Subject to the limitations imposed by the Federal Constitution, the reserved power of the people of the state to amend their Constitution is unlimited.”); see also FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 3
is that state constitutional amendment processes, especially those incorporating a public referendum, reflect the sovereign preferences of the people, which courts are obliged to enforce no matter how far-reaching or deeply incongruous with the existing constitution. Thus, state courts have gone so far as to hold that state legislatures can propose entirely new constitutions as singular amendments.

A few state courts have noted the oddity of an unlimited state amendment power. In 2006, Justice Greaney of the Massachusetts Supreme Judicial Court responded to a proposed amendment limiting marriage to heterosexual relationships by noting that the amendment was “mutually inconsistent and irreconcilable” with the Adams Constitution’s “elegantly stated, and constitutionally defined, protections of liberty, equality, tolerance, and the access of all citizens to equal rights and benefits.” Similarly, in an important but widely overlooked 1936 case, the Alabama Supreme Court held that the amendment power could not be used to “temporarily suspend the Constitution or any part thereof . . .” because popular suspension of a constitution would contradict the document’s essential purpose.

Besides these few instances, and a handful of largely overlooked cases, courts and scholars have generally dismissed the suggestion that there are implicit, judicially enforceable limits on state amendment

(2006) (“Other than these relatively rare federal constitutional restrictions, . . . there are no legally enforceable restrictions on the content of what may be placed in the state constitution.”).

11 See, e.g., Smith v. Cenarrusa, 475 P.2d 11, 17–18 (Idaho 1970) (“We retain our faith in our people and their intelligence for being informed in matters of their government. Theirs will be the final determination as it should be ideally in all matters of their government.”); Omaha Nat’l Bank, 389 N.W.2d at 278 (holding that the court has no authority “to tell the voters of this state that although the Constitution states that the people have reserved the power to amend that Constitution, they may only amend it in ways that [the court] determine[s]”). A related justification is that courts are obligated to reconcile inconsistent provisions and have no authority to declare one provision superior over another. See, e.g., Floridians Against Casino Takeover v. Let’s Help Fla., 363 So. 2d 337, 341–42 (Fla. 1978).

12 See, e.g., Wheeler v. Bd. of Trustees, 37 S.E.2d 322, 327 (Ga. 1946) (upholding Georgia’s 1945 constitution, which was adopted through the amendment procedures prescribed in the operative 1877 constitution, as lawful because the 1877 constitution authorized the legislature to create amendments subject to a referendum); Cenarrusa, 475 P.2d at 17–18 (upholding the state legislature’s power to propose an entirely new constitution as an amendment or revision to the existing constitution); see also A. E. Dick Howard, Constitutional Revision: Virginia and the Nation, 9 U. RICH. L. REV. 1, 33–34 (1974) (arguing that Virginia’s 1970 constitution, which was adopted as a singular amendment to the 1902 constitution, was lawful because of Virginia Supreme Court precedent).


14 Houston Cty. v. Martin, 169 So. 13, 15 (Ala. 1936) (invalidating amendment while acknowledging that it was procedurally perfect).

15 See infra Sections III.A.2, III.B.2 (discussing overlooked state court jurisprudence enforcing functional limitations on extra-conventional amendment processes).
procedures. Contemporary high courts around the country generally take the position that there is no doctrinal basis to invalidate a procedurally perfect, federally compliant amendment. To the extent scholars have entertained the idea at the state level, they suggest that it can be justified only by appeals to natural law or by borrowing exotic foreign doctrine from other countries.

16 See, e.g., Scott L. Kaufert & David A. Russcol, The Eye of a Constitutional Storm: Pre-Election Review by the State Judiciary of Initiative Amendments to State Constitutions, 2012 Mich. St. L. Rev. 1279, 1317 (“[T]o challenge a properly passed state constitutional amendment on grounds that it generally violated the state constitution as it existed prior to amendment would be novel, to say the least.”).

17 See, e.g., Floridians Against Casino Takeover v. Let’s Help Fla., 363 So. 2d 337, 341–42 (Fla. 1978) (“When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.”); Opinion of Justices to Senate, 436 N.E.2d 935, 944 (Mass. 1982) (“We cannot comprehend how a proposed amendment to the Massachusetts Constitution could be found to violate that Constitution.”); Omaha Nat’l Bank v. Spire, 389 N.W.2d 269, 278 (Neb. 1986) (“[I]t is difficult to comprehend how the proposed constitutional amendment can be ‘unconstitutional’ under our Constitution.”) (internal quotations omitted). In a series of cases from the 1920s, the United States Supreme Court summarily dismissed similar arguments under Article V. See Nat’l Prohibition Cases, 253 U.S. 350, 386 (1920); Rhode Island v. Palmer, 253 U.S. 350, 386 (1920). Those cases involved challenges to the Eighteenth and Nineteenth Amendments as violating the Constitution’s core commitment to federalism and going beyond the amendment power of Article V. See W. F. Dodd, Amending the Federal Constitution, 30 Yale L.J. 321, 335–38 (1921). The Court rejected those arguments, and, in 1939, effectively foreclosed the issue by holding that disputes under Article V are nonjusticiable political questions. See Coleman v. Miller, 307 U.S. 972, 980 (1939).


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This Article analyzes whether state constitutional history, doctrine, and theory support prevailing judicial conceptions of a limitless state constitutional amendment power. To do this, I rely on a set of largely neglected sources: the debates and proceedings from the 233 state constitutional conventions that have occurred since the Founding. I collected and reviewed all known deliberations regarding the design of amendment processes (ninety-one different state convention debates spanning 1818–1984). I also draw on an original database of several hundred state cases reviewing the constitutionality of state amendments in all fifty states. Based on this review, I find that the underlying logic of state constitutional theory is inconsistent with the presumption of a limitless amendment power and that a body of forgotten and neglected case law has implied functional limitations on the amendment power.

A full understanding of the state tradition suggests that there are implicit functional limits on what can be done through amendment. Specifically, there is a standing presumption that amendments developed outside of a state constitutional convention cannot fundamentally destroy or create a state constitution. Foundational changes of that nature are presumed lawful only
when formulated by the people acting in their sovereign constituent capacity through a convention of specially elected delegates. Indeed, the constitutional convention came from the belief that for a constitution to originate from the people, it had to originate from an institution separate from existing officials and insulated from undue influence by private faction. Thus, in the state tradition, because a constitution depends on popular consent for legitimacy, there is a presumption that it must originate with a convention of specially elected delegates whose sole mandate is to craft a constitution on behalf of the people. No other institution is presumed to have inherent power, without an explicit constitutional grant, to create government on behalf of the people.

Consequently, states developed extra-conventional amendment procedures with the background understanding that no ordinary official, institution, or private group has the inherent power to formally initiate changes to the people’s fundamental law. Although state legislatures unquestionably have plenary legislative power, that authority does not include the power to propose or initiate constitutional change. Indeed, the separation between ordinary legislative power and the power to make or change a constitution was one of the key breakthroughs in American political thought. Thus, state constitutionalists recognized that if there was to be an extra-conventional method of amendment, it would have to be a new and

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23 See infra notes 215–219 and accompanying text.
24 Many state constitutions include provisions stating that the people retain the right to change their constitution in whatever manner they choose. See TARR, UNDERSTANDING STATE CONSTITUTIONS, supra note 9, at 74. If we assume (incorrectly, I argue) that the referendum procedure can be equated with the full sovereign capacity of the people, then these provisions might support the doctrine of referendum sovereignty and the idea that extra-conventional amendment processes are inherently unlimited when subject to referenda. Part of my argument in this Article is that these provisions are better understood as declarations that although the constitution granted limited amendment powers to certain officials and institutions, no ordinary institution or official ever has the inherent authority to create or change a constitution on the people’s behalf. See infra notes 215–219. They are declarations of where residual power exists. They appear in preambles or state bills of rights to clarify the limits of the grants of power effectuated by the rest of the constitution. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457, 477–81 (1994) (arguing that these provisions support the view that amendment rules are not exclusive means for lawful constitutional change).
25 See WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (Rita Kimber & Robert Kimber trans., Univ. of North Carolina Press 1980) (1973); MARC W. KRAMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 28–29 (1997) (explaining that early American constitution-making was galvanized around the belief that legislatures were creations of the constitution with delegated law-making power subordinate to the people’s sovereign power to create a constitution); TARR, UNDERSTANDING STATE CONSTITUTIONS, supra note 9, at 70 (“The shared understanding that the people are the source of constitutional authority alerted the states to a further problem: if a legislature could not create a constitution, then neither could it re-create the constitution by altering it.”); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1998).
explicitly authorized power. It would have to be a power that they created through positive law by engrafting language into their constitutions that authorized certain agents to participate in constitutional amendment outside of a convention. The important consequence of this was that the power of a legislature to make or propose “specific” amendments was not understood to be synonymous with the original power of the people to make (or change) their constitution. In the state constitutional tradition, the extra-conventional amendment power is presumed to be a limited and explicitly “constituted power.” It is a power derived entirely from the express language in the constitution that creates it, and it has no inherent or implied authority.

This same logic underlies the constitutional initiative. Although the initiative is heavily cloaked in the rhetoric of popular sovereignty, the debates regarding adoption of the initiative centered on concerns about constitutional agency. Opponents of the initiative argued that the initiative process did not directly empower the people, but created constitutional agents of individuals who were inevitably prone to act out of self-interest, thus actually undermining popular sovereignty. Proponents of the initiative, on the other hand, emphasized that the existing deputies (the legislators) were themselves self-interested or captured by special interests, and,

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26 See infra Part III (providing evidence from convention debates). This point is powerfully illustrated by one of the earliest known convention debates addressing amendment by a legislature. At the Maine convention of 1819, a delegate exclaimed in response to a first-of-its-kind proposal to allow the legislature to formulate amendments for popular ratification: “It appears to me this section delegates to our Legislature a stretch of power, that no Legislature on earth has a right to exercise.” The Debates and Journal of the Constitutional Convention of the State of Maine 1819–20 and Amendments Subsequently Made to the Constitution 345–47 (1894).

27 See ROZNAI, supra note 18, at 106; 11 Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention 413 (1905) (a delegate arguing that in regard to extra-conventional amendment “[t]he very object of a constitution is to control Legislatures”).

28 I use the phrase “constitutional initiative” to refer to the process whereby citizens can craft a proposed amendment to a state constitution and qualify it for a referendum by obtaining signatures as proscribed by law. In this article, I also use the phrase “citizens’ initiative” to refer to this process, although the phrase can be used in the literature to refer to a process whereby citizens can draft and propose ordinary statutes in addition to constitutional amendments.

29 See infra Section III.B. See generally DAVID D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION (1989) (tracing history of constitutional and statutory initiative in states). By “constitutional agency,” I mean the delegation of the people’s sovereign power to make or change government to some institution, group, or official to act as the people’s agent in the process of constitution making or constitutional reform.

30 See, e.g., 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio 688–89 (1912) (“A measure to be submitted under this method is drawn up in some back office by someone personally interested therein . . . .”).

31 See id. at 688 (“The result will be that you will have laws passed for the government of the honest people by the worst class of the citizens of our state.”).
therefore, were unfaithful constitutional agents. The initiative, they argued, would deputize individual citizens who were not entangled with powerful special interests and could propose amendments that truly represented the people or at least counteracted legislative capture. Both sides acknowledged, however, that the debate centered around who to deputize for purposes of amendment. And in places where the initiative was adopted, all seemed to agree that the legal effect of initiative provisions was to authorize private citizens to act as amendment agents in a way that they would not otherwise have a legal right to act.

These findings suggest that state amendment rules are properly understood as deputizing agents of constitutional change. Because those agents derive their authority entirely from the existing constitution, they implicitly lack the authority to destroy or replace the source of that power. Only the people in their sovereign capacity have the inherent authority to create or destroy government, and the constitutional convention is the only state institution with the implied authorization to exercise that authority on behalf of the people. To be sure, the people can delegate their authority to destroy or create government to existing officials or institutions. In fact, a small minority of states have adopted provisions that allow legislatures or other agents of constitutional change to propose entirely new constitutions.

32 See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 560 (1907) (“The history of legislatures for the recent past decades is prolific with disregard for the prayers of the people.”).

33 See, e.g., THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 189 (John S. Goff ed., 1991) (“I believe it initiates a true republican form of government, and will enable the people of this state to hold the government within their control.”).

34 See infra Section III.B.1 (providing evidence from convention debates of this understanding). See generally KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 23 (2009) (explaining that initiative was first introduced into the American constitutional system by positive law adopted during the Progressive Era). Something like the initiative had existed at the local government level since before the Revolution. See ELLIS PAXSON OBERHOLTZER, THE REFERENDUM IN AMERICA 369–73 (1900) (describing various initiative-type processes used to handle disputes regarding the location of county capitals, whether “live stock shall be allowed to run at large,” and local liquor regulation). However, the initiative was never recognized as a matter of state law in any form until South Dakota constitutionalized the statutory initiative in 1898 and Oregon adopted the statutory and constitutional initiative in 1902. See DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION, supra note 19, at 64 n.132. There was, of course, a long standing right in American and English law allowing citizens to petition the legislature. On the legal differences between the initiative and the preexisting right to petition the legislature in state constitutions, see OBERHOLTZER at 368–69, 384 (noting that the right to petition was legally subordinate to the legislature whereas initiative was a legal right designed to be independent of the legislature).

35 Three state constitutions explicitly allow the legislature to create and propose an entire constitution for the people to ratify at a referendum. See FLA. CONST. art. XL § 1 (“Amendment of a section or revision of one or more articles, or the whole, of this constitution may be proposed by . . . the legislature.”); GA. CONST. art. X, § 1, para. I (“Amendments to this Constitution or a new Constitution may be proposed by the General Assembly . . . .”); OR. CONST. art. XVII, § 2(1), available at https://www.oregonlegislature.
But absent an explicit and clear delegation of the power to create or destroy a constitution, courts should presume that the constituent power inheres only in the people acting in convention. To hold otherwise misunderstands how the states have institutionalized popular sovereignty.

These findings are important in light of the ever-expanding use of state constitutional amendment procedures to effectuate large-scale change. They provide a coherent framework for state courts to assess whether a proposed amendment is an impermissible use of the amendment power. If an amendment actually or effectively creates a fundamentally new constitution, it exceeds the presumed scope of amendment. Courts should uphold such far-reaching changes as lawful “amendments” only if the constitution explicitly authorizes the relevant amendment agent—legislature, commission, or private group—to formulate a new constitution.

Of course, line-drawing will be difficult, and the proposed doctrine will surely require further delineation, refinement, and critical assessment. For now, my findings reveal that state constitutional history, doctrine, and theory are inconsistent with the prevailing judicial notion that amendment processes can be equated with the people’s sovereign right to create or replace government. If nothing else, the findings suggest that courts should reevaluate their approach to reviewing extra-conventional amendments and recognize that a limitless amendment power may actually undermine popular sovereignty.

This Article proceeds as follows. Part I explains state amendment practice and the doctrine of referendum sovereignty. Part II explores how state constitutionalism is grounded in the assumption that only a convention of specially elected delegates has the inherent power to create a constitution on behalf of the people. Part III argues that the states developed extra-conventional amendment processes with the assumption that the amendment power was a limited and explicitly constituted power separate from the people’s inalienable and foundational right to create government. Part IV explores how these findings could support judicially enforceable limits on state amendment processes and provides a preliminary assessment of likely costs and impediments to judicial enforcement. Part IV also illustrates how courts might implement the doctrine by analyzing two hypothetical amendments: an amendment to eliminate the initiative and referendum under the Oklahoma Constitution, and an amendment to eradicate public education under the New Hampshire Constitution.

gov/bills_laws/Pages/OrConst.aspx [https://perma.cc/3WX6-8DE2] ("[A] revision of all or part of this Constitution may be proposed in either house of the Legislative Assembly . . . .").
I. **STATE AMENDMENT PRACTICE AND REFERENDUM SOVEREIGNTY**

As state constitutional amendment procedures have grown in frequency and significance, legal doctrine regarding the permissible substance of amendments has treated the amendment power as highly deferential to amendment actors. This Part presents an overview of state constitutional amendment processes and charts the development of legal doctrine supporting a limitless state amendment power. I first provide an overview of state amendment rules and illustrate the significance of formal amendment in contemporary state constitutional politics. I then discuss the jurisprudence, or doctrine of referendum sovereignty, that has developed around a theory of limitless state amendment power.

### A. State Amendment Practice and Procedure

Although state constitutions contain a variety of nuanced approaches to amendment, two general methods dominate contemporary state politics. First, all state constitutions authorize their legislatures to formulate amendments. The dominant approach is the “legislative-referral” method, which allows legislatures to craft proposed changes and place them on the ballot for ratification at a referendum. All states except Delaware have a legislative-referral method of amendment, and the vast majority of legislative-referral states allow legislatures to submit proposals to a public referendum after only a single legislative session. A minority of states

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36 See TARR, UNDERSTANDING STATE CONSTITUTIONS, supra note 9, at 130; G. Alan Tarr & Robert F. Williams, Getting from Here to There: Twenty-first Century Mechanisms and Opportunities in State Constitutional Reform, 36 RUTGERS L.J. 1075, 1092 (2005) (reporting that 90% of amendments are by legislative method); Marshfield, supra note 7, at 489 (providing a detailed breakdown of amendments by method in all citizen-initiative states between 2005 and 2014).


38 States impose a variety of requirements on the legislative-referral method. For example, most states impose a “single-subject” rule of some kind, which limits proposals to one general issue. See, e.g., LA. CONST. art. XIII, § 1(B) (“A proposed amendment shall . . . be confined to one object . . .”); see also Tarr & Williams, supra note 36, at 1092. Several other states similarly place a cap on the total number of amendments the legislature can propose at a single election, and a few states prohibit the legislature from resubmitting a failed amendment to voters within a certain timeframe. See, e.g., ARK. CONST. art. XIX, § 22 (“But no more than three amendments shall be proposed or submitted at the same time.”); N.J. CONST. art. IX, ¶ 7; see also Tarr & Williams, supra note 36, at 1092–93.

39 See Dinan, supra note 37, at 12 tbl.1.2. Delaware is unique in that it allows the legislature to amend the constitution without a public referendum provided that a proposed amendment is approved by supermajorities in both houses in two successive legislative sessions.

40 DINAN, supra note 2, at 14. These states generally allow the legislature to place proposals on the ballot after a majority or supermajority in each house approves the amendment. See id.
require the legislature to approve amendments in two successive sessions before they can be sent to a referendum.41

Second, eighteen states allow for amendment by citizen initiative (“the initiative” or “the constitutional initiative”).42 Requirements for the initiative vary, but generally it allows private citizens to craft amendment proposals and place them on the ballot for ratification by gathering a set number of signatures in support of the proposal.43 Together, the legislative-referral and initiative processes account for 99% of all contemporary state amendments.44

Additionally, the vast majority of state constitutions explicitly allow for constitutional change by the calling of a convention.45 The particulars vary, but the standard approach is to allow the legislature to begin the process by submitting to referendum the question of whether to convene a constitutional convention.46 If the public approves, delegates are specially elected to the convention, which deliberates and formulates proposals for ratification at another referendum.47 Although the convention was the dominant method of state constitutional amendment during the nineteenth and much of the early twentieth century, there have been no convention-generated amendments in over thirty years.48 One final point regarding the text of state constitutions is relevant and important to this discussion of limits on the amendment power.

41 The states that require this are Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin. See id.

42 See Dinan, supra note 37, at 14 tbl.1.3 (summarizing procedures for initiative in all eighteen states); see generally John Dinan, State Constitutional Initiative Processes and Governance in the Twenty-first Century, 19 CHAP. L. REV. 61, 93–103 (2016) (detailing many nuances and variations in constitutional initiative rules).

43 Signature thresholds and denominators vary. See id. (describing various approaches).

44 Marshfield, supra note 7, at 489. In addition to these two methods, plus the option of calling a constitutional convention, the constitutional commission has become an important institution in contemporary state constitutional change.

45 See Gerald Benjamin, Constitutional Amendment and Revision, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 192 (G. Alan Tarr & Robert F. Williams eds., 2006) (all but nine provide for conventions); Dinan, supra note 37, at 15–16 tbl.1.4 (describing procedures in all state constitutions). State constitutions can contain a great amount of detail regarding the structure and operation of conventions. See Benjamin, supra note 45, at 192 (providing a taxonomy of state approaches to regulating conventions through their constitutions). In addition to conventions, state constitutional commissions have become important institutions in contemporary state constitutional change.

46 Even when the constitution does not explicitly allow for this, state constitutional doctrine generally holds that legislatures can propose a convention without explicit constitutional authorization. See Tarr & Williams, supra note 36, at 1079.

47 See 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 197–99 app. (G. Alan Tarr & Robert F. Williams eds., 2006). The states use the convention method to adopt entirely new constitutions and to reform their existing documents. See id. at 199; Dinan, supra note 38, at 15–16.

48 DINAN, supra note 2, at 30.
Several state constitutions appear to distinguish between constitutional “amendment” and “revision.”49 Although the texts are mostly unclear as to the substance of the distinction, scholars and courts have tried to define the concepts. Professor Richard Albert, for example, describes an amendment as a specific change that “alters the constitution within the existing framework of government while revision amounts to a fundamental change that departs from the presuppositions of the constitution and may even reshape its framework.”50

When looking at the twenty-three state constitutions that refer to both amendment and revision, four general categories emerge. First, several initiative states provide that the initiative can be used for amendments, but legislatures or conventions may propose amendments or revisions—thus creating the inference that broad change cannot occur through the initiative process.51 Second, some non-initiative states authorize the legislature to propose only amendments but provide that conventions may propose amendments or revisions—thus creating the same inference regarding legislative proposals.52 Third, some non-initiative states explicitly authorize legislatures to propose amendments or revisions to the constitution—thus creating the inference that the legislature can propose broad changes.53 Finally, several states seem to use “revision” as a more general reference to constitutional change than a term of particular legal significance.54 As

49 See generally Benjamin, supra note 45, at 178 (noting that twenty-three state constitutions contain both amendment and revision in reference to constitutional change).
50 Richard Albert, The Structure of Constitutional Amendment Rules, 49 WAKE FOREST L. REV. 913, 929 (2014); see Benjamin, supra note 45, at 178 (defining amendment as “the alteration of an existing constitution by the addition or subtraction of material” and “revision” as “replacement of one constitution by another”); see also Jonathan L. Marshfield, Amendment Creep, 115 MICH. L. REV. 215, 269–71 (2016) (discussing an illustrative case regarding amendment-revision distinction).
51 See, e.g., CAL. CONST. art. XVII, § 3 (“The electors may amend the Constitution by initiative.”); OR. CONST. art. XVII, § 2(1) (“In addition to the power to amend this Constitution granted by section 1, Article IV, and section 1 of this Article, a revision of all or part of this Constitution may be proposed in either house of the Legislative Assembly.”). Florida is an interesting exception because it explicitly allows revision by initiative. See Fla. Const. art. XI, § 3 (“The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . . .”).
52 See, e.g., ALA. CONST. art. XVIII, § 284 (“Amendments may be proposed to this Constitution by the legislature in the manner following . . . .”); id. § 286 (“Nothing herein contained shall be construed as restricting the jurisdiction and power of the convention, when duly assembled in pursuance of this section, to establish such ordinances and to do and perform such things as to the convention may seem necessary or proper for the purpose of altering, revising, or amending the existing Constitution.”).
53 See Tarr & Williams, supra note 36, at 1082 n.35.
54 See, e.g., N.C. CONST. art. XIII, § 2 (“The people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way.”); see also Staples v. Gilmer, 33 S.E.2d 49, 56 (Va. 1945) (holding that terms as used in 1902 Virginia Constitution were effectively interchangeable); State ex rel. Miller v. Taylor, 133 N.W. 1046, 1051 (N.D. 1911) (holding “revision”
explained below, only a small minority of courts have enforced a distinction between amendment and revision.

Regarding amendment practice and substance, state constitutions operate very differently than the Federal Constitution. One of the Federal Constitution’s defining characteristics is its onerous formal amendment procedures, which divert pressures for constitutional change into informal processes such as constitutional litigation. State constitutions, on the other hand, are universally more susceptible to formal amendment through political processes. Whereas the Federal Constitution has been amended only twenty-seven times over 230 years, state constitutions average 1.3 amendments per year and there have been 7,586 amendments to current state constitutions.

Aside from their frequency, state amendments have great substantive and political significance. They address almost every aspect of public life—from contentious cultural issues like marriage equality, abortion rights, marijuana criminalization, and gun rights; to high-stakes regulatory and structural issues such as taxation, education financing, public debt, judicial review, and redistricting. State amendments have become a go-to political device for citizens, interest groups, and public officials.

Not surprisingly, therefore, state amendment practice attracts significant capital investment by interest groups hoping to influence the amendment process in their favor. In 2018, for example, Ballotpedia confirmed $1.185 billion in contributions to 167 different ballot question campaigns. The average amount contributed per campaign was over $7

and “amendment” are interchangeable); Albert, supra note 50, at 930–32 (finding that foreign national constitutions frequently use terms interchangeably).

55 See Rosalind Dixon, Updating Constitutional Rules, 2009 SUP. CT. REV. 319, 319 (2009) (explaining the common understanding that Article V’s rigidity has rerouted constitutional change into judicial review and “superstatutes”).

56 See DINAN, supra note 2, at 11; TARR, supra note 9, at 139–40.

57 See DINAN, supra note 2, at 23 (as of 2017).

58 See generally id. (explaining that reformers resort to amendments in the states).

59 See Ballot Measure Campaign Finance, 2018, BALLotpedia, https://ballotpedia.org/Ballot_measure_campaign_finance,_2018 [https://perma.cc/6MHQ-XN33]. Of course, these numbers capture statutory ballot questions unrelated to constitutional amendments. However, they are informative for the purpose of illustrating the significant amount of money interest groups spend in amendment campaigns. In 2016, for example, a proposed constitutional amendment in California related to taxes on tobacco attracted more than $74.79 million in contributions. See Elaine S. Povich, Big Money Pours into State Ballot Issue Campaigns, PEW TRUSTS (Sept. 23, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/23/big-money-pours-into-state-ballot-issue-campaigns [https://perma.cc/N7RK-MXU5].
million.\textsuperscript{60} Moreover, a recent study by The Pew Charitable Trusts found that most money given to ballot question campaigns “comes from businesses or other interests with financial stakes in the outcome.”\textsuperscript{61} Indeed, many observers note that initiative and referendum politics has been “industrialized” and weaponized by well-financed special interests who manipulate the process to obtain favorable substantive policies.\textsuperscript{62}

To be sure, amidst this high-stakes political activity, many state amendments are “ordinary” in the sense that they make relatively minor adjustments, deletions, or updates to the constitution.\textsuperscript{63} But amendments can also fundamentally restructure state governance or even abolish a constitution’s core commitments. Indeed, some of the most significant and far-reaching developments in American public law have occurred through singular state amendments crafted by legislatures or private citizens.\textsuperscript{64} The popular election and recall of state judges,\textsuperscript{65} legislative term limits,\textsuperscript{66} and even

\textsuperscript{60} Ballot Measure Campaign Finance, 2018, supra note 59. Total contributions were $32 million in 2015, $1.012 billion in 2016, and $102 million in 2017. \textit{Id}. In 2018, $1.185 billion was contributed to campaigns for or against 167 ballot measures. \textit{Id}.

\textsuperscript{61} Povich, supra note 59.

\textsuperscript{62} See Marshfield, supra note 7, at 477–79.

\textsuperscript{63} See Tarr, supra note 9, at 142 (“[M]ost twentieth-century amendments have facilitated the operation of state government, making adjustments in an existing body of law rather than introducing grand changes.”).

\textsuperscript{64} See \textit{id}. at 24. Combinations of amendments and amendments over time can also fundamentally reconstitute state governance. See \textit{id}. While this phenomenon might present its own problems and concerns, my focus in this article is with singular attempts to re-constitute a state.

\textsuperscript{65} The adoption of judicial elections was a momentous change from the appointment model. Indeed, no other advanced democracy in the world elects judges in the same way. See David E. Pozen, The Irony of Judicial Elections, 108 COLUM. L. REV. 265, 266 (2008). It was intended to fundamentally restructure the balance of power between courts, legislatures, political parties, and the people. As Professor G. Alan Tarr has explained, proponents of judicial elections often argued that elections would preserve judicial independence by releasing judges from party control and political elites. See G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES 51 (2012). Judicial elections were intended to ensure that courts practiced judicial review of legislation with more independence and were not afraid to strike down unconstitutional legislation. \textit{Id}.

\textsuperscript{66} Fifteen states currently have legislative term limits, several of which were adopted by ordinary constitutional amendment. See \textit{Dinan}, supra note 2, at 38 (noting that voters in nearly one-third of the states approved constitutional amendments limiting the number of terms legislators can serve). These amendments can have the effect of dismantling professional policy making and fundamentally reshaping governance in a state. See generally THAD KOUSSELL, TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM (2005) (documenting and analyzing the significant impact of legislative term limits on state government). Professors Bruce Cain and Roger Noll have observed, for example, that California’s 1990 term limit amendment “substantially weaken[ed] the legislature’s leadership, institutional knowledge, oversight capability, and committee system.” Cain & Noll, supra note 6, at 1524–25. Moreover, “[i]n so doing, the amendment shifted power from the legislature to the executive and increased lobbyists’ influence on the legislative process.” \textit{Id}. Interestingly, the California term limit amendment was ratified by a mere 4% margin. See The Term-Limited States, NAT’L CONF. ST.
the initiative and referendum itself were all adopted in various states as singular state amendments. Amendments can also attack a constitution’s core normative commitments. Rights-stripping amendments, for example,


The statutory initiative was first introduced into the United States by an amendment to the South Dakota Constitution in 1898. See M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 391 (2003). Several other states subsequently adopted the initiative via extra-conventional amendments; including California in 1911 and, finally, Mississippi in 1992. See SCHMIDT, supra note 29, at 16–17 tbl.1-1 (tracing each state’s adoption of initiative). The initiative’s impact has nevertheless been substantial, and it was intended to have far reaching effects on state governance. See generally DIRECT DEMOCRACY’S IMPACT ON AMERICAN POLITICAL INSTITUTIONS (Shaun Bowler & Amihai Glazer eds., 2008) (providing a collection of essays assessing the wide-ranging impacts of the initiative on governance and politics); DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 130, 137–48 (2004) (outlining the historical justifications for introducing initiative as a corrective institutional measure, and the accepted, far-reaching effects on governance, and assessing its impact). Most directly, the initiative aimed to fundamentally restructure legislative power. The initiative had its origins in the Progressive Era concern that, as structured, state legislatures were unresponsive to popular will and captured by wealthy special interests. See generally JAMES QUAYLE DEALY, GROWTH OF AMERICAN STATE CONSTITUTIONS 214–15 (1915). The initiative was intended to correct these agency costs by allowing citizens to create law without any legislative intervention, which would not only fix unrepresentative policies, but would change the decision-making incentives for sitting legislators. See SCHMIDT, supra note 29, at 26. Thus, the initiative formalized an entirely new institution in state governance with the goal of fundamentally restructuring legislative authority and, ultimately, democratic practice. See generally THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 38–59 (1989). As Professor Elizabeth Garrett has argued, the initiative created a new “hybrid democracy” that is “neither wholly representative nor wholly direct, but a complex combination of both.” See Elizabeth Garrett, Crypto-Initiatives in Hybrid Democracy, 78 S. CAL. L. REV. 985, 985 (2005). Garrett concludes that this new approach to democracy has deep impacts on candidate elections, legislator policy decision-making, and party strategy. See id. at 985–86. It is no stretch to suggest that states with a robust initiative are constituted around a fundamentally different theory of democratic governance. See MILLER, supra note 34, at 19–40 (describing this as an “epic debate”). See generally NAT’L CONF. OF STATE LEGIS., INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE 1–3 (2002), http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/IandR_report.pdf [https://perma.cc/WQ2W-DXTV] (providing an overview of the initiative process).

Most scholars recognize that constitutions are animated by “broad norms and basic commitments” that exist underneath the enforceable rules. See Stephen Holmes & Cass R. Sunstein, The Politics of Constitutional Revision in Eastern Europe, in RESPONDING TO IMPERFECTION 275, 276–80 (Sanford Levinson ed., 1995). Professor John Rawls has argued, for example, that the normative values reflected in the First Amendment represent deep and pervasive commitments that underlie the United States Constitution. See RAWLS, supra note 18, at 237–40. Professor Walter Murphy has similarly argued that the “most fundamental” value reflected in the United States Constitution over time is “human dignity.” Walter F. Murphy, The Art of Constitutional Interpretation: A Preliminary Showing, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 130, 147, 156 (M. Judd Harmon ed., 1978). Some scholars have argued that state constitutions are too chaotic to reflect any coherent underlying commitments or normative values. See James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761, 822 (1992); Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 HARV. L. REV. 1147, 1160 (1993). Others have argued that a state constitution—like any constitution—can reflect unique political choices and circumstances suggestive of coherent priorities and values. See
can directly undermine a constitution’s deep counter-majoritarian commitments to equal protection and due process. In short, experience with state amendment processes shows that they are susceptible to manipulation by interest groups and can be used not only to incrementally modify, but also to instantaneously destroy or fundamentally recreate the underlying constitution.

B. The Doctrine of Referendum Sovereignty

State courts have done little to curb dangers posed by unlimited state amendment practices. As Professor Robert Williams notes, state courts

Daniel J. Elazar, American Federalism: A View from the States (3d ed. 1984); Donald S. Lutz, The Origins of American Constitutionalism 16 (1988); Daniel J. Elazar, A Response to Professor Gardner’s The Failed Discourse of State Constitutionalism, 24 Rutgers L.J. 975, 975 (1993). These competing perspectives on state constitutionalism are important, but the disagreement should be kept in perspective. Although all state constitutions may not be tightly encased around an identifiable ethos, some state constitutions surely reflect deep, pervasive, and identifiable constitutional values. See, e.g., John Breitting & F. Chris Garcia, New Mexico’s Constitution: Promoting Pluralism in La Tierra Encantada, in The Constitutionalism of American States 743 (noting that New Mexico’s Constitution contains several unique provisions demonstrating a deep commitment to cultural pluralism); Brian A. Ellison, Wyoming: The Equality State, in The Constitutionalism of American States 666, 667 (George E. Connor & Christopher W. Hammons eds., 2008) (observing that the Wyoming constitution centers around its commitment to political pragmatism, libertarianism, and anti-national government sentiment); Kenneth L. Manning, The Massachusetts Constitution: Liberty and Equality in the Commonwealth, in The Constitutionalism of American States 35 (similarly observing that Massachusetts’s constitution is fundamentally committed to liberty and equality). And, despite California’s chaotic constitutional development, the California Supreme Court has emphasized that the state’s constitutional tradition remains firmly grounded on at least the structural commitment to an independent state judiciary. See Raven v. Deukmejian, 801 N.E.2d 1077, 1080 (Mass. 2006) (explaining the content and history of the initiative). The initiative was challenged as violating the provision in the amendment rules prohibiting the use of the initiative for “reversal of a judicial decision.” See id. The court held that the initiative did not violate that provision. Id. at 507. However, in a concurring opinion, Justice Greaney observed that the marriage amendment would “look so starkly out of place in the Adams Constitution, when compared with the document’s elegantly stated, and constitutionally defined, protections of liberty, equality, tolerance, and the access of all citizens to equal rights and benefits.” See id. at 512–13 (Greaney, J., concurring). Justice Greaney continued that the marriage amendment appeared “mutually inconsistent and irreconcilable” with the Massachusetts Constitution’s emphasis on equality and liberty. Id. at 512. In other words, Justice Greaney believed that the marriage amendment was significant not only to the outcome of the immediate marriage-equality dispute, but also because the amendment represented a change to one of the constitution’s core values.

Although the United States Supreme Court has held that disputes arising under Article V are nonjusticiable, state courts universally assume responsibility for enforcing state amendment rules.
enforce “virtually no substantive restrictions on state constitutional amendment and revision (other than federal constitutional constraints).”\textsuperscript{71} Indeed, the dominant perception of state court review is that courts evaluate amendments to ensure only that they satisfy explicit procedural requirements and that review of an amendment’s substance is beyond the judicial pale.\textsuperscript{72}

In this regard, courts in a minority of states—nine at most according to my research—have enforced an explicit textual distinction between “amendment” and “revision.”\textsuperscript{73} State courts have struggled to clearly distinguish between amendment and revision,\textsuperscript{74} but the general approach defines revision as a “wholesale or fundamental alteration of the constitutional structure” and an amendment as something of comparatively less significance.\textsuperscript{75} Because the structure of amendment rules vary between states, the holdings in these cases take a few different forms.

First, in two initiative states (California and Oregon), courts have held that the constitution limits initiative proposals to amendments and that

\textsuperscript{71} WILLIAMS, supra note 9, at 402. As Williams notes, state court review of amendments is to ensure only that explicit amendment rules are satisfied. See id. For example, courts have enforced single-subject requirements, publication requirements, “regular session” requirements, journal-entry requirements, and caps on the number of amendments the legislature can propose at one time. See generally Stephen B. Niswanger, A Practitioner’s Guide to Challenging and Defending Legislatively Proposed Constitutional Amendments in Arkansas, 17 U. ARK. LITTLE ROCK L. REV. 765 (1995) (outlining judicially enforceable limits on amendment in Arkansas and elsewhere).

\textsuperscript{72} See GRAD & WILLIAMS, supra note 10, at 3 (“[O]ther than . . . federal constitutional restrictions . . . there are no legally enforceable restrictions on the content of what may be placed in the state constitution.”).

\textsuperscript{73} See WILLIAMS, supra note 9, at 403–04 (describing how state courts have approached the distinction).

\textsuperscript{74} See DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 152 (2006) (quoting Albert Sturm that in practice, the distinction is “conceptually slippery, impossible to operationalize, and therefore generally useless”) (citation omitted).

\textsuperscript{75} See Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009) (“[T]he category of constitutional revision referred to the kind of wholesale or fundamental alteration of the constitutional structure . . . .”). See also WILLIAMS, supra note 9, at 403–04 (describing definitions).
revisions must proceed through the legislature or a convention. Second, in three other initiative states (Florida, Michigan, and Nevada), courts have held that the constitution limits initiative and legislative proposals to amendments, and revisions must proceed through a convention. Third, in a few non-initiative states (Alabama, Alaska, Delaware, and perhaps Kansas), courts have held that the constitution requires “revisions” to occur through a convention and the legislature may propose only “amendments.” Courts have applied the amendment-revision distinction to strike down both initiative and legislative amendments. However, all of the cases relied on explicit constitutional language distinguishing between “amendment” and “revision.”

Outside of the few jurisdictions that have enforced a textual distinction between amendment and revision, courts have balked at arguments suggesting implied substantive or functional limits on the amendment power. Instead, contemporary state amendment practice has developed

76 See Strauss, 207 P.3d at 100 (providing an exhaustive summary of California’s doctrine); Holmes v. Appling, 392 P.2d 636, 638 (Or. 1964) (rejecting a constitution proposed as amendment through initiative).

77 See Rivera-Cruz v. Gray, 104 So. 2d 501, 502 (Fla. 1958); Citizens Protecting Mich.’s Const. v. Sec’y of State, 761 N.W.2d 210, 222 (Mich. Ct. App. 2008). It should be noted that since the Florida Supreme Court’s ruling in Rivera-Cruz, the amendment rules were changed to allow the legislature to propose revisions. See Fla. Const. art. XI, § 1. Additionally, the only opinion I could find in Nevada was a federal district court opinion, which is not binding on questions of state constitutional law. See PEST Comm. v. Miller, 648 F. Supp. 2d 1202, 1207 (D. Nev. 2009) (“Through an initiative, Nevadans cannot revise their entire Constitution; this may only be done by constitutional convention.”).

78 See State v. Manley, 441 So. 2d 864, 877 (Ala. 1983) (enforcing a distinction to enjoin the state from submitting a new constitution as an amendment to the existing constitution); Bess v. Ulmer, 985 P.2d 979, 987 (Ala. 1999) (invalidating as “revision” amendment that required Alaska courts to follow Supreme Court precedent on certain state constitutional issues); Op. of Justices, 264 A.2d 342 (Del. 1970); Moore v. Shanahan, 486 P.2d 506, 513 (Kan. 1971) (acknowledging doctrine in dicta). Before adopting the initiative, North Dakota Courts analyzed the distinction but rejected the notion that it had legal significance. See State ex rel. Miller v. Taylor, 133 N.W. 1046, 1051 (N.D. 1911).

79 See, e.g., Adams v. Gunter, 238 So. 2d 824, 832 (Fla. 1970) (striking initiative that proposed unicameral legislature); Bess, 985 P.2d at 987–88 (striking legislative proposals that imposed forced linkage between state and federal constitutions).

80 Indeed, some scholars have called them procedural rulings for this reason. See Williams, supra note 9, at 402–04 (introducing discussion of the amendment–revision distinction in state court jurisprudence by noting: “While there are virtually no substantive restrictions on state constitutional amendment and revision . . . there are significant procedural requirements”).

81 See, e.g., Floridians Against Casino Takeover v. Let’s Help Fla., 363 So. 2d 337, 341 (Fla. 1978) (“[C]onflict with existing articles or sections of the Constitution can afford no logical basis for invalidating an initiative proposal.”); Answer of Justices to House of Representatives, 377 N.E.2d 915, 916 n.2 (Mass. 1978) (“It is difficult to comprehend how the proposed constitutional amendment can be ‘unconstitutional’ under our Constitution.”); Pig Pro Nonstock Coop. v. Moore, 568 N.W.2d 217, 222 (Neb. 1997) (“In a case involving such a constitutional amendment, it is not the province of this court to judge the wisdom or the desirability of the amendment.”). Scholars have also summarily dismissed these arguments under state law. See Julian N. Eule, Judicial Review of Direct Democracy, 99 Yale L.J. 1503.
around the doctrine of referendum sovereignty. In short, the doctrine holds that state amendment processes can be used to effectuate any imaginable constitutional reform so long as the proposal complies with federal law and state procedural requirements and is subject to a referendum. The prevailing justification for this is that the amendment process (whether by initiative or legislative proposal) represents the sovereign actions of the people.\textsuperscript{82} And, consequently, the judiciary is required to harmonize new amendments with the existing constitution or give effect to recent amendments as implicit repeals of any earlier irreconcilable provisions.\textsuperscript{83} To support the notion that amendment processes are equivalent to the people’s inherent sovereign right to create and alter government, courts cite to language in the state constitution’s preamble or Bill of Rights affirming that the people retain the right to alter or abolish government,\textsuperscript{84} as well as provisions in the amendment rules declaring that a successful amendment “becomes a part of this Constitution” on equal footing with all other provisions.\textsuperscript{85} Based on these principles, courts effectively refuse to hear arguments challenging procedurally perfect amendments as unconstitutional under state law.\textsuperscript{86}

This basic line of reasoning was put to the test in a string of cases from Georgia (\textit{Wheeler v. Board of Trustees}),\textsuperscript{87} Kentucky (\textit{Gatewood v. Matthews}),\textsuperscript{88} and Idaho (\textit{Smith v. Cenarrusa}).\textsuperscript{89} In all three cases, the legislature adopted an entirely new constitution subject to a ratification

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\textsuperscript{83} See \textit{Floridians Against Casino Takeover}, 363 So. 2d at 341–42 (“When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions. Otherwise, an amendment could no longer alter existing constitutional provisions and the amendment process might, in every case, be frustrated by the judicial determination that a given proposal conflicts with other provisions.”); \textit{Cohen v. Att’y Gen.}, 237 N.E.2d 657, 661 (Mass. 1968) (“[A]n attempt to amend a constitutional provision is not open to objection because it is inconsistent with that provision.”).


\textsuperscript{85} See, e.g., \textit{IND. CONST.} art. 16, § 1(c).

\textsuperscript{86} See, e.g., \textit{Hall v. Progress Pig, Inc.}, 610 N.W.2d 420, 430 (Neb. 2000) (“Obviously, [Appellant] cannot claim that the amendment violates the Nebraska Constitution. Conflict with existing articles or sections of a constitution can afford no logical basis for invalidating an initiative amendment.”); \textit{Staples v. Gilmer}, 33 S.E.2d 49, 52 (Va. 1945) (holding that amendment power is effectively limitless).

\textsuperscript{87} 37 S.E.2d 322 (Ga. 1946).

\textsuperscript{88} 403 S.W.2d 716 (Ky. 1966).

\textsuperscript{89} 475 P.2d 11 (Idaho 1970).
referendum.90 All three proposals were challenged as beyond the legislature’s amendment power.91 And, in all three instances, the court affirmed the proposals as lawful adoptions of new constitutions primarily because the constitution would ultimately be subject to a ratifying referendum.92

Wheeler is especially illustrative of how courts apply and understand the doctrine of referendum sovereignty. In that case, a twenty-three-member commission appointed by the governor drafted a constitution and submitted it to the legislature.93 The legislature made a few changes to the draft constitution but then approved it for the ballot as an amendment to the existing constitution.94 The proposal was procedurally perfect under the existing amendment rules: it was approved by more than two-thirds of the members of each house.95 It was then approved by the required majority of voters.96 The apparent political motivation for pursuing a new constitution through this process was to “overcome the opposition of rural legislators who feared that a convention would reapportion the state legislature and eliminate the overrepresentation of rural areas.”97

The court upheld this as a “legal” process for adopting a new constitution,98 because “the people” have a “right . . . to adopt a new constitution framed by any one, or submitted from any source” so long as “the expression of the people was made manifest in a legal way.”99 In

90 See Wheeler, 37 S.E.2d at 327; Gatewood, 403 S.W.2d at 717; Cenarrusa, 475 P.2d at 12–13.
91 See Wheeler, 37 S.E.2d at 322, 327 (noting that the amendment was challenged in court by taxpayer claiming that it violated the amendment process outlined in the constitution); Gatewood, 403 S.W.2d at 718 (noting that the amendment was challenged by a taxpayer as violating exclusivity of the state constitution’s procedures for constitutional change); Cenarrusa, 475 P.2d at 12–13 (noting taxpayer challenge was that revision process exceeded legislative authority).
92 See Wheeler, 37 S.E.2d at 328–29 (“When the people adopt a completely revised or new constitution, the framing of submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution.”); Gatewood, 403 S.W.2d at 720–21 (holding that pursuant to the ordinary amendment process, “the legislature does nothing unless and until the people ratify and choose to give the revised constitution life by their own direct action,” and, therefore, the new constitution was valid “[s]o long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free popular election, their will is supreme, and it is to be done”); Cenarrusa, 475 P.2d at 17–18 (“We retain our faith in our people and their intelligence for being informed in matters of their government. Theirs will be the final determination as it should be ideally in all matters of their government.”).
93 For background on the proposed constitution, see Albert B. Saye, American Government and Politics: Georgia’s Proposed New Constitution, 39 AM. POL. SCI. REV. 459, 459–61 (1945).
94 See Wheeler, 37 S.E.2d at 327.
95 See id. at 329 (results of 38–9 in the senate and 180–3 in the house).
96 See id. It was approved by more than 60,000 votes at the polls. Id.
98 Wheeler, 37 S.E.2d at 329.
99 Id. at 328–29.
response to the argument that a convention was required for a new constitution, the court responded that the existing constitution did not explicitly require a convention, and the court would not infer any restrictions on the people’s inherent and expressed right to create government. The court concluded that because the referendum was held in compliance with state election law, the people had exercised their sovereign right to create a new constitution.

As Wheeler illustrates, the doctrine of referendum sovereignty assumes that a lawful referendum is the full institutional embodiment of the people’s sovereignty. This assumption leads to the conclusion that the judiciary has no authority to review the substance of amendments because the judiciary is subordinate to the people as sovereign. In other words, state courts presume

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100 Id. at 329.
101 Id. ("We conclude that the constitution of 1945 was and is a valid and legal expression of the will of the people, and that the instrument now under consideration has been duly and legally proclaimed as the constitution of Georgia."). The court explained: “When the people adopt a completely revised or new constitution, the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution.” Id. at 328–29.

Similarly, in Gatewood, the Kentucky legislature adopted a new constitution and submitted it to the voters after the voters rejected three prior convention calls. See Colantuono, supra note 97, at 1487–88. The constitution was drafted by a Constitutional Revision Assembly, which consisted of delegates appointed by the Governor, Lieutenant Governor, Chief Justice, and Speaker of the House. Id. at 1488. The legislature made changes to the draft prepared by the Revision Assembly, and then approved it by extraordinary majorities in both houses for submission at a referendum. Id. at 1489 (results of 32–0 in the senate and 79–17 in the house). The constitution was challenged in court before the referendum as an impermissible attempt to adopt a new constitution through the legislature’s amendment process. See Gatewood, 403 S.W.2d at 717. The Kentucky Court of Appeals upheld the legislature’s process as a valid method for adopting a new constitution. Id. at 720–21. The court first noted that the Bill of Rights in the existing constitution affirmed that “[a]ll power is inherent in the people” who “have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may deem proper.” Id. at 718. The court concluded that pursuant to the ordinary amendment process, “the legislature does nothing unless and until the people ratify and choose to give the revised constitution life by their own direct action.” Id. at 720. Thus, the court held that a new constitution is valid “[s]o long as the people have due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election, their will is supreme, and it is to be done.” Id. at 721. Although the court cleared the constitution for the referendum, the people rejected it. See Colantuono, supra note 97, at 1491. In Cenarrusa, a commission drafted a new constitution for Idaho and submitted to the legislature. 475 P.2d at 12–13. The legislature approved it by two-thirds majorities in both houses. Id. Citizens then sued to enjoin the Secretary of State from submitting the constitution to a referendum. Id. at 11. In upholding the process as a valid use of the legislature’s amendment power, the Idaho Supreme Court essentially recited the reasoning in Wheeler and Gatewood. The court emphasized that the constitution grants the legislature broad powers, and, therefore, it can use discretion in deciding the best process for crafting a new constitution. Id. at 17–18 (noting also that the constitution’s amendment rules suggested that a convention was permissive but not required for revision). Ultimately, however, the court’s ruling turned on its assessment that the referendum was sufficient process for creating a constitution. Id. ("We retain our faith in our people and their intelligence for being informed in matters of their government. Theirs will be the final determination as it should be ideally in all matters of their government.").
there are no implicit, substantive, or functional limits on state constitutional amendments. However, as detailed in Part II, this understanding fails to account for the role of the convention in state constitutional history, theory, and practice. Indeed, the doctrine of referendum sovereignty runs afoul of state constitutionalism’s clear historical development and context.

II. FORGOTTEN FOUNDATIONS OF THE STATE AMENDMENT POWER

This Part argues that in the state constitutional tradition, the doctrine of popular sovereignty presumes that a convention is necessary for the foundational act of creating government. This understanding took time to develop, but from at least 1829 virtually all states have operated under the assumption that the full sovereign power of the people can be lawfully and validly summoned only through the calling of a temporary convention of specially elected delegates who are subject to extraordinary popular accountability. 102 Although aberrations have occurred, 103 no other mechanism has ever been equally recognized as an appropriate “repository of the sovereign power of the people.” 104 The widespread use of ratification referenda after 1829 did not change this. The ratification referendum was directed to concerns about convention accountability. It did not replace the convention as the preferred institution for formulating a constitution in the first instance. Indeed, early state constitutionalists were very clear in their understanding that ordinary officials and institutions had no inherent power to create or change constitutions. Constitution-making was understood to be an extraordinary power that inhered only in the people themselves acting through a convention. This foundation is crucial for properly understanding state amendment provisions as affirmative delegations of power that are entirely derivative of the existing constitution and necessarily inferior to the people’s sovereign constituent power institutionalized in the convention.

In this Part, I first analyze the historic origins of the state constitutional convention and show that it was a device created from the conviction that ordinary officials and institutions had no inherent authority to make constitutional law. I then argue that although the constitutional convention has been refined over the centuries, it persists as the only institution presumed to have authority to formulate a constitution on the people’s behalf.


103 See Dinan, THE AMERICAN STATE CONSTITUTIONAL TRADITION, supra note 19, at 12–13 (discussing aberrations); Tarr & Williams, supra note 36, at 1083–84 (same).

104 See Garner, supra note 70, at 214.
A. Origins of the State Constitutional Convention

The initial creation of state constitutions was inextricably linked to the revolution. As Professor Gordon Wood has observed, the revolution was concerned not only with winning independence from Great Britain, but with establishing new governments in the colonies that would be “fixed on genuine principles” of popular sovereignty. Additionally, as a matter of strategy, many revolutionaries viewed “the erection of new governments as the best instrument for breaking ties with England.” Many states also found themselves struggling without well-organized governments following the retreat of British governors.

Thus, by the end of 1775 there was mounting pressure for the colonies to institute new forms of government. Following a series of petitions from the states to the Continental Congress for guidance, Congress issued two famous Congressional Resolutions on May 10 and 15, 1776. The May 10 resolution recommended to the colonies that “where no government sufficient to the exigencies of their affairs have been hitherto established,” the colonies should “adopt such Government as shall, in the Opinion of the Representatives of the People, best conduce to the Happiness and Safety of their Constituents in particular and America in general.” The May 15 resolution added: “[T]he exercise of every kind of authority under the crown should be totally suppressed, and all powers of government, exerted under the authority of the people of the colonies . . . .”

These resolutions, combined with the Declaration of Independence, provided the states with vague procedural guidelines and ideological

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105 See Wood, supra note 25, at 129 (finding that revolutionary pamphlets often blended the revolution with issues related to framing a new government).
108 See Adams, supra note 25, at 28–29 (recounting how governors in North Carolina, New Hampshire, and New York abandoned theirs posts because the Revolution left their colonies without an organized government).
109 See id. at 29.
110 For a detailed account of the petitions and Congress’s responses, see id. at 49–62; see also Wood, supra note 25, at 129–31.
112 See Adams, supra note 25, at 61 (quoting resolution).
commitments.\textsuperscript{113} They did not, however, offer details as to what state constitutions should contain or describe any implementable process for creating state constitutions.\textsuperscript{114} The states were thus left to develop their own constitution-making processes.\textsuperscript{115} This was no simple task.\textsuperscript{116} Revolutionary Americans had expressed a clear commitment to popular sovereignty, but they had no useful precedent for how to operationalize a government where all power was “vested in and derived from the people.”\textsuperscript{117}

One immediate solution to this problem was for sitting state legislatures to adopt constitutions on the people’s behalf. Three of the four states to first adopt constitutions in 1776 took this approach.\textsuperscript{118} Almost immediately, however, there were concerns about the competency of a regularly elected legislature to adopt a constitution for the people.\textsuperscript{119}

First, from a theoretical perspective, there was a burgeoning recognition that constitutions were meant to operate as “higher” law that constrained government officials, especially legislatures, on behalf of the people.\textsuperscript{120} Written constitutions were tied closely to the emerging commitment to popular sovereignty.\textsuperscript{121} Constitutions were understood as an instrument that would help the people create and control their own government.\textsuperscript{122} As a consequence, there was an early awareness that constitutions were different

\textsuperscript{113} See id. at 61–62.

\textsuperscript{114} See id. There was debate regarding a model state constitution from Congress that was rejected in favor of individualized, popular constitution-making by the states. See id. at 55–56.

\textsuperscript{115} See DINAN, supra note 2, at 19 (describing this as period of “wide-ranging experimentation” with processes of constitution-making).

\textsuperscript{116} See ADAMS, supra note 25, at 63 (noting states were “faced with a task that had never before been accomplished in political entities of comparable size”).

\textsuperscript{117} TARR, supra note 9, at 69 (quoting N.C. CONST. pmbl.); see ADAMS, supra note 25, at 63.

\textsuperscript{118} Legislatives in South Carolina, Virginia, and New Jersey adopted inaugural constitutions in the late spring and summer of 1776. See ADAMS, supra note 25, at 70–73. However, Professor Marc Kruman has argued that no “ordinary legislature” wrote any of the first state constitutions. KRUMAN, supra note 25, at 22–24. This is so because provincial assemblies were unique revolutionary bodies “more likely to involve something approximating a direct representation of the people.” TARR, supra note 9, at 69 n.33 (explaining the unique character of revolutionary legislatures).

\textsuperscript{119} TARR, supra note 9, at 69. Jefferson most famously raised this objection regarding the Virginia constitution of 1776. JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 25 (1992).

\textsuperscript{120} The idea of a higher law that constrained legislatures on behalf of the people was in contrast to the British constitutional system which located sovereignty in Parliament. WOOD, supra note 25, at 348; see also id. at 363 (explaining that British parliamentary sovereignty was theoretically grounded on popular representation but agency gaps were so great that representation was only a theoretical justification for sovereignty and not an actual description of Parliament’s claim to power). American revolutionary thought sought to wrestle sovereignty from government and lodge it directly in the people.

\textsuperscript{121} See id. Americans displayed a deep distrust of legislatures and a strong desire to make clear that legislatures had only derivative authority and no original sovereignty. See id.

\textsuperscript{122} See id. at 306.
from ordinary law because they were intended to deputize and constrain public officials on behalf of the people. The significance of this was that sitting legislatures, or other officials, were not appropriate for creating or changing constitutions. In fact, doing so would dissolve the distinction between the people as the source of sovereignty and the legislature as the recipient of delegated authority from the people.

Second, experience had taught the revolutionary Americans that officials in power were inclined towards the abuse of power for their own self-interest. Americans were fundamentally suspicious of all officials because of the foundational belief (and repeated experience) that the attainment of power would lead towards corruption. This distrust was also fueled by the nature of existing institutions. Existing legislative bodies were often more representative of the propertied elite who had a stronger connection to Britain than to the people. British Parliament, which claimed authority over the colonies based on the colonies’ supposed representation and consent, was also unresponsive to the colonies’ needs and preferences. The pervasive distrust of elected officials, especially legislators, that stemmed from early American experience led to the conclusion that “no legislative assembly, however representative, [was] capable of satisfying

123 See id.; Tarr, supra note 9; see also Walter Fairleigh Dodd, The Revision and Amendment of State Constitutions 1–2 (1910) (noting that the concept of a constitution, even in British law, included the notion of a law beyond legislative power).

124 Adams, supra note 25, at 63; Wood, supra note 25, at 337; see also Kruman, supra note 25, at 25 (quoting an early American political writer as asserting that a legislature “could not draft a constitution [because] a constitution ‘is an act that can only be done to [legislatures] but cannot be done by them’”).

125 Adams, supra note 25, at 63; Wood, supra note 25, at 342 (stating that the convention was developed in part so that “the constitution [could] rest on an authority different from the legislature’s”).

126 Adams, supra note 25, at 63 (quoting the Pennsylvania Journal from May 22, 1776 as stating that “officers of the old constitution” should not be “entrusted with the power of the making of a new one when it becomes necessary” because “[b]odies of men have the same selfish attachments as individuals, and they will be claiming powers and prerogatives inconsistent with the liberties of the people”); Wood, supra note 25, at 328 (“The mistrust of all men and institutions set above the people-at-large was precisely the point.”).

127 See Wood, supra note 25, at 328; see also id. at 340 (explaining that Americans became suspicious of their own institutions in the same way they suspected the Crown). This skepticism and the evolution of the special election also developed out of the chaos that ensued after the development of the principle of popular sovereignty. See id. at 332. Once popular sovereignty became the norm, the concept of “the people” became a political bargaining chip. See id. at 330–33 (“[T]he people were the undisputed, ubiquitous source that was appealed to by [everyone]. But who were the people? What institutions expressed their will?”). Everyone presumed to speak on the people’s behalf, but there was no established tradition or institution that could make this claim within the existing political culture. See id. at 331 (“[T]he people were rapidly becoming a permutable force whose will could never be embodied by any representative institution.”).

128 See id. at 332–38.

129 See id. at 336, 340.

130 See id. at 348–54.
[the people’s] demands and grievances” regarding the creation of a constitution.\textsuperscript{131}

Thus, early constitutionalists were in need of a new institution that was distinct from ordinary government, more closely tied to the people, and sufficiently practical, to create a constitution by and for the people.\textsuperscript{132} The towns of Massachusetts are often credited with first imagining the constitutional convention in response to these demands.\textsuperscript{133} In October 1776, the town of Concord debated and voted on “the question of authorizing the legislature to frame a constitution.”\textsuperscript{134} In an extraordinary resolution, the town concluded that “the Supreme Legislative, either in their proper capacity, or in Joint Committee, are by no means a body proper to form and establish a Constitution, or form of Government.”\textsuperscript{135} The town justified its conclusion as follows:

[First, because we conceive that a Constitution in its proper idea intends a system of principles established to set the subject . . . against any encroachments of the governing part, second, because the same body that forms a constitution have of consequence a power to alter it, third, because a constitution alterable by the Supreme Legislative is no security at all to the subject against any encroachment of the governing part on any, or all on their rights and privileges.\textsuperscript{136}

The town recommended instead that a constitution should be drafted by a “convention of delegates elected for that purpose alone.”\textsuperscript{137} The town of Acton, Massachusetts adopted a similar resolution in November 1776, and

\textsuperscript{131} Id. at 328; see also id. at 332–38 (explaining the details of how existing institutions were not truly democratic and led Americans to distrust them).

\textsuperscript{132} See id. at 307; KRUMAN, supra note 25, at 22 (assigning these attributes to extraordinary legislatures of the revolutionary period); see also supra text accompanying note 118 (explaining the unique characteristics of the revolutionary legislatures).

\textsuperscript{133} ADAMS, supra note 25, at 64; ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 7 (1917) (attributing the convention idea to the town of Concord, Massachusetts in October 1776). But see DODD, supra note 123, at 5–6 (tracing the state constitutional convention to the New Hampshire town of Hanover); ADAMS, supra note 25, 88–89 (explaining competing claims to the origin of the convention). See also WOOD, supra note 25, at 310–19 (explaining the European understanding of convention as an extra-legal convening of the public); id. at 338 (explaining how the European concept of convention morphed into a distinct institution in America).

\textsuperscript{134} HOAR, supra note 133, at 7.

\textsuperscript{135} See id. at 7. A copy of the original resolution is reproduced in THE COMMONWEALTH OF MASSACHUSETTS, A MANUAL FOR THE CONSTITUTIONAL CONVENTION 1917 (2d ed. 1917) [hereinafter “MANUAL”]; see WOOD, supra note 25, at 340 (referencing town returns).

\textsuperscript{136} See HOAR, supra note 133, at 7.

\textsuperscript{137} See MANUAL, supra note 135, at 15.
at least twenty-three other towns rejected the legislature’s authority to formulate a constitution for the people.\textsuperscript{138}

In response to these resolutions, the Massachusetts state legislature proposed that “in the next general election” the people would “give to the new members of the house of representatives full authority to draft a constitution, along with the ‘ordinary Powers of Representation.’”\textsuperscript{139} After the general election in mid-1777, the newly elected body met and adopted a constitution that it sent to the citizens for approval in March 1778.\textsuperscript{140}

In a remarkable moment, the electorate of Massachusetts resoundingly rejected the constitution by a ratio of more than 5-to-1.\textsuperscript{141} The “material factor” defeating the constitution was:

[T]he widespread belief that the only convention which could stand for all the people . . . and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of framing a constitution, and not a body of representatives entrusted at the same time with other duties.\textsuperscript{142}

In other words, a convention could claim the sovereign constituent power of the people only if it was directly and specially elected solely for that purpose.\textsuperscript{143} The Massachusetts legislature subsequently took steps to call “a State convention, for the sole Purpose of forming a new Constitution.”\textsuperscript{144} The convention met in September 1779, and was the “first true constitutional

\textsuperscript{138} See id. These resolutions appear to be the earliest conceptions of the American constitutional convention as we now understand it. See id.; HOAR, supra note 133, at 7.

\textsuperscript{139} ADAMS, supra note 25, at 90.

\textsuperscript{140} See id. at 91.

\textsuperscript{141} See id. (the final vote was 9,972 votes against and 2,083 for).

\textsuperscript{142} HOAR, supra note 133, at 5 (noting that Massachusetts towns rejected the constitution “because they resented the legislature’s assumption that it could call a convention without first obtaining an authorization from the people”); OBERHOLTZER, supra note 34, at 74 (stating that towns’ rejection of the constitution solidified the norm that legislature should not “mix in the work of making the constitutional and fundamental law of a State”); Arthur Lord, The Massachusetts Constitution and the Constitutional Conventions, 2 Mass L.Q. 1, 5 (1916) (emphasis added). Another factor that defeated the constitution was the perception that the constitution-making process should be more inclusive than a general election. See ADAMS, supra note 25, at 91 (“Arguments frequently brought against the draft were: the disqualification of Negroes, Indians, and mulattoes as voters was not justifiable; property qualifications were too high . . . and—the most frequent objection—distribution of seats in the house of representatives was unfair.”).

\textsuperscript{143} See WOOD, supra note 25, at 341 (quoting the Boston return: “‘A Convention for this and this alone, whose existence is known no longer than the Constitution is forming, can have no prepossessions in their own favour.’”); see also R. R. PALMER, THE AGE OF DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800, at 214 (2014) (connecting a special election to the convention’s extraordinary mandate).

\textsuperscript{144} ADAMS, supra note 25, at 92. Moreover, it broadened the electorate for purposes of electing delegates to include “all free men.” See KRUMAN, supra note 25, at 15.
convention in Western history” because it was the only body ever assembled from “representatives elected for the exclusive purpose of framing a constitution.”

Following the 1779 Massachusetts convention, a clear theory of constitution-making emerged across the states. There was soon a widespread understanding that a constitution could be created “only [by] ‘a Convention of Delegates chosen by the people for that express purpose and no other.’” Indeed, by the 1780s, a specially elected convention “had become such a firmly established way of creating . . . a constitution that governments formed by other means actually seemed to have no constitution at all.”

B. State Convention Theory

The spread of the Massachusetts model was not an accident in political history. The Massachusetts convention became an archetype for state constitutionalism because it purported to solve the practical problems associated with how to form a government grounded in popular sovereignty. If sovereignty belonged only to the people, then only the people could establish legitimate government. But, as Samuel West explained in 1776, “it is very difficult, and in many cases impossible, for all to meet together.” Additionally, as illustrated by the Massachusetts Convention, it was illogical and impractical for the people to trust existing government officials with the

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145 Adams, supra note 25, at 91–92 (explaining adoption of constitution and difficulties in counting the votes). Ironically, despite the debate and extensive deliberation regarding the process for convening and populating the convention, the constitution was drafted by essentially one man, John Adams. See id. at 86–93.

146 Wood, supra note 25, at 342 (quoting the South Carolina legislature from 1787); see Kruman, supra note 25, at 15–16; Palmer, supra note 143, at 213–35 (explaining how convention became institutionalized in public law); Christian G. Fritz, Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate, 24 Hastings Const. L.Q. 287, 353 (1997) (stating that conventions became the “established mechanism for creating or revising constitutions”).

147 See Wood, supra note 25, at 342 (quoting the South Carolina legislature from 1787: only “a Convention of Delegates chosen by the people for that express purpose and no other” could establish or alter a constitution); see also Ernest R. Bartley, Methods of Constitutional Change, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 32 (W. Brooke Graves ed., 1960) (“Historically and legally, the convention is the direct ‘voice of the people’ in matters affecting general constitutional overhaul.”); Garner, supra note 70, at 214 (noting the norm of a convention for creating a constitution); Lord, supra note 142, at 5 (observing that as early as 1776 in Massachusetts there was “widespread belief that the only [institution] which could stand for all the people and best define its rights and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of framing a constitution and not a body of representatives entrusted at the same time with other duties”).

power to create a constitution limiting their own authority.¹⁴⁹ Thus, the states devised the constitutional convention as a temporary institution subject to extraordinary democratic accountability and with the exclusive mandate of drafting a constitution on behalf of the people.¹⁵⁰ Far from being an accident, the state constitutional convention was rigorously designed to realize the theoretical commitment to popular sovereignty. In the words of Judge Willard Hall, a delegate to Delaware’s 1831 convention, a constitutional convention “bring[s] into exercise [the people’s] sovereign power” to create government.¹⁵¹

In this section, I argue the constitutional convention has three core attributes, each of which is closely tied to popular sovereignty as the basis for legitimating a new state constitution. My claim is that since the founding era, state constitutionalism has continued to develop around the assumption that only a convention of (1) specially elected delegates; (2) subject to extraordinary political accountability; and (3) with the sole mandate of debating and drafting a constitution, has inherent authority to act as “a repository” of the people’s sovereign constituent power to create government.¹⁵² This presumption is crucial for understanding the state theory of extra-conventional constitutional amendment, which is grounded in the

¹⁴⁹ See Wood, supra note 25, at 338 (“[N]othing can be a greater violation of reason and natural rights, than for men to give authority to themselves.”).

¹⁵⁰ See id. at 342. On the significance of the convention as an innovation in constitutional design and political science, see Stephen M. Griffin, Constituent Power and Constitutional Change in American Constitutionalism, in The Paradox of Constitutionalism: Constituent Power and Constitutional Form (Martin Loughlin & Neil Walker eds., 2007) (describing the convention as “an extraordinary invention, the most distinctive institutional contribution . . . the American Revolutionaries made to Western politics”).

¹⁵¹ See Debates of the Delaware Convention, for Revising the Constitution of the State, or Adopting a New One 227 (1831); see also Bruce Ackerman, 1 We the People: Foundations 177–78 (1991) (noting that even Federalists treated “constitutional conventions as if they were perfect substitutes for the people themselves”). This understanding of the convention is visible in many convention documents and records. See, e.g., Debates and Proceedings of the Constitutional Convention of the State of Delaware 2524 (1958) (“[Constitution delegates] are the people; they are derived from the people; they are the direct delegates from the people.”); Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 104 (1864) (“[I]t is for the purpose of sustaining the sovereign power in the hands of the people that this Convention is assembled.”). A 1968 Commission report from Arkansas—prepared in anticipation of a constitutional convention—recounts how “it [is] almost inherent in the definition of a constitutional convention that most or all of its delegates be elected by the people. This relates to the basic nature of a constitution . . . which derives its strength and authority from the people themselves.” Arkansas Constitutional Revision Study Comm’n, Revising the Arkansas Constitution 28 (1968); see also Va. Const. of 1902, preamble (“[W]hether the members of this Convention were elected by the good people of Virginia, to meet in convention for such purpose. We, therefore, the people of Virginia, so assembled in Convention through our representatives, . . . do ordain and establish the[ ] following revised and amended Constitution for the government of the Commonwealth.”).

¹⁵² Garner, supra note 70, at 214.
notion that amendment actors do not exercise the same fundamental and inherent power held by a convention. These three elements of a valid constitutional convention and their persistence over time are each explored in turn.

1. *Specially Elected Delegates*

The norm favoring a special election for convention delegates was crucial in the development of state convention theory. Revolutionary Americans galvanized around the notion that only the people could create legitimate government, and that existing officials and institutions had no inherent authority to create or destroy government for the people. Consequently, the people had to specifically and directly deputize delegates with this power before it could be claimed by any agent. The special election of convention delegates served this function by giving delegates a temporary and extraordinary mandate to create government for the people. Thus, as Professor Marc Kruman has observed, the early states “did not conduct special elections simply to gather a better understanding of the public’s views.” Instead, “they held them to gain popular approval for the extraordinary acts of framing and founding constitutions.” In the state

153 *See* DODD, *supra* note 123, at 21 (“We are now accustomed to the practice of having state constitutions framed by conventions entirely independent of the regular legislature . . . ”); *id.* at 22 (finding that the most “fundamental” commitment in state constitutional theory is “distinction between the constitution and ordinary legislation, and the development of a distinct method for the formation of constitutions”); WOOD, *supra* note 25, at 337–38.

154 Courts have affirmed this. The Rhode Island Supreme Court stated in 1935:

> A constitutional convention is an assembly of the people themselves acting through their duly elected delegates. The delegates in such an assembly must therefore come from the people who choose them for this high purpose and this purpose alone. They cannot be imposed upon the convention by any other authority. Neither the Legislature nor any other department of the government has the power to select delegates to such a convention. The delegates elected by and from the people, and only such delegates, may and of right have either a voice or a vote therein.

*In re Opinion to the Governor*, 178 A. 433 (R.I. 1935); *see*, e.g., *State v. Manley*, 441 So. 2d 864, 872 (Ala. 1983) (discussing Alabama’s history of constitutional conventions); *Pryor v. Lowe*, 523 S.W.2d 199, 202 (Ark. 1975) (“[A] constitutional delegate is an agent of the people ‘for the purpose of acting in their stead in the exercise of their inherent power in working out the substance, form and content of a constitution to be submitted to all the people of Arkansas for their approval or rejection.’”) (citation omitted); *Op. of the Justices*, 264 A.2d 342, 345 (Del. 1970) (“[A] Constitutional Convention, specially elected for its expressed purpose, is more the direct agent of the people for that purpose than is a General Assembly.”).


156 *See id.* at 21.

157 *See id.* This was precisely Jefferson’s point in his famous critique of the 1776 Virginia constitution that was adopted by a generally elected legislature. *See* Fritz, *supra* note 146, at 328–29. Jefferson complained that “‘no special authority had been delegated by the people to form a permanent constitution’” because the sitting legislators “had been elected for the ordinary purposes of legislation only, and at a time when the establishment of a new government had not been proposed or contemplated.”
tradition, the people deputize agents with their constituent power only through a special election that clearly confers that power.

From a practical perspective, the special election was intended to promote public accountability and reduce agency costs by separating constitution-making delegates from ordinary government officials.\textsuperscript{158} As Professor Krumen further observes, “because constitutions defined and limited governmental powers, only a special, temporary convention with no permanent institutional interests should undertake the task.”\textsuperscript{159} Allowing existing legislatures to create constitutions was “unacceptable, [because] it would empower the legislature to write . . . a document designed to restrict legislative and other government power.”\textsuperscript{160} Existing officials “could hardly ‘divest themselves of the idea of their being members’ of government, and this ‘may induce them to form the government, with particular reference to themselves.’”\textsuperscript{161} Specially elected delegates, on the other hand, could better represent the people and would be less likely to use their position for personal gain because their appointments were temporary and the constitutions they designed would be deployed by a different group of people, or at least a group of people with no immediate conflict of interest.\textsuperscript{162}

\textsuperscript{158} See Adams, supra note 25, at 63–66 (explaining that the special election of delegates to a convention “originated in the mistrust the towns and counties felt toward the house of representatives” and a need to separate the people’s constituent power from the legislature’s “supreme delegate power”). The special election was also intended to reduce agency costs by impressing on delegates (and the electorate) the extraordinary nature of the constitution-making process. See Krumen, supra note 25, at 18–19. By electing delegates solely for the purpose of creating a constitution, it was hoped that delegates would “view their responsibilities as requiring a longer time perspective than is generally expected of legislators and an obligation to rise ‘above politics’ and pursue the public interest.” G. Alan Tarr, Explaining State Constitutional Changes, 3 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS 9, 21 (2016) (Braz.).

\textsuperscript{159} Krumen, supra note 25, at 25.

\textsuperscript{160} See id. at 29.

\textsuperscript{161} Wood, supra note 25, at 341 (quoting return from City of Boston).

\textsuperscript{162} See Krumen, supra note 25, at 22. On whether this agency theory holds true in practice see Tarr, Explaining State Constitutional Changes, supra note 158, at 18–19 (2016) (summarizing political science literature criticizing whether this agency theory holds true in practice and noting that the literature may be oversimplified); Oberholtzer, supra note 34, at 97–98 (noting the general political neutrality of the convention participants). But see Tarr, supra note 9, at 57 n.124 (noting that if the normal participants in the political process do not participate in the convention, the proposed document may lack support for ratification). Modern empirical research appears to be mixed on whether special elections reduce agency costs as intended. See Tarr, supra note 158, at 18–20 (examining evidence and finding that although conventions can operate under conditions that suggest “politics as usual” there is also compelling evidence that convention delegates “view their responsibilities as requiring a longer time perspective than is generally expected of legislators and an obligation to rise ‘above politics’ and pursue the public interest”).
Popular sovereignty and public accountability justifications for specially elected delegates have largely prevailed in state constitutional tradition. As Professor Albert Sturm has observed, a constitutional convention of specially elected delegates “is the best known and by far the most universally accepted method . . . for formulating new state constitutions.” Indeed, Thomas Cooley famously stated that “[i]n accordance with universal practice,” state constitutions “must be prepared and matured by some body of representatives chosen for the purpose.” Leading modern scholars confirm this assessment. Ernest Bartley has observed that “[t]he convention method, based upon the people’s election of delegates for the specific purpose of constitutional revision, carries with it a sanction and a prestige not found in other methods.” And several scholars have concluded that the use of a convention of specially elected delegates “became the norm” for creating new state constitutions. Indeed, most state conventions since 1800 that successfully proposed new constitutions were comprised of specially elected delegates.

To be sure, scholars have noted anomalous attempts to dispense with the requirement of separately elected delegates in the drafting of new constitutions. In 1974, for example, Texas assembled a constitutional convention comprised entirely of sitting state legislators. In 1944, the New Jersey legislature operated as a constitutional convention, and in 1992 the

163 See ALBERT L. STURM, METHODS OF STATE CONSTITUTIONAL REFORM 80 (1954). Professor Sturm has further explained that “[s]ince constitutional conventions are basically assemblies of the people on a small scale, organized for the high purpose of formulating basic law, selection of their membership rightly belongs to the electorate.” Id. at 94.

164 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 32 (3d ed. rev. 1874); see Garner, supra note 70, at 214 (“Everywhere the idea was strong that a convention made up of popularly chosen delegates was a repository of the sovereign power of the people, and had a right to establish a frame of government.”). JOHN ALEXANDER JAMESON, 4 A TREATISE ON CONSTITUTIONAL CONVENTIONS; THEIR HISTORY, POWERS, AND MODES OF PROCEEDING 259 (1887) (“It is believed that the precedents developed thus far in our history . . . conform to the principle [that a convention must be comprised of specially elected delegates].”)

165 Bartley, supra note 147, at 32.

166 DINAN, supra note 2, at 19; William B. Fisch, Constitutional Referendum in the United States of America, 54 AM. J. COMP. L. 485, 492 (2006) (“Historically, the preferred vehicle for major revisions of existing state constitutions and creation of new ones has been the popularly elected convention . . . ”).

167 See DINAN, supra note 19, at 12.

168 See Tarr & Williams, supra note 36, at 1082–84.


Louisiana legislature did the same.\textsuperscript{173} The Texas convention failed to produce a proposed constitution, and voters soundly rejected proposals from both the New Jersey and Louisiana legislatures.\textsuperscript{172}

There have been successful twentieth century efforts to adopt new constitutions without calling a convention of any kind. This occurred in Florida (1968),\textsuperscript{173} North Carolina (1970),\textsuperscript{174} Georgia (1945, 1976, 1982),\textsuperscript{175} and Virginia (1970).\textsuperscript{176} In all of these instances, legislatures worked to bypass a convention and propose a new constitution directly at a referendum. The most common approach was for a state legislature to employ a commission to study constitutional reform and propose a new constitution.\textsuperscript{177} The

\begin{footnotesize}
\begin{enumerate}
\item See DINAN, supra note 19, at 12.
\item See Sturm & May, supra note 172, at 119; see also Tarr & Williams, supra note 36, at 1083–04.
\item See DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION, supra note 19, at 12–13 (discussing other states); see also Thomas Rauburn White, Amendment and Revision of State Constitutions, 100 U. PA. L. REV. 1132, 1134 n.6 (1952) (discussing Virginia’s 1928 Constitution as perhaps another example of wholesale change outside of a convention).
\end{enumerate}
\end{footnotesize}
legislature then reviewed, changed, and approved the proposal for submission to a referendum.\textsuperscript{178}

Some have suggested that this “commission” process represents a new norm for state constitution-making, and the constitutional convention may be a “thing of the past.”\textsuperscript{179} Adding to this idea is the increasing reluctance of voters to approve convention calls.\textsuperscript{180} Thus, as state constitution-making and revision has become professionalized in the states, conventions may now be superseded, at least in practice, by other vehicles for wholesale change.\textsuperscript{181}

There are, however, good reasons to doubt that this has replaced state constitutionalism’s underlying logic and theory. North Carolina’s 1970 Constitution, for example, was not a truly new constitution in substance.\textsuperscript{182} The majority of the changes were non-substantive updates to archaic language and structure.\textsuperscript{183} Indeed, the Commission singled out substantive changes for separate review and consideration by the legislature.\textsuperscript{184} The legislature then separately reviewed and approved some of those changes, which were then submitted to voters.\textsuperscript{185} Voters ultimately approved only six of those substantive changes.\textsuperscript{186} Thus, Professor Sturm characterized North Carolina’s 1970 constitution as merely an “editorial revision.”\textsuperscript{187} Florida’s 1968 Constitution and Georgia’s 1976 and 1982 Constitutions were all adopted pursuant to provisions in the preexisting documents that explicitly allowed the legislature to propose entire constitutions to voters at a referendum.\textsuperscript{188}

\begin{footnotesize}
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\item \textsuperscript{178} See Tarr & Williams, \textit{supra} note 36, at 1083.
\item \textsuperscript{179} Williams, \textit{supra} note 177, at 1–3.
\item \textsuperscript{181} \textit{TARR, supra} note 9, at 170.
\item \textsuperscript{182} See Sturm & May, \textit{supra} note 172, at 119.
\item \textsuperscript{184} \textit{Id.} at 81.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 82.
\item \textsuperscript{187} Sturm & May, \textit{supra} note 172, at 119–20.
\item \textsuperscript{188} See \textit{FLA. CONST. art. XVII,} § 4 (amended 1964) (adding section 4 to article XVII, which stated, “[a]s a method of revising the entire constitution of Florida, and as an additional method of revising or amending any portion or portions of it, either branch of the legislature, at any regular session, or at any special or extraordinary session called for the purpose, may propose by joint resolution a revision of the entire constitution or a revision or amendment of any portion or portions thereof and may direct and provide for an election thereon”); \textit{GA. CONST. art. XIII,} § 1 (1945).
\end{enumerate}
\end{footnotesize}
Thus, the list of successful and truly new constitutions adopted outside of a convention and without explicit constitutional authority during the twentieth century is short. The most representative examples likely include Georgia’s 1945 Constitution and Virginia’s 1970 Constitution because they involved wholesale substantive constitutional change and not editorial or focused alterations. However, these two instances represent anomalies when compared to the several hundred state constitutions drafted by popularly elected conventions.\(^\text{189}\) Moreover, both of these constitutions were propped up or saved by judicial opinions that fundamentally misunderstood the nature of the state amendment power.\(^\text{189}\) Those who have observed contemporary voter reluctance to calling conventions have noted that “the commission approach to constitutional revision is generally a less desirable substitute for the constitutional convention” because “the commission system provides considerably less opportunity for popular input” or participation.\(^\text{191}\)

Ultimately, the weight of historical authority supports the idea that state constitutions are most properly created by a convention of specially elected delegates. Likewise, most states have a long tradition of respecting and enforcing this norm—either through authoritative judicial rulings or political custom.

2. **Popular Accountability**

In addition to the requirement of a special election, state convention theory has emphasized that a convention should be subject to greater popular input and control than ordinary legislative assemblies.\(^\text{192}\) This characteristic was again derived from a commitment to popular sovereignty.\(^\text{193}\) Despite many nuanced understandings of popular sovereignty during the revolutionary era,\(^\text{194}\) there was quickly a recognition that constitutional conventions required extraordinary democratic credentials.\(^\text{195}\) Because conventions were tasked with constructing government on behalf of the people as the ultimate source of government authority, the convention had to

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\(^{189}\) It should be noted here that constitutional change can be legitimate but extra-legal. See Griffin, *supra* note 150, at 9. My focus here is on lawful constitutional change.

\(^{190}\) On Virginia, see Howard, *supra* note 12, at 33–34 (explaining the role that precedent played in the adoption of the Virginia Constitution). On Georgia, see *supra* notes 91–101 and accompanying text.

\(^{191}\) Tarr & Williams, *supra* note 36, at 1084.

\(^{192}\) TARR, *supra* note 9, at 69 (noting that states sought to ensure “greater popular input and control” over constitution making).

\(^{193}\) Fritz, *supra* note 146, at 329.

\(^{194}\) The debates during the revolutionary era regarding direct democracy, republicanism, and popular sovereignty were complicated and nuanced. *See id.* at 302, 312.

\(^{195}\) See TARR, *supra* note 9, at 69–70.
represent the people as directly and faithfully as possible.\footnote{\textit{See Sturm}, supra note 163, at 101–02 ("A constitutional convention . . . represents directly its sovereign superior—the people."); Fritz, \textit{supra} note 146, at 330–31 (describing "indirect ratification" practices in early state constitutions designed to enhance accountability).} Moreover, as an extraordinary and temporary institution, the convention was not designed with an emphasis on internal checks and balances, but with the core objective of directly “embod[ying] the sovereignty of the people.”\footnote{\textit{Krumen}, supra note 25, at 15.} Indeed, early theorists suggested that a convention would ideally be populated by all the people themselves.\footnote{\textit{See Wood}, supra note 25, at 307.}

States have used a great variety of devices to protect the democratic credentials of the convention.\footnote{\textit{See Tarr}, supra note 9, at 69–70.} In the eighteenth century, Pennsylvania and South Carolina imposed waiting periods before a constitution could be proposed to ensure public discussion and input.\footnote{\textit{See id.} at 69 (South Carolina); Fritz, \textit{supra} note 146, at 330 (Pennsylvania).} New Jersey ordered copies of its new constitution be printed and distributed to the people.\footnote{\textit{See Tarr}, supra note 9, at 69.} Maryland, North Carolina, and Pennsylvania had similar distribution initiatives.\footnote{\textit{Id.} at 69–70.}

Ultimately, of course, the referenda became the dominant device for ensuring democratic accountability. In most instances, referenda are used at both the beginning and the end of the constitution-making process.\footnote{\textit{See Oberholtzer}, supra note 34, at 113.} Conventions are usually called by legislation submitting the question of a convention to a referendum.\footnote{\textit{See Sturm}, supra note 163, at 85–90.} Then, after a special election for delegates and the conclusion of the convention’s work, there is a ratification referendum regarding the proposed constitution.\footnote{\textit{See id.} at 104–08.} The ratification referendum was not a requirement in early state constitutional theory, but it is now all but essential for legitimating a new state constitution.\footnote{\textit{See generally Charles Sumner Lobinger, \textit{The People’s Law or Popular Participation in Lawmaking} (1909) (tracing the history of popular ratification).} Some have argued that the ratification referendum signaled a change in state convention theory whereby the convention was no longer recognized as an embodiment of the people’s constituent power but something more akin to an advisory body. \textit{See William Partlett, \textit{The American Tradition of Constituent Power}, 15 \textit{Int’l. J. Const. L.} 955, 955–56 (2017).} On these theories, contemporary state conventions cannot stake claim to the people’s original constituent power to create government. That power, it is argued, is activated by the ratification referendum. \textit{See Fritz, supra} note 146, at 332 (explaining that ratification was necessary for people to “breath ‘life’” into a constitution). This perspective is surely true to some degree. Contemporary theory and practice suggest that a convention could not adopt a constitution without submitting it to a ratification referendum. \textit{See Oberholtzer}, \textit{supra} note 34, at 112–13. However, as described above, conventions still exercise a
3. Generative Mandate

One of the most overlooked, but important, attributes of the state constitutional convention is its generative mandate. State constitutional theory prioritizes the people’s inclusion, as directly as practical, in the generative process of creating and compiling the constitutional text for ratification. Stated simply, for the people to create government—as popular sovereignty requires—they must actually participate in the origination of the constitution. Simply reacting to a constitution, whose details, nuance, and tradeoffs have been negotiated by an institution the people do not recognize, does not itself qualify as an exercise of their constituent power.

Indeed, the convention came into being so delegates could do more than vote on a proposal that originated elsewhere. Conventions were designed to collectively deliberate and compile constitutional text. A convention of delegates was never necessary for popular approval of a pre-packaged proposal. Society as a whole could always cast ballots on a proposal from a commission, committee, or legislature. Instead, the convention was developed because the principle of popular sovereignty required the people be included (as directly as possible) in the actual deliberative generation of the constitution. A specially elected convention gave the people the best, and most practical, opportunity to create—rather than just ratify—their own unique generative function that implicates the locus of constitutional sovereignty. Contemporary conventions may no longer have the independent authority to create a constitution without a ratification referendum, but they still have as their core mandate to formulate a constitution on behalf of the people (subject to ratification). That mandate derives from the people’s exclusive right to create government. Stated differently, even if we accept that the referendum has altered state convention theory so that the delegates are best conceptualized as an advisory body, state convention theory still presumes that the advisory body should be comprised of specially elected delegates because of the convention’s generative mandate. The referendum is a check on the convention, but it cannot by nature act as a substitute.

See supra Section II.A.

The internal operations of conventions have varied remarkably little over the centuries. See STURM, supra note 163, at 99–100 (describing convention operating procedures); JAMESON, supra note 164, at 208–300 (same). Almost all conventions begin with delegates selecting a chairperson or president and several other administrative officers. STURM, supra note 163, at 99–100. The convention then adopts rules for its own operation and appoints committees to develop specific substantive proposals. Id. The convention’s internal rules are often modelled after the rules for the state’s lower legislative chamber, with modifications “to permit greater opportunity for deliberation and discussion.” Id. at 100. The next stage in most conventions is dedicated to fact-finding and expert hearings, research, and the study of proposals. Id. Committees then complete and distribute their reports to all delegates, who then debate the proposals in a plenary session. Id. The proposals can be accepted, modified or rejected by a set majority of the attending delegates. Id. If a proposal is accepted, most conventions refer it to a committee on “arrangement and style,” which prepares the formal proposal for final consideration by the convention. Id.

The idea of a plebiscite was developing in revolutionary America and might not have immediately occurred to early constitutionalists. OBERHOLTZER, supra note 34, at 106–07. It became the norm for constitutional ratification by 1829. TARR, supra note 9, at 70 n.37.

WOOD, supra note 25, at 331–32.
Thus, state convention theory reflects the foundational belief that only the people can legitimately create government, and that a convention of specially elected delegates is the preferred device to achieve this.

The Massachusetts convention of 1780 again provides an especially powerful illustration. The convention was preceded by a failed draft constitution sent to the people for ratification by the Massachusetts General Court. The people rejected this constitution, not because of its substance, but because “the only convention which could stand for all the people and best define its rights and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of framing a constitution.” In other words, the people of Massachusetts refused to accept that the power to ratify the constitution could cure their limited inclusion in the generative process conducted by the General Court.

New Jersey’s failed 1944 constitutional convention provides a more recent example of the same principle. The process—which began in 1942 with a special referendum authorizing the legislature to draft a constitution for submission at a subsequent referendum involved the use of an appointed commission, legislative committees, public hearings before the legislature, a joint meeting of the legislature to approve the constitution, and

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211 To be sure, conventions themselves have a long history of relying on commissions and experts for information and guidance. See Williams, supra note 177, at 7–11.

212 See Adams, supra note 25, at 90–91 (describing the process used to draft the constitution in December 1777 that was finalized in February 1778 but rejected by a vast majority of the towns in March 1778). The General Court of 1777, which drafted the constitution, was no “ordinary” legislature. See id. at 90. It had convened following a general election of the lower house where the sole issue was to select representatives who “would have full authority to draft a constitution.” Id. Following the election, the upper and lower houses met in joint session to draft the constitution, which was then sent to the people to be ratified in town meetings. See id. at 90–91; supra Section II.A.

213 Hoar, supra note 133, at 6–7.

214 Consider also Jefferson’s comments on the Virginia’s 1776 Constitution, which was drafted by an ordinary legislature. Jefferson was not concerned by the content of the constitution nor even the great care and deliberation with which it was drafted. See Adams, supra note 25, at 72 (stating legislators worked harder than any convention); Fritz, supra note 146, at 328–29 (“What disturbed Jefferson more than the absence of popular ratification was that the drafters did not clearly identify the distinctive nature of constitutional law. He expressed the same concerns with respect to the ‘dangerous doctrine’ that the people’s acquiescence was sufficient to overcome the absence of authority to frame a constitution in the first place.”).


a public referendum to ratify the proposal.\textsuperscript{217} At the public hearings following publication of a draft from the legislature, various groups expressed concern that this process was not appropriate for generating a new constitution because, despite the referenda at the beginning and end, the process failed to adequately include the people in the actual drafting of the constitution.\textsuperscript{218} Ultimately, voters handily defeated the proposed constitution, and the legislature’s unusual processes played a key role.\textsuperscript{219}

Of course, these illustrations are anecdotal and involve other complex factors. But the basic point persists in state constitutional thought—for purposes of creating a constitution, the convention is the preferred and universally accepted method because, among other things, it directly includes the people in the front-end process of deliberating towards the collective drafting of a constitutional text. Legislatures, on the other hand, are inherently unauthorized to create or destroy constitutions for the people—no matter how extensive their efforts and deliberations. A constitution must originate with the people and only a convention is presumed to represent the people for purposes of creating a constitution.

With these foundational principles in mind, I now turn to the historical development of state amendment procedures that allow for amendment outside of a constitutional convention.

III. The State Theory of “Extra-Convention” Amendment

During most of the eighteenth century and the early nineteenth century, the states relied primarily on conventions to change their constitutions.\textsuperscript{220} The states quickly realized, however, that conventions were cumbersome and actually blocked popular reforms.\textsuperscript{221} Moreover, following violent uprisings,

\textsuperscript{217} 2 \textsc{Public Hearing on Proposed Revised Constitution} 345 (1944).

\textsuperscript{218} 3 \textsc{Public Hearing on Proposed Revised Constitution} 35 (1944) (“Of course, we think the ideal way to write a constitution is by a special convention . . . [T]here are certain very great advantages [] in having a convention which has no other business before it but consideration of the constitution.”); 1 \textsc{Public Hearing on Proposed Revised Constitution} 20–21 (1944) (“We feel this thing is too hurried and we are asking that you let us recess the hearings until some future date, and give us an opportunity of really being publicly heard.”); 2 \textsc{Public Hearing on Proposed Revised Constitution} 334 (1944) (noting that the committee was comprised of a majority from the dominant political party and that this created “practical considerations”). \textit{But see} \textsc{Robert F. Williams, The New Jersey State Constitution: A Reference Guide} 14–15 (1997) (describing the New Jersey Supreme Court’s endorsement of process in dicta).

\textsuperscript{219} See Tarr & Williams, supra note 36, at 1083.

\textsuperscript{220} See Tarr, supra note 9, at 73.

\textsuperscript{221} A famous example of this is the 1801 New York convention, which was called “primarily for the purpose of determining the interpretation of one clause of the constitution.” \textsc{See} \textsc{Dodd, supra} note 123, at 120; \textit{see also Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana} 101 (1864) (framing the legislative model for amendment in terms of the need to bypass cumbersome conventions).
such as Shay’s Rebellion in Massachusetts and the Dorr Revolution in Rhode Island, there was great interest in ensuring that constitutional change would be institutionalized and the “doctrine of the Revolution” would be replaced with a set of legally exclusive but accessible amendment processes.\footnote{Jameson, supra note 164, at 548. See also Dinan, supra note 19, at 36–37; Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New-York 292–94 (1821) (offering a stylistic amendment to remove “people” from amendment rules because “[t]here were frequently warm disputes [about] who were the people—party after party sprung up, all claiming to be the people.”).}

Thus, the states soon began to discuss alternative ways to accomplish constitutional change by leveraging existing government structures. The first major move was to enlist the legislature as an agent of constitutional reform.\footnote{This method of amendment actually existed in several inaugural state constitutions but was largely neglected in favor of the convention until the early nineteenth century when states began to critically evaluate and theorize amendment design. Dinan, supra note 19, at 32.} The second was to authorize small groups of private citizens to formulate amendments through the initiative process. This Part considers how each of these procedures developed as a limited and constituted power distinct from and subordinate to the people’s inherent sovereign constituent power to create constitutions. This forgotten core of the state constitutional amendment power is crucial to understanding that the state amendment power is presumptively limited.

A. The Legislature as Limited Amendment Agent

During the initial wave of state constitution-making in the eighteenth century, relatively little time was spent deliberating over the best processes for constitutional amendment.\footnote{See id. at 32–33.} It was not until around 1820, under mounting pressure for a more flexible amendment process, that constitution-makers “began to reflect in a sustained fashion on the merits of various approaches to amendment.”\footnote{Id. at 32 (noting that the political impetus for more flexible amendment during this time period was primarily related to apportionment in state legislatures); see also Fritz, supra note 146, at 289 n.2 (explaining that few convention debates were published before 1820).}

The most efficient approach was to authorize the legislature, as the state’s law-making branch, to amend the constitution.\footnote{Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts [1820–21], at 413 (New ed. rev. 1853) [hereinafter Mass. Journal] (“It was a natural course and conformable to analogy and precedent in some degree, that every proposition for amendment should originate in the legislature under certain guards, and be sent out to the people.”).} But this was troublesome because states had labored since the revolution to strip
legislatures of control over constitution-making. Indeed, the triumph of the convention was that it institutionalized the people’s right to create government in a representative assembly distinct from the legislature—or any other official or group subject to the constitution.

Thus, the story of the legislative amendment power began with debate about the legislature’s legal authority to participate in constitutional change and the wisdom of entrusting the legislature with the constitution. As proponents of legislative amendment gained ground, what emerged was a theory of legislative amendment founded on the principle that the legislature has no inherent legal authority to formulate amendments, but the constitution can grant that authority subject to conditions that will protect against misuse. First, I present historical evidence from the convention debates. I then discuss a body of largely neglected case law affirming this conception of legislative amendment.

1. Convention Debates

This Section first presents the arguments made by state constitutional convention delegates against legislative amendment. It then discusses how those arguments were addressed and how the states landed on an inherently limited theory of the amendment power.

Many early convention delegates argued that legislative amendment was improper simply because the legislature had no legal right or authority to tamper with the constitution. The power to change government inhered only in the people and could be exercised only through a convention independent of the legislature. To many early state constitutionalists, it was inconceivable that the legislature would be given control over the content of the very instrument designed to constrain the legislature on behalf of the people. This argument was surely formalistic, but it was also understandable in light of the perceived harms attendant to the English doctrine of parliamentary sovereignty. Indeed, parliamentary sovereignty represented

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227 Although a few early eighteenth-century state constitutions included legislative amendment provisions, this was not the dominant approach, and many scholars suggest that these processes were included without much critical thought. See DINAN, supra note 19, at 32; DODD, supra note 123, at 120–27 (providing extensive history of legislative amendment procedures). Indeed, several early state constitutions explicitly prohibited legislatures from proposing amendments. See LUTZ, POPULAR CONSENT AND POPULAR CONTROL, supra note 106, at 64 (noting provisions in the Pennsylvania and Vermont constitutions of 1776 and 1777).

228 OBERHOLTZER, supra note 34, at 154.

229 On the anomaly of these provisions as both grants and limitations, see JAMESON, supra note 164, at 548–49 (“But however liberal these provisions seem to be, restriction is really the policy and the law of the country.”).
exactly what the delegates feared—a legislature with unchecked control of the constitution.  

One of the earliest expressions of this argument occurred at the Maine convention of 1819. In opposition to a first-of-its-kind provision allowing the legislature to formulate amendments for popular ratification, Mr. Baldwin exclaimed in a tone reminiscent of the revolutionary era: “It appears to me this section delegates to our Legislature a stretch of power, that no Legislature on earth has a right to exercise.” Mr. Baldwin opposed the provision because he perceived that it would “[d]eprive the people of their power, [and] give unlimited power to their rulers . . . .” He concluded: “It is more safe to trust the people with the right of revising, or to give their rulers unlimited power? Every man acquainted with history can easily answer.”

Similarly, at the 1835 North Carolina convention, Mr. Hogan asserted that he was “entirely opposed” to a provision allowing the legislature to formulate amendments because “the People, in revising their fundamental law, should act through a Convention, from the deliberations of which, all persons should be excluded who were members of the Legislature.”

Perhaps the most colorful and poignant articulation of this point came from Mr. Howell at the Louisiana Convention of 1864, where he exclaimed that “[t]he Legislature is the creature of the constitution, and when you give the creature power to destroy the creator, you adopt almost an anomaly.”

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230 See Wood, supra note 25, at 348–54.
231 This provision was adopted by the convention and was the first process to dispense with an intervening-election requirement and permit a single legislature to send amendments directly to referendum. Dodd, supra note 123, at 120–21.
233 Id. at 346.
234 Id.
236 DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA 102 (1864). Affirmations of this principle are not antiquated. The most recent affirmation came during the New Hampshire convention of 1984, where Mr. Ober pejoratively described the legislature’s authority to propose amendments as a “new-found power” that did not exist in New Hampshire until it was explicitly engrafted into the constitution by a constitutional convention in 1964. JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION 95–96 (1984). Mr. Webster at the 1820 Massachusetts convention gave an especially direct statement of the point when he declared that formulating amendments “was not an exercise of legislative power.” MASS. JOURNAL, supra note 226, at 407. Many other expressions of this principle appear in the debates, especially at moments when states initially considered legislative amendment or considered loosening restrictions on the legislature. See, e.g., MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION 1252 (1956) (“I don’t think that we should delegate the supreme power to the legislature to alter the document by which they themselves are constituted and they themselves are governed.”); THE STATE OF TENNESSEE, JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1953, at 771 (1953) (“I
Thus, as a matter of state constitutional law and theory, opponents of legislative amendment were very clear that legislatures had no inherent amendment power.

New Hampshire’s experience is worth highlighting because it powerfully illustrates this point across time. New Hampshire’s current constitution was adopted in 1784, and it provided for amendment only by a convention. Between 1784 and 1964, the state held twelve different conventions to consider and propose amendments to the constitution.237 Across those conventions, there were more than thirty different failed proposals to adopt a legislative amendment process.238 The arguments against legislative amendment were varied, but a persistent theme throughout all of the New Hampshire debates was a clear understanding that the legislature had no legal right to formulate changes precisely because it was not an assembly of specially elected delegates.239 Perhaps even more revealing, for almost one hundred years, the New Hampshire legislature did not propose

think we have the best possible method of amending our constitution before us right now, for we came here, as delegates, for the sole purpose of studying the Constitution relative to certain articles and sections, and with no particular purpose in mind but to study, and, being free from politics . . . ”); 2 THE [ILLINOIS] CONSTITUTIONAL DEBATES OF 1847, at 200 (1919); OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA 531 (1866) (“I am opposed in toto to giving any one Legislature the power to amend the Constitution, even with a vote of ratification by the people.”); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1259 (1850); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 342 (1849); DEBATES OF THE TEXAS CONVENTION 473 (1846) (“I am in favor of leaving it to the people to make these amendments. I would prefer to have no other mode of alteration except by way of Convention.”); PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION 62 (1838).

237 See DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION, supra note 19, at 8 tbl.1-1.


239 For example, at the 1964 New Hampshire Convention, Mr. Bennett argued that because the constitution “has emanated from the people . . . any change in this Constitution should also emanate from the people in Constitutional Conventions and not from the General Court.” JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION 112–13 (1964). See also JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION 50 (1959) (“Now this amendment, if it goes through we might just as well throw the Constitution out the window, and we won’t have any Constitution.”); JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION 177 (1956) (“The Convention and the legislature are two different cats, they’re not colored alike at all. The Convention is supposed to amend the fundamental laws of the state . . . [t]he legislature is supposed to provide . . . laws within these fundamental laws.”); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE 127 (1889) (“A convention elected under the present method comes directly from the people and is uninfluenced by the partisan questions which often affect Legislatures. The delegates of the convention come here with a single purpose in mind[]—the real benefit of the people. Changes in the Constitution should be kept clear of political entanglements and free from those influences that ordinarily affect a Legislature.”); JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW HAMPSHIRE 256 (1877) (“And the Constitution, in my judgment, ought not to be altered until the people, sending representatives directly from themselves, see occasion to modify it.”).
amendments despite the fact that by 1964 legislative amendment had become the norm in every other state.  

Opponents of legislative amendment also offered a variety of pragmatic arguments. Various delegates argued, for example, that legislative amendment would detract from the legislature’s primary law-making responsibilities. Implicit in these arguments was the understanding that the legislature’s law-making obligations did not include the power to develop constitutional amendments. The idea was that the legislature exists primarily to pass beneficial laws, and adding a special, nonlegislative responsibility was unwise because it would detract from the legislature’s core purpose.

Specifically, at the 1837 Pennsylvania convention, Mr. Merrill opposed legislative amendment by arguing that it would allow “[a] single member of the legislature . . . [to] bring forward measures to consume the time of that body, and although he may be voted down, he can renew them [and a] great portion of time may thus be consumed unprofitably.” Similarly, at the New York convention of 1821, Mr. Sharpe argued that “[t]he legislature will always be troubled with propositions from various parts of the state, to alter the constitution, and these from one place or another, will be received year after year.” These arguments were all predicated on the idea that legislative amendment would be a new grant of power that would upset ordinary legislative business.

Another recurring argument was that legislators would be tempted to misuse the amendment power precisely because they also acted in a legislative capacity. This argument took a variety of forms, but the core idea was that legislators were poorly situated to act as faithful constitutional agents. Because legislators were primarily motivated by winning re-election, for example, they were likely to view the amendment power simply as a tool to achieving their legislative agenda or a method for demonstrating party loyalty. These arguments also asserted that the legislature inherently

240 See also Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 103 (1864) (commenting on omission of legislative mode in the 1812 Constitution as precluding the legislature from submitting amendments).

241 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution 59 (1838).


243 See, e.g., The State of Tennessee, Journal and Debates of the Constitutional Convention of 1953, at 771 (1953); 1 Debates and Proceedings of the Constitutional Convention of the State of California 1878, at 1277 (1880) (“It would make the constitution a foot-ball, to be kicked between the two parties.”); Proceedings and Debates of the Convention of Louisiana 406–97 (1845) (arguing that legislative amendment would be a tool for losers in statutory debates to overturn legislation); Proceedings and Debates of the Convention of the
desires to enlarge its own power. Thus, opponents concluded that these dynamics were likely to bias or pervert amendment decision-making, resulting in outcomes unrepresentative of the people’s constitutional preferences.\textsuperscript{244} Again, this concern was predicated on the understanding that the amendment power would be a new and special grant of power to the legislature that could undermine the legislature’s internal structure and result in bad constitutional decision-making.\textsuperscript{245}

Another version of the “unfaithful-agent” argument was the concern that state legislatures have a propensity towards infringing the rights of minorities. Various delegates argued that a written constitution was intended to protect minorities from abusive majoritarian legislation. If legislators were given the power to amend the constitution, they would likely try to eliminate important minority projections during times of “popular excitement.”\textsuperscript{246}

A final version of the unfaithful-agent argument centered on the legislature’s representative structure. Various delegates argued that the legislature was an inappropriate institution to formulate amendments because it did not represent the majority of the people directly enough. This argument was especially prominent prior to the United States Supreme Court’s rulings in \textit{Baker v. Carr}\textsuperscript{247} and \textit{Reynolds v. Simms},\textsuperscript{248} which forced states to ensure that their upper houses were apportioned based on population. The basic argument was that the state senate gave disproportionate power to certain regions and groups.\textsuperscript{249} Although that

\textsuperscript{244} See, \textit{e.g.}, \textit{THE STATE OF TENNESSEE, JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1953}, at 777 (1953) (arguing that legislative amendment gives legislators the ability to “hide behind that procedure; the legislators are going to seek that escape”); \textit{PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 407} (1845) (arguing that the legislature does not always represent constitutional preferences of people).

\textsuperscript{245} Another version of this argument was that the legislature would not have enough time to seriously consider amendments because of their legislative docket. See, \textit{e.g.}, \textit{THE STATE OF TENNESSEE, JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1953}, at 771 (1953).

\textsuperscript{246} \textit{PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844}, at 54–56 (1942) (noting that legislature may be “chosen . . . under the influence of some temporary political excitement” that poses danger to minorities); \textit{see also} 1 \textit{DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE 2398–2400} (1958) (making this argument in reverse, saying that removing the successive session requirement would allow the amendment power to be used by singular counties).

\textsuperscript{247} 369 U.S. 186 (1962) (holding that districting of state legislatures is justiciable).

\textsuperscript{248} 377 U.S. 533 (1964) (holding that both houses of state legislatures must comply with one-person, one-vote principle).

\textsuperscript{249} See, \textit{e.g.}, \textit{MASS. JOURNAL, supra} note 226, at 413–14; \textit{PROCEEDINGS AND DEBATES OF THE CONVENTION OF LOUISIANA 407} (1845) (“[I]t is not always that the majority in the legislature represents the majority of the people of the State, and therefore it is no proof, because such majority may be found, that the people at large desire such alteration in their constitution . . . .”).
structure may have been appropriate for legislative decision-making, making constitutional law required more direct popular input.\textsuperscript{250}

Essentially, all of these concerns stemmed from the recognition that the legislature did not have any legal authority to formulate constitutional amendments, absent a positive grant of power. In other words, opposition to legislative amendment was grounded in an assumption that amendment power did not exist until the constitution positively granted it and that it would be unwise to do so.

Despite the passion with which the above concerns were expressed, they were overcome in most states rather quickly. By the end of the nineteenth century, all states except New Hampshire had adopted legislative amendment in some form.\textsuperscript{251} However, it is important to note how state convention delegates addressed the arguments against legislative amendment. Proponents of legislative amendment did not argue that the legislature had the right to propose amendments pursuant to its legislative mandate, nor that the people’s right to change government implicitly authorized the legislature to act in that capacity.\textsuperscript{252} Indeed, any notion of implicit legislative authority to change the constitution was anathema to even the proponents of legislative amendment.\textsuperscript{253} Instead, proponents offered a series of pragmatic and legal arguments designed to show that legislative amendment could be worthwhile and made “perfectly safe.”\textsuperscript{254}

\textsuperscript{250} A variant of this argument was that legislators were not representative of the people’s constitutional preferences because they were elected based on a legislative agenda and not particular constitutional reforms. See, e.g., \textit{Minutes of the Daily Proceedings, Alaska Constitutional Convention} 1251 (1956); \textit{Proceedings of the New Jersey State Constitutional Convention} of 1844, at 54–56 (1942).

\textsuperscript{251} See \textit{Dinan, supra} note 19, at 42.

\textsuperscript{252} Perhaps the closest to this position that I saw in the debates was a discussion in the Massachusetts convention of 1820, where a delegate suggested that the legislature could propose amendments without satisfying ordinary legislative process. See \textit{Mass. Journal, supra} note 226, at 407. However, the assumption in this argument was that the legislature could bypass legislative process because proposing amendments was not a legislative function. See \textit{id}. The delegate implicitly conceded that an affirmative constitutional grant of power was required. See \textit{id}. There was also recognition from delegates that the legislature retains an inherent right to propose a constitutional convention, which is a long-standing principle of state constitutional law distinct from the power to propose amendments. See \textit{Proceedings of the New Jersey State Constitutional Convention} of 1844, at 73–74 (1942). There is also some rhetoric from delegates arguing that making the legislative amendment processes easier honors the people’s right to control content of the document. See, e.g., \textit{Official Proceedings of the Constitutional Convention of the State of Alabama} 3911 (1901) (arguing that convention cannot make provisions unamendable by legislature because that would elevate the convention over the people themselves).

\textsuperscript{253} See, e.g., \textit{Mass. Journal, supra} note 226, at 413 ("[T]he only question was in what manner it should be provided that particular amendments might be obtained.").

\textsuperscript{254} \textit{Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution} 247 (1838); see \textit{Minutes of the Daily
First, this argument was grounded in the notion that conventions were unnecessarily costly and inefficient for discrete changes.\textsuperscript{255} Allowing for amendment only by convention often resulted in institutional “overkill” because many “ordinary” changes could be fairly resolved without the cost or political grandeur of a convention.\textsuperscript{256} Mr. Read made this point at the 1850 Indiana Convention. Noting that the session had already dragged on for eleven weeks without an end in sight, he suggested that relatively minor amendments, such as the establishment of a state bank, would be possible without the cost and burden of a convention.\textsuperscript{257}

This argument was sophisticated and powerful. It rested on the idea that constitutional changes can vary in significance or complexity, and that discrete, clear changes can be legitimated by less comprehensive processes and by agents with a less direct connection to the people.\textsuperscript{258} In this way, proponents of legislative amendment were able to unravel the formalistic, all-or-nothing approach taken by their opponents by introducing a sliding scale. If a change was significant or complex, a convention was better to ensure a direct connection to the people and focused deliberation. If a change was clear and discrete, a more efficient and mediated process could be used.

For example, at the 1867 New York Convention, Mr. Murphy argued that New York’s amendment rules, which allowed for legislative amendment by a majority but imposed a higher threshold for a convention, were justified because:

[When] there are evils that require remedy such evils should be promptly corrected . . . [But] [n]o Convention should be called for the purpose of revising

\textsuperscript{255} See, e.g., MASS. JOURNAL, supra note 226, at 407 (“The object of the mode proposed for making amendments in it, was to prevent the people from being called upon [presumably in convention] to make trivial amendments, or any amendments, except when a real evil existed.”); id. at 188 (“Any plan, sensible, and useful alterations which might be suggested, the people would see, and in the mode proposed would easily be effected.”).

\textsuperscript{256} See, e.g., MINUTES OF THE DAILY PROCEEDINGS, ALASKA CONSTITUTIONAL CONVENTION 1249 (1956) (“the object is to save the state expenses” for “amendment[s] that [are] urgent and worthwhile”); PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA, CALLED TO AMEND THE CONSTITUTION OF THE STATE, WHICH ASSEMBLED AT RALEIGH, JUNE 4, 1835, at 347 (1836) (arguing that convention process as the sole amendment device was too cumbersome).


\textsuperscript{258} See Op. of the Justices, 264 A.2d 342 (Del. 1970) (drawing this conclusion from the Delaware convention debates).
the Constitution, that is, for the purpose of making corrections generally, unless upon the most deliberate and full decision of the people on the question.259

This argument opened the door for proponents of legislative amendment to explain why it might be appropriate to involve the legislature.260 If popular sentiment on a discrete constitutional issue was clear, the legislature, as a democratic assembly, could identify and formulate that sentiment for ratification by the people.261 If the issue was complex or far-reaching, or the solution unclear, a specially elected deliberative convention could be used to ascertain and more directly legitimate the people’s constitutional preferences. Thus, Mr. Hinman at the 1915 New York convention, argued:

[T]here might be incidental changes needed from year to year, which would, while important, not be important enough to go to the great expense of calling a great Convention for the purpose remedying it. Therefore [the committee] ha[s] concluded that it was essential that we should retain the legislative method in conjunction with the Convention plan.262

This perspective on constitutional change was crucial in the development of legislative amendment in the states because it paved the way for a more flexible cost–benefit analysis regarding the design of amendment rules. It allowed proponents of legislative amendment to concede that the legislature was not ideal for creating amendments. But it also empowered them to justify the risks associated with legislative amendment by emphasizing the efficiencies gained.263 In many respects, this was the conceptual foundation upon which legislative amendment was built.

To be sure, proponents of legislative amendment recognized its dangers. But rather than rejecting legislative amendment outright, they proposed constitutional limitations that could guard against abuse while

260 See, e.g., MASS. JOURNAL supra note 226, at 413 (“It was a natural course and conformable [sic] to analogy and precedent in some degree, that every proposition for amendment should originate in the Legislature under certain guards . . . “).
261 See, e.g., JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION 110, 115 (1964); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2807 (1868); MASS. JOURNAL, supra note 226, at 406–07 (discussing how the house is especially well suited to proposing amendments).
263 See, e.g., PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 66–67 (1942) (many proponents downplayed the risks, suggesting that the legislature is not prone to misuse amendment).
preserving efficiency. In the end, a key argument in favor of extra-conventional amendment was that the constitution could be used to carefully delineate a special legislative power, which would meet the need for incremental reform while limiting the legislature’s involvement in constitutional change. In other words, state amendment rules did not originate as broad grants of power that might approximate the people’s sovereign constituent power but as limited and restricted grants designed principally to protect against legislative supremacy.

Because the amendment power was initially conceived in limited terms, subsequent developments in the design of amendment rules centered on questions of agency. Delegates debated and refined legislative amendment in terms of how to ensure the legislature would not usurp the people’s foundational right to create and change government while also making amendment accessible and efficient. The people’s sovereignty was relevant to these debates not because the amendment power was designed to embody the people’s sovereign constituent power, like the convention, but because the amendment power was designed to ensure that the legislature did not attempt to take the place of a convention.

This point was frequently clarified in state convention debates. At the Massachusetts convention of 1820, for example, an issue arose as to the appropriate legislative thresholds for proposing amendments. In opposition to supermajority thresholds, Mr. Varnum recited the Massachusetts Bill of Rights, declaring that “all the rights of self-government [are] vested in the people,” which he understood to mean a simple “majority of the people.” In support of higher thresholds, however, Mr. Pickman emphasized that the question was not “what power should be vested in the people, but what power should be vested in the Legislature.”

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264 See, e.g., PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION 247 (1838) (arguing that a successive-session requirement would make legislative amendment “perfectly safe”); PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA 370 (1836) (arguing that constitutional limitations on amendment processes were not intended to limit “the people, but the creatures of the people”; “[i]t is to impose a check on the Legislature, that it may not avail itself of an incidental majority to disturb the repose of the people . . .”); MASS. JOURNAL supra note 226, at 413 (describing “guards” against abuse to be included in the constitution and concluding: “Would not this furnish a reasonable security against unreasonable alterations?”)

265 See, e.g., 3 MONTANA CONSTITUTIONAL CONVENTION 1971–1972, at 493 (1981) (“The committee feels such a measure is restrictive enough to prevent frivolous legislative action, it is open enough to overcome stringent opposition of a few well-placed members of one bicameral house.”); MASS. JOURNAL, supra note 226, at 407, 413; PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION (1838).

266 MASS. JOURNAL, supra note 226, at 414.

267 Id.

268 Id. at 415.
Mr. Pickman “agreed that the people are the sovereigns of the country, and that a majority must control the will of the people,” but “the question now was, what powers should be given to the Legislature.” On that question, Mr. Pickman preferred higher thresholds as a way to limit the legislature’s influence on constitutional change.

The Louisiana convention of 1864 presented a more nuanced discussion of the same issue. In supporting legislative amendments but opposing higher legislative thresholds, Mr. Cutler argued that higher legislative thresholds “abridge” the people’s right to change the constitution because only a majority are required to create government and bind society to a constitution. Accordingly, a small minority in the legislature should not be empowered by the amendment process to block otherwise popular changes to the constitution. In defense of higher thresholds, Mr. Howell explained: “It is not the object . . . to restrict the power of the people at all; it is rather to restrict the facility of the Legislature in acting upon this matter.” By imposing higher thresholds, he argued, “the rights of the people will [not] be restricted one iota [because] [t]he people have a right to call a convention at any time . . . .”

The historical progression of amendment design also suggests the states understood amendment procedures to be limited grants of power. The first era of legislative amendment procedures, in the early nineteenth century, was characterized by relatively strong limitations on legislative amendment and greater institutional redundancies. Most states in the early nineteenth century adopted procedures that required supermajority approval in both houses, an intervening election for at least one house (usually the lower-house), and then supermajority approval by both houses to ratify. The other dominant approach was to require approval in two successive legislative procedures.

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269 Id. Debates regarding appropriate voting thresholds often involved popular sovereignty on both sides. Some argued that thresholds had to be based on a simple majority because higher thresholds offended the notion that a majority of the people decide. Others argued that they had to be high to ensure that the legislature did not usurp the people’s power by amending the constitution easily. Id.

270 See id. For similar arguments see Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 102 (1864) (noting that higher thresholds would limit the influence of legislature and “few men representing private interests”).

271 Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 104 (1864).

272 Id. at 105. Mr. Cutler emphasized that the legislature would be held accountable by requiring prolonged publication before a ratification referendum.

273 Id. at 106.

274 Id.

275 See Dinan, supra note 19, at 41–45 (explaining the loosening of limitations on legislatures over time).

276 See Dodd, supra note 123, at 120–23.
sessions and then ratification at a popular referendum. A minority of states required a referendum in between two successive supermajority votes in the legislature. In all, these early procedures were designed to significantly restrict legislative involvement in constitutional amendment. They evidence the understanding that giving the legislature constitutional amendment power was a risky business to be constrained.

However, by the mid-nineteenth century, there was growing discontent that legislative amendment, which was championed as a device with lower barriers to constitutional change, had, in the words of Mr. Hammond at the 1877 Georgia convention, made state constitutions “as unchangeable as the laws of the Medes and Persians.” While this was surely an exaggeration, states had become increasingly frustrated with the rigidity of legislative amendment by the onset of the Progressive Era because state constitutions were working to block popular social reforms and retain the status quo. In large part, this was happening because state judges were invalidating legislation under state constitutions, and to a lesser degree, because legislators were using state constitutional limitations as a pretext for not implementing popular policies.

Thus, states began reducing barriers to legislative amendment so that smaller legislative majorities could more quickly clear the way to popular social and economic reforms. Specifically, the Progressive Era set in motion a trend towards eliminating successive-session and supermajority requirements as well as lowering referendum thresholds to only a majority of those voting on the amendment. The result was that few formal barriers to legislative amendment remained besides the ratification referendum.

At first glance, debates from the Progressive Era might suggest that the states were fundamentally restructuring the amendment power. These debates contain much rhetoric espousing the people’s right to change and control government as the basis for liberalizing amendment procedures. The

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277 See id. Some states required only majority thresholds (as opposed to super-majorities) in either the first or second session. See DINAN, supra note 19, at 43 (describing many variations).

278 The original approach to legislative elections was to hold them annually, which made these processes relatively streamlined, at least to a degree. See DINAN, supra note 19, at 43 (noting that successive session requirements were initially devised before biennial legislative elections).

279 A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 430 (1877) (Georgia). The change to biannual legislative elections contributed to the problem. Various delegates emphasized how successive-session requirements with biannual elections meant the amendments took several years to complete. Id.

280 See DINAN, supra note 19, at 48–49.

281 See id. at 50.

282 See id. at 56–58.

283 OBERHOLTZER, supra note 34, at 155–56.
referendum in particular was often worshiped as the purest method for realizing popular sovereignty as the most effective check on legislatures.\textsuperscript{284} Thus, one could argue the Progressive Era’s emphasis on popular referenda suggests that amendment rules were supplanting the convention in state constitutional theory as the repository of the people’s full constituent power.

However, this conclusion risks pulling the debates from context and proving too much. The core of the Progressive Era indictment of government was that it was unrepresentative and captured by private interests.\textsuperscript{285} Progressives invoked popular sovereignty as a principle to justify breaking apart entrenched institutions that were frustrating popular reform and favoring entrenched interests.\textsuperscript{286} In terms of state constitutional amendment procedures, this meant eliminating rules that allowed a minority in the legislature to maintain the status quo—most notably, supermajority thresholds and successive-session requirements.\textsuperscript{287}

However, the Progressives’ invocation of popular sovereignty was not directed to the underlying structure and theory of extra-conventional amendment. Indeed, Progressives liberalized amendment processes precisely because of great distrust in the legislature.\textsuperscript{288} By installing the referendum as the primary check on the legislature, Progressives did not intend to empower the legislature to act as a substitute for the constitutional convention. Instead, they intended to more directly constrain the legislature in exercising its existing amendment powers.

Stated differently, placing great trust in the referendum did not necessarily mean Progressive Era delegates also intended to grant a new power to legislatures. Rather, the Progressive liberalization of amendment rules in favor of referenda evinces a desire to more effectively constrain the legislature to its existing powers and guide it towards popular outcomes.

In fact, thoughtful Progressives revered the convention because of its direct accountability to the people and its independence from the

\textsuperscript{284} See, e.g., 1 DEBATES OF THE NORTH DAKOTA CONSTITUTIONAL CONVENTION OF 1972, at 726 (1972) (“After all, the people in the final analysis will vote whether or not they want to add or subtract from the basic document.”); 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 379 (1912) (“Permit the people themselves by popular vote, after due deliberation and discussion . . . to settle what the proper construction of any constitutional point is.”); 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 3911 (1901).

\textsuperscript{285} See MILLER, supra note 34, at 25–28 (summarizing the core Progressive tenets).

\textsuperscript{286} See id.

\textsuperscript{287} Cf. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION, supra note 19, at 48–53 (recalling the push to enact more flexible amendment processes).

\textsuperscript{288} Indeed, the Progressive Era was characterized by pervasive distrust in the legislature’s ability to formulate laws on behalf of the people. See OBERHOLTZER, supra note 34, at 155–56 (“Faith has been put in the referendum as a power to deliver us from evils arising from the legislature through this source [i.e., the amendment power].”); Cooper, supra note 7, at 231–32.
legislature. James Dealey, for example, wrote in 1915 regarding the convention:

It is the great agency through which democracy finds expression. In its latest form, that of a body made up of delegates elected from districts of equal population, it is one of the greatest of our political inventions. Through it popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated . . .

Thoughtful discussions of this issue by delegates during and after the Progressive Era also support the idea that legislative amendment was not understood as a substitute for the people exercising their sovereign power in convention.

2. The Neglected Jurisprudence of “Limited” Legislative Amendment

Although contemporary case law has tended towards a doctrine of referendum sovereignty, a largely overlooked body of case law recognizes that legislative amendment is a constituted and inherently limited power. The cornerstone of this line of cases is the widely held (but underappreciated) rule in state constitutional law that plenary legislative power does not include the power to propose amendments. All state constitutions are structured around a plenary grant of legislative power authorizing state legislatures to enact any law in furtherance of the public good, so long as it does not violate the Federal Constitution or an explicit limitation in the state constitution. However, plenary legislative authority does not include the power to formulate or propose constitutional change. This is a power that inheres only

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290 See DEALEY, supra note 67, at 258.


292 See State v. Manley, 441 So. 2d 864, 868–69 (Ala. 1983) (“This court recognized no authority for constitutional revision existing within the ‘plenary power’ of the legislature . . .”); Moore v. Shanahan, 486 P.2d 506, 513 (Kan. 1971) (“In submitting propositions for specific amendments to the Constitution, the Legislature does not act in the exercise of its ordinary legislative power . . .”); Hutcheson v. Gonzales, 71 P.2d 140, 145 (N.M. 1937); Mitchell v. Hopper, 241 S.W. 10, 12 (Ark. 1922); see also JAMESON, supra note 164, at 622 (“The power to propose amendments, then, not enuring as a part of the general grant, must be authorized by a special provision of the Constitution. And when no such provision can be pointed out the power does not exist.”); WILLIAMS, supra note 9, at 406 (noting rule that “legislative power to propose constitutional amendments to the voters is not within the basic, plenary legislative power but rather must be specifically authorized, and limited, by the state constitution”).

293 See WILLIAMS, supra note 9, at 249–53.
in the people.\textsuperscript{294} The policy behind this rule is that the constitution exists to create and constrain the legislature on behalf of the people. And, therefore, the legislature is presumed to be without power to change its governing instrument.\textsuperscript{295} Thus, state courts generally recognize that amendment rules in state constitutions represent extraordinary, affirmative grants of power to the legislature; rather than limitations on plenary legislative power.\textsuperscript{296}

Although this doctrine is deeply embedded in the state constitutional jurisprudence, it is widely overlooked in modern cases analyzing the nature and substantive scope of legislative amendment. Instead, as noted above, modern cases tend to allow amendments from any source so long as they are subjected to a referendum.\textsuperscript{297} However, a few courts have found implicit functional limitations on legislative amendment, based on the underlying structure and logic of the amendment power.\textsuperscript{298} Though largely ignored, these cases illustrate the inherently limited nature of legislative amendment, and they provide support for the doctrine that I more fully develop in Part IV.

In \textit{Livermore v. Waite},\textsuperscript{299} for example, the California Supreme Court considered an amendment to change the state capital from Sacramento to San Jose, provided that the state received a donation of land “not less than ten acres and one million dollars.”\textsuperscript{300} In analyzing the amendment, the court emphasized that “the power of the legislature to initiate any change in the existing organic law is, however, of greatly less extent [than a convention], and, being a delegated power, is to be strictly construed under the limitations by which it has been conferred.”\textsuperscript{301} The court further explained that “[i]n submitting propositions for the amendment of the constitution, the

\textsuperscript{294} See supra note 236 and accompanying text; see also Holmberg v. Jones, 65 P. 563, 564 (Idaho 1901) (“The power to make constitutions and amend them is inherent, not in the legislature, but in the people.”).

\textsuperscript{295} See Holmberg, 65 P. at 564 (“[T]he power to propose amendments has been granted by the people to the legislature. While the power of the legislature to enact laws is inherent, so far as legislative enactment is concerned, yet the power to propose amendments to the constitution is not inherent.”).

\textsuperscript{296} This is precisely why state courts generally invalidate legislative amendments that do not strictly comply with the constitution’s amendment rules and refuse to enlarge legislative amendment power by implication. For an extreme example, see \textit{Bailey v. Brookhart}, 84 N.W. 1064, 1067 (Iowa 1901) (invalidating amendment approved at referendum because it was not entered into the legislative journals as required by the constitution).

\textsuperscript{297} See supra Section I.B (describing the doctrine of referendum sovereignty).

\textsuperscript{298} Key cases include Smathers v. Smith, 338 So. 2d 825, 826 (Fla. 1976); Houston County v. Martin, 169 So. 13, 15 (Ala. 1936); Livermore v. Waite, 36 P. 424 (Cal. 1894). See also Ellingham v. Dye, 99 N.E. 1 (Ind. 1912) (rejecting the legislature’s attempt to propose a new constitution to the people at a referendum because the constitution did not explicitly authorize the legislature to propose a new constitution, and no such power was inherent in the legislature).

\textsuperscript{299} 36 P. 424 (Cal. 1894).

\textsuperscript{300} Id. at 425.

\textsuperscript{301} Id. at 426.
legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted [sic] to it, but is merely acting under the limited power, conferred upon it by the people . . . .”302 Applying this logic, the court concluded that the amendment was invalid because it did not make a clear change to the existing constitution but instead delegated constitutional decision-making to a private individual.303 According to the court, this was an unauthorized use of the amendment power because the constitution required that legislative amendments “become . . . part of the constitution” after ratification by voters.304

In Houston County v. Martin, the Alabama Supreme Court considered a legislative amendment—ratified by the people at a referendum—that temporarily suspended all constitutional provisions prohibiting the legislature from reducing salaries for public officials.305 Although the court ruled that the amendment did not apply to the facts in the case, it insisted a constitutional amendment could not be used to “temporarily suspend the Constitution or any part thereof to meet a real or fancied emergency.”306 The court reasoned that if the legislature could use amendment to temporarily suspend the constitution, then the amendment power would “substitut[e] a government of men for a government of law.”307 The court concluded that temporary suspension was an impermissible use of the amendment power because “[c]onstitutions are not primarily designed to protect majorities . . . but to preserve and protect the rights of individuals and minorities against arbitrary actions of those in authority.”308

In Smathers v. Smith, the Florida Supreme Court considered the validity of an amendment that allowed the legislature to nullify agency rules.309 The amendment was tacked onto a loosely related provision that prohibited agencies from imposing civil or criminal penalties. In reviewing the amendment, the court held that “[i]nherent in the amendatory process for the Constitution, by necessary implication, is the . . . notion of

302 Id. (“The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. The legislature is not authorized to assume the function of a constitutional convention . . . .”).
303 Id. at 427 (“The legislature was not authorized . . . to propose an amendment which, if ratified, will take effect only at the will of other persons . . . .”).
304 Id. at 427.
305 169 So. 13, 15 ( Ala. 1936).
306 Id.
307 Id.
308 Id.
309 338 So. 2d 825, 826 (Fla. 1976). The amendment allowed the legislature to nullify any agency rule “on the ground that the rule is without or in excess of delegated legislative authority.” Id.
‘germaneness.’”310 The court further explained that “[a] concept of germane, or rationality, for constitutional amendments is clearly essential to accomplish harmony in language and purpose between articles and to produce as nearly as possible a document free of doubts and inconsistencies.”311 Thus, the legislature could not use the amendment power to destroy the constitution’s “rationality.”312 The court ultimately upheld the amendment, but “only because there exists a reasonable basis to view the new sentence as germane to the provision it amends.”313 Inherent in the court’s reasoning, however, was the premise that the legislature could not use its delegated amendment power to destroy a key attribute of the constitution, i.e., its rationality and internal coherence.

This line of case law reinforces the basic notion that legislative amendment is a limited, delegated power derived from the constitution. Yet, the doctrine of referendum sovereignty often ignores this core premise.

B. Citizens as Limited Amendment Agents

The constitutional initiative similarly developed as a limited grant of power subordinate to the people’s inherent sovereign constituent power to create constitutions. The constitutional initiative was first adopted by Oregon in 1902 during the heart of the Progressive Era.314 Since then, seventeen other states have adopted it.315 The dominant justification for the initiative was to address concerns about legislative accountability. Those concerns related to (a) legislative capture by private interests, and (b) legislators’ own incentives for retaining the political status quo.316 The initiative was thus viewed as a device for correcting those agency problems by bypassing the legislature and allowing private citizens to initiate constitutional change.

For present purposes, it is crucial to recognize that the initiative was first adopted against the backdrop of a universal recognition that “amendments are to be made only in the modes pointed out in the

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310 Id. at 830.
311 Id. (quoting Adams v. Gunter, 238 So. 2d 824, 829 (Fla. 1970)).
312 Id.
313 Id. at 831.
314 DINAN, supra note 2, at 16. South Dakota is often mistakenly attributed with originating the constitutional initiative in 1898. See, e.g., Cooper, supra note 7, at 230; Kafker & Russcol, supra note 16, at 1283 (discussing South Dakota as first adopting initiative in context of constitutional initiative). In fact, South Dakota adopted only the statutory initiative in 1898 and did not adopt the constitutional initiative until 1972. See DINAN, supra note 19, at 6 n.132.
315 See DINAN, supra note 19, at 6 n.132 (listing dates of adoption for all states).
316 See Dinan, supra note 42, at 74–84. For an example of Progressive Era literature making this point, see J.W. SULLIVAN, DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM 93 (1893) (“Among the plainest signs of the times in America is the popular distrust of legislators.”).
constitution, and that any departure therefrom is revolution." Although proponents of the initiative championed it as a way to “exercise . . . sovereignty without the consent of the ordinary government agencies,” the initiative was not inherent or original in any particular citizen or group, as a matter of state constitutional law. That is, no citizen or private group could claim a legal right to propose a constitutional amendment on behalf of the people. To be implemented, the initiative had to be created through positive constitutional law deputizing some number of private citizens to act as agents for all of the people in formulating constitutional amendments. Thus, like the legislative amendment power, the state constitutional initiative is derived entirely from the constitution that creates it.

In this Section, I first present evidence from the convention debates addressing the constitutional initiative. I then discuss the body of case law affirming this conception of the initiative.

1. Convention Debates

Convention debates regarding the initiative were extensive, often involving lecture-type treatises addressing the history, theory, and purpose of the initiative. Indeed, the Ohio convention of 1912 drew speeches from William Jennings Bryan and Theodore Roosevelt.

In general terms, proponents of the initiative hoped to correct agency problems in government by allowing private citizens to bypass government and formulate constitutional proposals on their own. Proponents viewed

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317 Garner, supra note 70, at 219.
318 See Delos F. Wilcox, Government by All the People: Or the Initiative, the Referendum and the Recall as Instruments of Democracy 117 (1912). This is not to say that all proponents of the initiative appreciated the finer nuances of this point. Some brushed over the mechanics of the initiative in favor of broad rhetorical assertions that because all power resided in the people, the initiative was the essence of popular sovereignty because it bypassed existing representatives. See id. This rhetoric obscures the fact that when the initiative is operationalized, it necessarily creates new representatives or agents on behalf of the people. See Staszewski, supra note 82, at 399. The small number of citizens needed to qualify an initiative bypasses existing government officials, but they do not truly constitute the “people” for purposes of the doctrine of popular sovereignty. See id. Instead, they are a small representative group that the full sovereign people have authorized to act as constitutional agents through positive law in the constitution itself. See Wilcox, supra, at 117 (“The Initiative affords an available method for the exercise of sovereignty without the consent of the ordinary governmental agencies.”).
319 See Oberholtzer, supra note 34, at 384–85.
321 See Miller, supra note 34, at 26; Proceedings and Debates of the Constitutional Convention of the State of Ohio 751–54 (1912) (providing an enumerated list of arguments for and against initiative).
322 See Proceedings and Debates of the Constitutional Convention of the State of Michigan 547 (1907) (making a point about the nonrepresentative nature of legislature); The Records
the initiative as a way to address particular substantive problems in constitutional law and correct judicial barriers to popular reforms. Proponents also hoped the mere presence of the initiative in the constitutional structure would prevent legislators and judges from acting inconsistently with public will. Opponents argued that the initiative is inherently prone to empower special interests because it authorizes private groups to formulate constitutional changes. They also argued the initiative tends to clutter constitutions with stifling and irreconcilable policy provisions, is prone to be used by majorities to limit the rights of minorities, and eliminates the deliberative benefits of representative law-making.

Therefore, I focus primarily on portions of the debates that address the legal foundations of the constitutional initiative. Within the debates there are frequent references to the initiative as an “old” and “inherent” right held directly by the people. In support of this, delegates frequently drew upon language from early state constitutions that discussed popular sovereignty

Of the Arizona Constitutional Convention of 1910, at 189 (John S. Goff ed., 1991) (“I believe it initiates a true republican form of government, and will enable the people of this state to hold the government within their control.”).

Proponents also relied heavily on recent application of the initiative in Switzerland. See, e.g., Proceedings and Debates of the Constitutional Convention of the State of Ohio 677–78, 689 (1912).

325 Proceedings and Debates of the Constitutional Convention of the State of Ohio 688 (1912); id. at 690 (“It enables every well organized interest, such as single tax, socialistic measures, corporations and kindred interests, by concentrating upon a single law where a number are submitted to have their pet measures pass, thus putting a dangerous power in the hands of selfish interests . . . .”); Sixth Illinois Constitutional Convention 456 (1970) (“[T]he majority report indicates that they fear the initiative process will lend itself to abuse by special-interest groups.”).

326 Proceedings and Debates of the Constitutional Convention of the State of Michigan 547–48 (1907) (noting problems associated with bypassing deliberation in a representative assembly). There were other historical arguments as well. For example, at the Michigan convention a recurring issue was whether the initiative violated the Guarantee Clause. Id. at 552–53. Proponents also relied heavily on recent application of the initiative in Switzerland. See, e.g., Proceedings and Debates of the Constitutional Convention of the State of Ohio 677–78, 689 (1912).

327 See 2 Debates in the Massachusetts Constitutional Convention 1917–1918, at 752 (1918) (“The purpose . . . for the initiative . . . is based upon a right inherent in the people to correct, to alter, to change mistakes made by the Legislature . . . .”); Proceedings and Debates of the Constitutional Convention of the State of Ohio 778 (1912) (arguing in favor of initiative based on assertions that “the people . . . are all-powerful; it is the people who are the fountain of power and honors. They are the sovereign. It is they who can reform the legislatures”); id. at 779 (describing the initiative as flowing from the principle of popular sovereignty that allows people to take back power from legislature at will).
and the people’s right to amend government however they see fit. They also pointed to older versions of the initiative that existed at the local government level. They made these claims to legitimize the initiative and respond to arguments that the initiative was un-American, and perhaps even unconstitutional under the Guarantee Clause of the Federal Constitution.

Proponents of the initiative were surely correct that direct law making was not entirely absent from American political thought before the Progressive Era. Madison and Jefferson famously sparred over direct democracy in various forms. Some early state constitutions also included more direct democratic structures (unrelated to constitutional amendment) that align with anti-federalist thinking on constitutional design. And there was a long tradition of things akin to direct democracy in American local government.

Nevertheless, the constitutional initiative as conceptualized and adopted during the Progressive Era was in fact new to the American constitutional system. The key novelty was the notion that state constitutions could be used to create a legal right for private citizens to initiate constitutional change. This idea was surely connected to popular sovereignty, but unlike the convention, the states had not recognized the initiative as an institutional necessity flowing from popular sovereignty. Indeed, Ellis Oberholtzer wrote about the difference between the long-standing right to petition government and the initiative:

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329 See id. at 552 (discussing initiative-type actions from New England towns during the Eighteenth Century); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 675 (1912) (discussing the source of initiative and referendum in Switzerland and in New England town meetings). These arguments appear to largely mirror James W. Sullivan’s famous 1892 work. See SULLIVAN, supra note 316. Sullivan is largely attributed with having introduced the idea of the initiative into American politics in the 1890s. See SCHMIDT, supra note 29, at 6. He visited Switzerland in 1888 and self-published his book, which provided a plan for how to introduce the initiative into American constitutionalism in the form he observed in Switzerland. Id.
330 A frequent retort to the initiative in the debates was that it was a foreign institution with no place in America. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 678 (1912) ("[T]his smells too much of Swiss cheese.").
331 MILLER, supra note 34, at 19–20.
332 See id. at 21–22 (describing state constitutions as aligning with anti-federalist thinking about direct democracy as a necessary check on officials).
333 OBERHOLTZER, supra note 34, at 368–72.
334 MILLER, supra note 34, at 23–24 (noting that the initiative was first introduced in America in the 1890s and that as late as 1892 “the initiative . . . [was] still largely unknown in the United States”).
335 See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 752 (1912) ("It may be conceded that the adoption of direct legislation is contrary to the original plan upon which both the national and state constitutions were based [but] [t]hat is not a conclusive argument against it.")
The petition is not the initiative in the form that the advocates of this feature of popular government desire to see it introduced into this country. The right of initiation includes the right to demand a vote of the people, not only on laws already proposed or passed by the representative legislature, but also on new measures. The right of initiation is the right to initiate the law as well as the election for and against the law. It is a democratic agency by which a minority party and elements which are without representation in the legislature may force the latter’s hand and compel it to submit any desired measure to popular vote.\footnote{Oberholtzer, supra note 34, at 384; Schmidt, supra note 29, at 5–10 (describing the “advent of initiative” in United States as occurring between 1885 and 1917). Not all proponents of the initiative accepted Oberholtzer’s distinction between the right to petition and the initiative. See 2 Debates in the Massachusetts Constitutional Convention 1917–1918, at 306 (1918) (arguing that the right to petition is similar to initiative).}

Although proponents of the initiative likely believed popular sovereignty compelled the right of citizens to directly initiate amendments, they conceded that the right to an initiative had never existed in the United States as a matter of state constitutional law.\footnote{See, e.g., 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio 778 (1912) (arguing in favor of initiative provisions because they were necessary to “enable the people to act”). Indeed, obtaining such a right through positive constitutional law was an “obsession” of many populists during this time. Schmidt, supra note 29, at 7–8; 1 Proceedings and Debates of the Constitutional Convention of the State of Ohio 664 (1912) (speech by William Jennings Bryan describing initiative as “the most useful government invention which the people of the various states have had under consideration in recent years. It is the most effective means yet proposed for giving the people absolute control over their government”).} At the 1917 Ohio convention, for example, proponents noted that adopting the initiative would “mean[] a fundamental changing of our state government.”\footnote{1 Proceedings and Debates of the Constitutional Convention of the State of Ohio 679 (1912).} Similarly, at the 1907 Michigan convention, a delegate remarked that the initiative would be an entirely “new and untried method of constitutional amendment.”\footnote{Proceedings and Debates of the Constitutional Convention of the State of Michigan 562 (1907).} More recently, at the 1971 Montana convention, a proponent of the initiative explained that the initiative provision “creates a new power for the people of Montana, the right to initiate constitutional amendments.”\footnote{3 Montana Constitutional Convention 1971–1972, at 505–06 (1981); see also id. at 507 (“I wish to advise these people that they’re putting in a brand new way of amending the Constitution, by initiative, that we haven’t had previous to this.”).}

Therefore, in the state tradition, the constitutional initiative was a new creation brought...
into being by constitutional provisions.Absent those provisions, the initiative did not exist as a legal right.

Additionally, these convention debates reflect an understanding that initiative provisions effectively deputized private citizens to act as agents of constitutional change on behalf of the people. Opponents of the initiative argued that the process was inherently vulnerable to misuse by special interests because it allowed for private formulation of constitutional amendments supported by only a minority of the electorate. Proponents of the initiative responded that the signature thresholds could be set high enough to limit inappropriate proposals but low enough to make constitutional change accessible to well-meaning citizens. All sides agreed, however, that the initiative was structured to authorize private

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341 See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 562 (1907) (“[W]ill you incorporate in the fundamental law of Michigan a new and untried method of constitutional amendment . . .?”); id. at 560 (“To simplify the proposition this is to be done by providing in the new Constitution for proposing or initiating amendments thereto by petition of the people themselves.”); id. at 547 (noting that adopting the initiative would require delegates to “engraft upon [the constitution] a method of making laws fundamentally different from that which has prevailed since our nation was founded”); THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 686–87 (John S. Goff ed., 1991) (finding that the provision is “drawn up in such a way as to make the machinery for amendment of the constitution operative immediately upon the adoption of the constitution.”).

342 See SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 490 (1969) (emphasizing that unless provisions under consideration are adopted, initiative would not exist); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 674 (1912) (describing constitutional provisions as providing necessary “machinery” for the initiative); id. at 686 (“And it is proposed to accomplish this by injecting into our constitution what is termed and known as the ‘initiative, referendum and recall.’”); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 606 (1907) (asserting that initiative had to be “put into the constitution” to be effective).

343 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 563 (1907) (“If this system is adopted a constitutional amendment must be submitted when a petition is signed by a sufficient number of electors who want it, without regard to the interest or the welfare of those who do not want it, and without providing for any legislative action or for any tribunal before which the opponents of the measure can be heard before its submission.”); PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION 1919–1920 497–98 (1921); id. at 511 (“An amendment to the Constitution may be framed by one man if he has the time and energy and money to spend and willingness to do it. One man could start an initiative to amend the Constitution. He may frame it to suit himself, without consultation with others, without deliberation, without discussion . . . .”).

344 See MONTANA CONSTITUTIONAL CONVENTION, 1971–1972, at 506 (1972) (15% of the population for signatures designed to ensure that petition standards “will operate to check any erratic whimsy”); id. at 507 (arguing to keep the threshold high to ensure against “attempts made to raid the Constitution”); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 778 (1912) (arguing that signature threshold will require statewide effort that cannot be captured by petty interests); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 546 (1907) (thresholds chosen to ensure that “amendments to the Constitution [are] safe, and . . . will not permit the constitution to be amended hastily or recklessly”).
citizens to formulate amendments and then obtain sufficient signatures to trigger a legal right to demand a referendum.\textsuperscript{345}

Finally, the debates include frequent suggestions that the initiative was not intended as a substitute for the convention.\textsuperscript{346} Indeed, proponents of the initiative were often strong supporters of accessible convention provisions.\textsuperscript{347} Progressive Era delegates seem to have understood both the convention and the initiative as instruments of direct democracy that could be used to correct errors in representative government.\textsuperscript{348} However, they distinguished between the two devices by designating the initiative as a mechanism for piecemeal changes and the convention as most appropriate for wholesale change.\textsuperscript{349} They objected to the convention only insofar as it existed without the initiative and tended to make popular constitutional change difficult and infrequent.\textsuperscript{350} Ultimately, this position was reflected in several state constitutions that explicitly permit the initiative to be used for “amendment” but not for “revision.”\textsuperscript{351}

Thus, properly understood, the convention debates make clear that both sides viewed the initiative as a creation of positive constitutional law, which deputized private citizens to initiate constitutional change. The constitutional initiative created a legal right that was previously nonexistent and did not inhere in any private citizen or group. This point is often lost in the rhetoric surrounding the initiative, but it is crucial to understanding the initiative as a constituted and limited power.

2. The Neglected Jurisprudence of the “Limited” Initiative

Generally, courts apply great deference to the constitutional initiative.\textsuperscript{352} This deference may be warranted when reviewing the constitutionality of

\textsuperscript{345} See, e.g., PROCEEDINGS OF THE NEBRASKA CONSTITUTIONAL CONVENTION 1919–1920, at 511–13 (1921).
\textsuperscript{346} See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 552 (1907).
\textsuperscript{347} SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 489–90 (1969) (arguing for either periodic convention call or the initiative); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 778 (1912) (arguing in favor of initiative and exclaiming that convention is the “voice of the people”).
\textsuperscript{348} See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1368 (1912) (arguing for convention call based on initiative and referendum in addition to specific amendments by initiative and referendum); id. at 779 (arguing that convention was actually a form of initiative and that initiative “made every constitution under which we have lived”).
\textsuperscript{349} See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 552 (1907) (arguing that people are properly allowed to call a convention for revision, and they should therefore also be permitted to initiate “separate amendment[s]” though the initiative).
\textsuperscript{350} See id.
\textsuperscript{351} Cain & Noll, supra note 6, at 1524.
\textsuperscript{352} See generally MILLER, supra note 34, at 101–04 (describing forms of deference).
legislation regulating the initiative. Various courts, for example, maintain that “initiative and referendum provisions should be liberally construed to maintain maximum power in the people.” 353 Nevertheless, courts collectively hold that the initiative is subject to the proscriptions contained in the constitution. 354 I found no case suggesting that there is an implicit legal right to amend a state constitution by initiative. Thus, although courts defend the initiative from legislative encroachment, they recognize (even if only implicitly) that the initiative power derives from the constitution itself. 355

At least two courts have gone a step further and have enforced implied limitations on the constitutional initiative. 356 In State v. Waltermire, the Montana Supreme Court held that the constitutional initiative may not be used “to enact a legislative resolution” or to enact a temporary law. 357 The initiative at issue was a constitutional amendment that “direct[ed] the 1985 Legislature to adopt a resolution requesting Congress to call a constitutional convention for the purpose of adopting a balanced budget amendment” to the U.S. Constitution. 358 The initiative further provided that if the 1985 Legislature failed to adopt the resolution, it would remain perpetually in session without compensation to legislators until adoption of the resolution. 359

After the U.S. Supreme Court denied review regarding any federal constitutional issues, the Montana Supreme Court held that although the initiative was procedurally perfect, it was “beyond the power of initiative granted to the people by the Montana Constitution.” 360 The court reasoned that the power to amend the constitution was functionally different from the power to adopt a legislative resolution and that temporary and specialized

353 Carlson v. Cory, 139 Cal. App. 3d 724, 728 (Cal. Ct. App. 1983); see In re Initiative Petition No. 349 State Question No. 642, 838 P.2d 1, 12 (Okla. 1992) (“The right of the initiative is precious and it is one which we are zealous to preserve to the fullest measure of the spirit and the letter of the law.”).

354 See, e.g., Scott v. Vaughn, 168 N.W. 709, 713 (Mich. 1918) (“Of the right of qualified voters of the state to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the Legislature, the courts, nor the officers charged with any duty in the premises. But the right is to be exercised in a certain way and according to certain conditions; the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution.”).

355 See, e.g., Assoc. Indus. v. Okla. Tax Comm’n, 55 P.2d 79, 82 (Okla. 1936) (“Courts can approve only those acts of the people which are in substantial conformity with the procedure provided by or under authority of the Constitution.”).

356 See also Holmes v. Appling, 392 P.2d 636, 640 (Or. 1964) (rejecting initiative proposing new constitution as impermissible “revision” under an amendment rule allowing revisions only by legislature).

357 691 P.2d 826, 828 (Mont. 1984).

358 Id.

359 Id.

360 Id.
laws were antithetical to the underlying purpose of a constitution. The court emphasized that the constitutional initiative was a limited power and that “the electorate cannot circumvent their Constitution by indirectly doing that which cannot be done directly.” The court also emphasized that the initiative was invalid because compelling “the legislature to reach a specific result under threat of confinement and no pay,” was “repugnant to the basic tenets of our representative form of government guaranteed by the Montana Constitution.”

The Oklahoma Supreme Court has similarly held that the constitutional initiative is a constituted power with implicit functional limitations. In re Initiative Petition No. 364, the Oklahoma Supreme Court considered the validity of a constitutional initiative that declared a public policy favoring Congressional term limits and instructed legislators to apply to Congress for an amendment to the United States Constitution establishing term limits. Because it was “beyond the power of the initiative granted [to] the people in the Oklahoma Constitution,” the court held that the initiative violated the state constitution. The court explained that the constitutional initiative could not be used to adopt “a nonbinding legislative resolution.” The “subject matter of the initiative” was beyond the initiative power, held the court, because it purported to “create a transient amendment for a specialized purpose.” Finally, the court concluded that the initiative amendment power “does not include the power to use the initiative process to attempt to change federal constitutional law.”

These cases, although largely overlooked, illustrate an understanding of the constitutional initiative as a derivative and constituted power. Although there are benefits to interpreting initiative provisions liberally to protect against legislative encroachment on the initiative, it is important to recognize that initiative is entirely a creature of positive constitutional law. Accordingly, courts should not infer that an initiative is limitless or a substitute for the convention, from its mere creation.

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361 Id. (“A temporary initiative measure is not a part of the permanent fundamental law of a state and should not be submitted under the guise of a constitutional amendment.”).
362 Id.
363 Id. at 829.
364 In re Initiative Petition No. 364, 930 P.2d 186, 193 (Okla. 1996) (“The initiative process was designed to propose laws and amendments to our State Constitution and the power of the people may not be extended past those limits.”).
365 See id. at 189 n.1 (reproducing the proposed amendment in entirety).
366 Id. at 193.
367 Id.
368 Id. at 195.
369 Id.
IV. TOWARD A DOCTRINE OF IMPLICIT LIMITS ON AMENDMENT

The doctrine of referendum sovereignty, which currently predominates judicial review of state constitutional amendments, has lost the structural presumptions at the core of state constitutionalism. In the state tradition, extra-conventional amendment processes are inherently derivative and creations of the constitution itself. The referendum does not change this because the crucial task of negotiating and crafting constitutional reform presumptively inheres only with the people acting through a convention.

This Part argues that the state tradition surrounding extra-conventional amendment processes necessarily implies certain outer limits on state constitutional amendment, and courts should enforce those outer limits. First, it articulates the substance of the doctrine that courts should apply when assessing an extra-conventional amendment. It next illustrates how the doctrine could be applied by analyzing the validity of two hypothetical amendments: an amendment to eliminate direct democracy under Oklahoma’s Constitution and an amendment to eliminate New Hampshire’s provisions guaranteeing public education. Finally, it provides a preliminary outline of the costs and benefits of the doctrine.

The purpose of this Part is not to fully delineate a state doctrine of unconstitutional constitutional amendment. Rather, I aim to show that (1) the doctrine’s underpinnings are grounded in state constitutional theory, (2) there are valid and important reasons for courts to consider enforcing limits on state constitutional amendments, and (3) the doctrine is workable for courts. Further work is surely necessary to fully explore a state doctrine of implied limits on the amendment power.

A. Substance and Logic of the Doctrine

The doctrine that I propose involves three steps. First, courts should recognize a standing presumption that ordinary officials and private groups lack authority to destroy, replace, or create state constitutions. Second, courts should hold that the power to destroy, replace, or create a constitution outside of a convention exists only if the constitution explicitly grants that power. All ambiguities should be construed against finding the power. Third, if a constitution does not give amendment actors power to create or destroy a constitution, courts should enforce the amendment power’s outer limits by reviewing amendments to ensure that they do not destroy or effectively re-create the constitution. Each step is explained in turn.

370 See supra Part I.
371 See supra Part III.
1. The Presumption

The first step rejects the doctrine of referendum sovereignty in favor of a presumption recognizing inherent limits on extra-conventional amendment. Specifically, courts should reject the premise that the referendum represents the full sovereign capacity of the people, and, consequently, that the referendum can legitimate constitutional changes crafted by unauthorized agents.\(^{372}\) Most of this article is dedicated to substantiating the premise that the authority to create or change a state constitution inheres only in the people, and the convention is the only institution with the presumed authority to act on the people’s behalf for the purpose of crafting constitutional reform.\(^{373}\) Besides a constitutional convention, no other institution, official, or group has an inherent right to formally initiate constitutional change.\(^{374}\) When ordinary government officials or private groups participate in extra-conventional change, they exercise powers that exist only because the constitution created them through positive constitutional law. This suggests that state amendment rules are best understood as deputizing agents of constitutional change. Because those agents derive their authority entirely from the constitution, they implicitly lack the authority to destroy or replace the source of that power. This presumptive outer limit on extra-conventional amendment processes is the core of the proposed doctrine.\(^{375}\)

The presumption that extra-conventional amendment actors are powerless to create or replace a constitution is not simply a formalistic deduction from the general structure of state constitutional power. Rather, it is consistent with the underlying rationale of state constitutional design. State amendment procedures developed with a clear understanding that the foundational act of creating a constitution required an extraordinary

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\(^{372}\) See supra Section II.B (describing state court opinions adopting this premise); supra note 157 and accompanying text (discussing Thomas Jefferson’s astute early assertion that a referendum cannot sanitize a constitutional reform originating from an unauthorized agent). Clear examples of how courts adopt the doctrine of referendum sovereignty (incorrectly, in my view) include Smith v. Conarrusa, 475 P.2d 11, 17 (Idaho 1970) (finding constitutional convention not necessary for constitutional amendment); Gatewood v. Matthews, 403 S.W.2d 716, 722 (Ky. 1966) (finding an “inalienable right of the ultimate sovereign to reform the government” in the people); Wheeler v. Board of Trustees of Fargo Consolidated School District, 37 S.E.2d 322, 328–29 (Ga. 1946) (“When the people adopt a completely revised or new constitution, the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution.”).

\(^{373}\) See supra Part II.

\(^{374}\) Indeed, conventions are the only democratically accountable institution designed expressly for the purpose of creating or changing constitutions on behalf of the people.

\(^{375}\) Although the doctrine of referendum sovereignty predominates state review of amendments, the approach that I propose is not unprecedented. In fact, the Alabama Supreme Court has consistently and clearly conceptualized the amendment power in this way. See, e.g., State v. Manley, 441 So. 2d 864, 873–74 (Ala. 1983).
institution distinct from existing government officials and insulated from undue influence by private faction.\textsuperscript{376} The convention was created precisely because it was believed to satisfy those conditions.\textsuperscript{377} Extra-conventional amendment, on the other hand, was created against the backdrop of great mistrust in giving legislatures or private groups a legal right to propose constitutional change.\textsuperscript{378} Extra-conventional amendment processes were designed with the understanding that those risks could be managed by limiting and controlling amendment actors through the constitution.\textsuperscript{379} To assume that extra-conventional amendment power encompasses the power to destroy or replace a constitution inverts the underlying logic and rationale of state constitutional design by releasing amendment actors from the very instrument intended to constrain them. Instead, state constitutional tradition suggests a presumption against revision, replacement, or creation of a state constitution by extra-conventional actors. This presumption should serve as the starting point for courts’ analysis of the validity of state constitutional amendments.\textsuperscript{380}

2. \textit{Rebutting the Presumption}

The second step in the doctrine requires courts to examine their state constitutions to determine whether the constitution explicitly grants the constituent power to extra-conventional actors. Applying the doctrine as a rebuttable presumption respects the principle that the people retain the right to amend their constitution in any matter they choose.\textsuperscript{381} Importantly, however, applying a rebuttable presumption also ensures that courts apply amendment rules consistent with their historical and theoretical context.\textsuperscript{382}

Thus, if the text of the state constitution does not clearly grant constituent power to extra-conventional actors, courts should enforce the presumption that only a convention has authority to create or replace a constitution. If, on the other hand, the constitution explicitly grants

\textsuperscript{376} See supra Section II.A.

\textsuperscript{377} See id. (describing the historical origins of the state constitutional convention).

\textsuperscript{378} See supra Sections III.A.1 and III.B.1.

\textsuperscript{379} Id.

\textsuperscript{380} Although this presumption has been largely forgotten or ignored by modern state courts, it is not without precedent in state constitutional jurisprudence. See supra Sections III.A.2 and III.B.2. Especially good examples of how courts have articulated and applied this presumption include Smathers v. Smith, 338 So. 2d 825, 826 (Fla. 1976); Ellingham v. Dye, 99 N.E. 1, 5 (Ind. 1912); Houston County v. Martin, 169 So. 13, 15 (Ala. 1936); Holmberg v. Jones, 65 P. 563, 564 (Idaho 1901) (“The power to make constitutions and amend them is inherent, not in the legislature, but in the people.”); Livermore v. Waite, 36 P. 424, 426 (Cal. 1894).

\textsuperscript{381} See supra note 23.

\textsuperscript{382} Indeed, to presume that extra-conventional amendment actors have implicit authority to create or destroy a constitution, is to flip state constitutional history and theory on its head.
constituent power—by authorizing extra-conventional actors to craft new constitutions for the people, for instance—this will likely rebut the presumption against extra-conventional revision. Conversely, some state constitutions clearly authorize the legislature to propose only amendments and require wholesale change and constitutional creation to occur through a convention. Those constitutions tend to confirm the presumption.

This step is straightforward in the sense that courts should rely on ordinary interpretive methods to determine whether the constitution rebuts the presumption. It can also be a complex analysis, however, because state constitutions describe the amendment power in myriad ways and some state constitutions are more difficult to analyze. The Kansas Constitution, for example, describes the legislative amendment process in this way:

One amendment of the constitution may revise any entire article . . . and in revising any article, the article may be renumbered and all or parts of other articles may be amended, or amended and transferred to the article being revised. Not more than five amendments shall be submitted at the same election.

This language could be read to support the presumption of a limited amendment power because it explicitly authorizes the revision of an entire article, suggesting, by implication, that revision of the entire constitution is impermissible. On the other hand, the language clearly authorizes the legislature to revise “any entire article” and allows for the revision to include amendments or wholesale integration of other articles in the constitution. Such a far-reaching power arguably supports the idea that the legislature is authorized to functionally recreate the constitution. Kansas is just one example of this complexity. Other interpretive difficulties exist when examining state constitutional amendment rules for evidence of a clear delegation of the constituent power.

This framework does not solve every complex interpretative issue. State courts will surely need to engage in rigorous constitutional interpretation to determine whether the constitution delegates the constituent power.

383 For example, three state constitutions explicitly authorize legislatures to adopt entirely new constitutions and submit them to referendum. See supra note 35 and accompanying text. Those provisions would likely support rebutting the presumption.

384 KAN. CONST. art. XIV, § 1.

385 This is based on the logic that if the constitution explicates something particular, the best interpretation is that explicit authorization of that sort is required.

386 A further complexity relates to theoretical problems associated with amendments to amendment rules. Although most major developments in state amendment processes have occurred in conventions, states have made meaningful adjustments to their amendment processes through singular amendments. This can complicate the interpretive process when searching for evidence that a state intends to delegate the constituent power to extra-conventional actors.
However, this framework provides a roadmap for how the presumption should be applied when the constitution is unclear. When considering the scope of amendment, courts should look for evidence that the state constitution intends to delegate the people’s original sovereign power to create or recreate a constitution to some institution or group other than a convention. Courts should conduct this analysis with a background assumption that the people did not delegate that power. Thus, when a state constitution’s text, history, and structure are unclear as to whether the people have reposed their constituent power in an institution other than a convention, courts should presume that they have not and thus hold that ordinary amendment processes cannot lawfully create or recreate a constitution.

3. Implicit Limits

If the court determines that the state constitution does not rebut the standing presumption against extra-conventional constitution-making, courts should impose limits on the amendment power by reviewing amendments to ensure they do not effectively destroy or recreate the constitution. This analysis can be both straightforward and complex. It is most straightforward when an amendment proposes an entirely new constitution as an amendment to the existing constitution.\(^{387}\) Although extreme, this occurred at least six times in the twentieth century, and courts struggled with how to assess challenges to these wholesale amendments.\(^{388}\) Under my proposed framework, courts should refuse to recognize these changes as lawful transitions, unless the constitution clearly authorizes such wholesale change outside of a convention.

More importantly, however, this framework provides a basis for assessing whether a singular amendment exceeds the amendment power because it effectively destroys or recreates a constitution. After all, “some constitutional amendments are not amendments at all.”\(^{389}\) Although styled as amendments, they are more accurately recognized as “efforts to repudiate the essential characteristics of the constitution and to destroy its foundations.”\(^{390}\) They are efforts to reconstitute a jurisdiction around a new foundation. These sort of fundamental changes effectively destroy existing

\(^{387}\) Even this “straightforward” case might present complexity depending on the circumstances. See Sturm & May, supra note 172, at 119 (describing North Carolina’s 1971 constitution as an “editorial revision” of its 1868 predecessor).

\(^{388}\) See supra notes 168–178 and accompanying text.

\(^{389}\) Albert, Constitutional Amendment and Dismemberment, supra note 18, at 1–2.

\(^{390}\) Id. at 2–3; see also State v. Manley, 441 So. 2d 864, 874 (Ala. 1983) (“As this court has noted, ‘to destroy is not to amend. A thing amended survives.’”) (quoting City of Ensley v. Simpson, 52 So. 61, 65 (Ala. 1909)).
constitutions by “alter[ing] a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution.” In other words, they fundamentally change a constitution’s central institutions or substantive values. These sort of changes implicate the people’s original right to create government because they effectively create a new constitution by destroying the existing constitution’s core.

The difficulty, of course, is in identifying when an amendment effectively destroys the existing constitution or when it simply “corrects” or “elaborates” on the existing constitution. This analysis surely requires difficult decisions by courts. It requires courts to identify and articulate a constitution’s core commitments and then determine whether an amendment alters those commitments in ways that destroy the constitution. This, in turn, may require courts to assess not only the face of an amendment, but also its likely effects. In some cases, this analysis may be too open-ended or speculative for courts to make principled rulings.

But this analysis is not so far beyond the judicial pale as one may think, and some cases may be clearer than others. As noted above, several state courts already enforce a distinction between constitutional amendment and revision. The dominant approach to that distinction is for courts to assess not only an amendment’s quantitative impact on the constitutional text, but also its qualitative effect on constitutional substance. The California Supreme Court, for example, has held that “even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision.” This analysis requires California courts to identify the constitution’s “basic government plan” and measure the effects of a proposed amendment on that plan. Importantly, at least two justices on the California Supreme Court have asserted that an

391 Albert, Constitutional Amendment and Dismemberment, supra note 18, at 2–3.
392 Identifying a state constitution’s core commitments is a complex task and one that I cannot fully address here. In other research, I am exploring whether there are any common factors in state constitutionalism that might better guide courts in identifying core institutions or commitments. For present purposes, it is sufficient to note that factors such as constitutional prevalence, interconnectedness, and historical longevity may guide courts towards a state constitution’s core.
393 See, e.g., Strauss v. Horton, 207 P.3d 48, 100 (Cal. 2009) (refusing to “undertake an evaluation of the relative importance of the constitutional right at issue or the degree to which the protection of that right had been diminished”).
394 See supra Section I.A.
395 See supra notes 66–69 and accompanying text. See generally Williams, supra note 9, at 403–05 (explaining this analysis in California).
396 Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990) (internal citation omitted).
397 In Raven v. Deukmejian, the Court invalidated as a qualitative revision an amendment that would have required California courts to interpret provisions of the California Constitution consistent with how the Supreme Court interprets analogous federal provisions. Id.
amendment may qualify as a revision even if it does not relate to government institutions or structures. According to those justices, a singular amendment may amount to a qualitative “revision” if it “strikes directly at the foundational constitutional principle” such as equal protection.398

Scholars of state constitutions have also noted that courts may be able to identify and enforce deep constitutional norms. Professor David B. Cruz, for example, has argued that equality is central to California’s constitutional structure.399 Professor Cruz summoned an impressive tome of evidence from California’s constitutional convention, the constitutional text, and centuries of California case law. He concludes that “[e]quality is central to the California Constitution and is necessary for the state constitution’s independent political legitimacy.”400 Similarly, various scholars have emphasized that state constitutions contain distinctive fundamental commitments that might guide courts in identifying a constitution’s core.401 Professor Lawrence Friedman, for instance, has argued that the Massachusetts Constitution may contain an “unamendable core.”402 Drawing on a line of cases from the Massachusetts Supreme Judicial Court, Professor Friedman concludes that the state constitution may contain a core commitment to political equality.403

Determining whether an amendment destroys a constitution’s core structure and substantive commitments will surely be state-specific and may be easier in cases where the amendment is more radical. The doctrine proposed here will necessarily depend on further analysis, research, and scholarship. My more modest, immediate, aim is to emphasize that judicial review of state constitutional amendments should be grounded in a robust state tradition and foundational principles of popular sovereignty. Some amendments represent foundational reform of the existing government structure and they should be undertaken only by agents with a clear mandate

398 See Strauss, 207 P.3d at 99 (quoting Petitioner’s argument). Moreover, as noted above, the Alabama Supreme Court invalidated an amendment that sought to temporarily suspend a constitutional provision because the court determined that temporary suspension was inconsistent with the constitution’s essential purpose as a check on extant majorities. See supra Section III.A.2. A sitting justice on the Massachusetts Supreme Judicial Court has also suggested that this analysis is within the judiciary’s abilities and role. Kafker & Russcol, supra note 16, at 1308–09 (“[A] court should be able to determine how much an initiative would change the constitution on the face of the proposal . . . .”).


400 Id. at 48.

401 See supra note 68 and accompanying text.


403 Id. at 328.
from the people to formulate that reform. Courts should not allow amendment actors with a limited mandate to reconstitute government. Such an approach undermines popular sovereignty as the basis for state constitutional legitimacy and realizes the precise danger that state constitutionalists sought to avoid when they created extra-conventional amendment processes.

B. Illustrating the Doctrine

To demonstrate the doctrine’s viability, I apply it to two hypothetical amendments: (1) an amendment eliminating direct democracy from the Oklahoma Constitution, and (2) an amendment eradicating New Hampshire’s public education provision. I have chosen these examples because courts in both Oklahoma and New Hampshire have noted that their respective state constitutions contain deep commitments to certain institutions and normative values. Thus, they provide helpful illustrations of how courts might apply the doctrine to hypothetical amendments that attack recognized constitutional values. The doctrine surely has application in other situations and other states, but these illustrations aim to demonstrate the doctrine’s workability for courts.

1. Eliminating Direct Democracy in Oklahoma

Consider an amendment to the Oklahoma constitution that eliminates the initiative and referendum. This would represent a momentous reform, and the proposed framework provides a principled basis for assessing whether it exceeds extra-conventional amendment powers in Oklahoma.

First, a reviewing court should recognize the presumption against extra-conventional reconstitution. Although not precisely articulated, this is a principle that Oklahoma courts have already eluded to in various cases. It would not be foreign to Oklahoma’s existing jurisprudence, and, as explained above, it is grounded in state constitutional history and logic.

Second, a reviewing court should determine whether the Oklahoma constitution rebuts the standing presumption against extra-conventional constitution. Although not precisely articulated, this is a principle that Oklahoma courts have already eluded to in various cases. It would not be foreign to Oklahoma’s existing jurisprudence, and, as explained above, it is grounded in state constitutional history and logic.

Second, a reviewing court should determine whether the Oklahoma constitution rebuts the standing presumption against extra-conventional reconstitution. Oklahoma’s provisions regarding both legislative and initiative

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404 As explained in Section IV.C, the practical effect of the doctrine that I propose is for the judiciary to enforce the background jurisdiction of the constitutional convention and ensure that fundamental change is channeled toward the convention. In holding that extra-conventional amendment actors do not have authority to propose foundational change, courts are not standing in the way of the people. Instead, they are protecting the people from their government allowing the people to retain control of their constitution through the more accountable device of a convention.

405 See, e.g., Assoc. Indus. v. Okla. Tax Comm’n, 55 P.2d 79, 82 (Okla. 1936) (“Courts can approve only those acts of the people which are in substantial conformity with the procedure provided by or under authority of the Constitution.”)
amendment speak only in terms of proposing an “amendment” or “amendments” to the constitution. In contrast, the constitution provides that a convention may propose “alterations, revisions,” “amendments,” or “a new Constitution.” Nothing in these provisions or the general structure of the constitution suggests that it intends to rebut the standing presumption against extra-conventional reconstitution. Indeed, the Oklahoma constitution seems to mirror the presumption. Thus, the court would proceed to analyze whether the proposed amendment effectively destroys the existing constitution.

Third, the reviewing court should assess whether eliminating the initiative and referendum would strike at the existing constitution’s core. Here, the court would draw on Oklahoma’s unique constitutional history, tradition, and structure. That review would surely tilt in favor of a finding that the initiative and referendum are essential to Oklahoma’s constitutional structure.

Indeed, Oklahoma was the first state to include direct democracy in its original constitution of 1907, and the 1906 convention was deeply committed to direct democracy as a core constitutional structure. Indeed, 102 of the 112 delegates to the convention pre-committed in writing to support the initiative and referendum, and the final vote at the convention was eighty to five to include them. More importantly, the convention debates show that the Oklahoma constitution was structured around direct democracy as the crucial institution necessary to prevent the people from being “despoiled” by their government. J.F. King, president pro-tempore

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406 See OKLA. CONST. art. 24, § 1 (“Any amendment or amendments to this Constitution may be proposed in either branch of the Legislature . . . .”); id. art. 5, § 1 (“[T]he people reserve to themselves the power to propose . . . amendments to the Constitution . . . .”).
407 See id. art. 24, § 1.
408 See id. § 2.
409 SCHMIDT, supra note 29, at 8.
411 See ELLIS, supra note 410, at 145 (“There had been a popular demand that the Constitution should provide for the Initiative and Referendum and the provision had been freely promised; and many of the Delegates very much desired to become the author of the provision.”); WATERS, supra note 67, at 342.
412 Cooper, supra note 7, at 231–32 n.28 (quoting the president pro-tempore at the 1906 convention proceedings: “More than a hundred years of experience in popular government in the United States has demonstrated that the great problem confronting the American people in constitution making is not so much to control or limit the executive as to control and properly limit the legislative department. By this latter department have people been despoiled. And while the Constitutions of the different states contain the germ and principles of good government, and while it is true of law as it is of farming that out of the old fields cometh the new corn, nevertheless these principles have been stated in such general terms and
of the convention, explained that after “more than a hundred years of experience in popular government in the United States,” the “great problem confronting the American people in constitution making” was how “to control and properly limit the legislative department.”\textsuperscript{413} The initiative and referendum were therefore incorporated into the Oklahoma constitution based on the belief that they were the core institutions necessary to the preservation of democracy and popular government.\textsuperscript{414} In other words, Oklahoma was constituted around the conviction that legislative power should not exist without the initiative and referendum as necessary checks.\textsuperscript{415}

This history suggests that removing direct democracy from the Oklahoma constitution would destroy its core structure. Oklahoma seems to conceptualize democracy as requiring the coexistence of representative law-making alongside a robust initiative and referendum process. Indeed, Oklahoma was apparently constituted around the notion that legislative power without the initiative was “the great problem” facing American constitutional design.\textsuperscript{416} Consequently, a reviewing court could reach the principled conclusion that such an amendment is beyond the limits of extra-conventional amendment and would be lawful only through the convention process.\textsuperscript{417}

Of course, this is a simplified caricature of the analysis. Oklahoma’s constitutional history and structure is nuanced, complex, and multi-variant. But its dominant themes suggest that my framework could be applied by courts to enforce the outer limits of the amendment power.

2. \textit{Eradicating Public Education in New Hampshire}

Another hypothetical from New Hampshire illustrates how the doctrine may be applied to an amendment altering a constitution’s substantive values. Consider an amendment to eradicate New Hampshire’s constitutional provisions providing for public education.

\begin{quotation}
with so little provisions for their application to the affairs of the people that little assistance can be derived from them in the way of administrative government.”\textsuperscript{).}
\end{quotation}

\textsuperscript{413} \textit{Id.} Other delegates emphasized the need to constrain courts in their practice of judicial review. \textit{Id.}

\textsuperscript{414} \textit{See id. at} 232; \textit{ELLIS, supra note} 410, \textit{at} 146–47.

\textsuperscript{415} This is also reflected in the structure of the Oklahoma constitution, which locates the initiative and referendum within its legislative article and introduces the legislative power of the state with the explicit qualification that “the people reserve to themselves the power to propose laws . . . and to enact or reject the same at the polls.” \textit{See OKLA. CONST.} art. 5 §§ 1, 3.

\textsuperscript{416} Cooper, \textit{supra note} 7, \textit{at} 231 n.28.

\textsuperscript{417} Oklahoma is arguably unique in its deep institutional commitment to direct democracy. Other states, such as Massachusetts and Illinois, have more complicated and measured experiences with direct democracy devices. In those states, the initiative may not be a core institution and it could be eliminated by extra-conventional amendment without exceeding the mandate of the ordinary amendment power.
Regarding the first and second steps in the analysis, New Hampshire’s constitution suggests that it has not rebutted the presumption against extra-conventional reconstitution. The amendment provisions allow for the legislature to propose “amendments” subject to a ratification referendum.\(^{418}\) A convention may also propose amendments.\(^{419}\) The constitution provides no process for adopting a new constitution or for wholesale revision.\(^{420}\) Moreover, until 1964, the constitution required all amendments to proceed through a convention.\(^{421}\) Nothing in New Hampshire’s constitutional history or structure rebuts the presumption against extra-conventional reconstitution.

Regarding the third step, New Hampshire has a long-committed history to public education as a core substantive value. The constitution provides that the encouragement of literature, “[k]nowledge and learning generally diffused though a community” is “essential to the preservation of a free government.”\(^{422}\) It continues that “it shall be the duty of the legislators and the magistrates, in all future periods of this government, to cherish the interest of literature and the sciences” because “spreading the opportunities and advantages of education” is “highly conducive” to sustaining free government.\(^{423}\) This language has been described as making education “fundamental,” “primary,” and “paramount” to New Hampshire’s constitutional structure.\(^{424}\)

Importantly, New Hampshire prioritizes public education because of its connection to democratic government.\(^{425}\) According to the New Hampshire Supreme Court, public education has long been fundamental in New Hampshire as a “means to the end of preserving a free, democratic state.”\(^{426}\) As the court further explained, because the people “by the constitution have

\(^{418}\) N.H. CONST. pt. 2, art. 100.

\(^{419}\) See id.

\(^{420}\) See id.

\(^{421}\) See supra notes 238–239 and accompanying text (discussing New Hampshire’s history with amendment procedures).

\(^{422}\) N.H. CONST. pt. 2, art. 83.

\(^{423}\) Id.

\(^{424}\) See Gershon M. Ratner, A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills, 63 Tex. L. Rev. 777, 816 n.146 (1985) (categorizing New Hampshire as a “Category IV” state); William E. Thro, The Role of Language of the State Education Clauses in School Finance Litigation, 79 W. Ed. L. Rep. 19, 29 (1993) (explaining that Category IV states treat education as “primary or paramount” duties and that they evince a commitment to education as a “fundamental right”). But see Thro, supra, at 25 n.36 (explaining that the author disagrees with Ratner’s categorization of New Hampshire as a “Category IV” but nevertheless concluding that the New Hampshire constitution requires a public school system).


\(^{426}\) Id.
a share in the Government, it is certainly of importance they should be able to sustain the part they are to bear with honor to themselves & with prosperity to the State which without such an Education is hardly feasibl[е]." 427 In other words, the New Hampshire constitution was built around the notion that democracy necessarily imposed an obligation on the state to provide education. 428

This suggests that removing New Hampshire’s “encouragement of literature” provision would strike at its core. In New Hampshire, constitutional democracy and public education are inseparable and mutually dependent. To destroy public education is to fundamentally reconstitute the state around a new set of basic values and assumptions about government. Of course, the people may bring about that change, but it may not be within the scope of the limited amendment power granted to the legislature under the New Hampshire Constitution.

C. Costs, Benefits, and Critiques of the Doctrine

Understandably, this doctrine would come with meaningful costs and concerns. Most notably, it would place the judiciary in the precarious position of regulating the substance of constitutional amendment. Indeed, a compelling critique of this framework is that even if the amendment power is inherently limited, the best enforcement mechanism is the political process and not the judiciary. 429 However, there are several points to consider here.

First, state courts have universally rejected the idea that amendment rules are nonjusticiable. 430 Courts routinely invalidate amendments approved through the political process (including at a referendum) when they violate amendment rules. 431 In state jurisprudence, the judiciary, not the political process, is the final arbiter of amendment disputes. 432 Second, judicial abstention overlooks state constitutional history. Extra-conventional amendment processes were developed with a clear distrust of ordinary

427 Id. at 1380 (quoting a statement of the General Assembly from 1771).
428 Id. (“Without a competent share of information diffused generally through the community, the natural as well as the acquired rights, and the duties to which the social compact necessarily subjects us, must be imperfectly understood, and consequently will be liable to be perverted and neglected.” (quoting the New Hampshire House and Senates response to Governor Gilman’s 1975 address)).
429 See Laurence H. Tribe, A Constitution We Are Amending: In Defense of a Restrained Judicial Role, 97 HARV. L. REV. 433, 442–43 (1983) (making this point regarding federal court review of Article V amendment and noting that judicial review of amendments is improper because amendments are by nature intended to “override” the political system within which the courts operate).
430 See WILLIAMS, supra note 9, at 402 (2009) (noting that state courts universally review proposed amendments).
431 See TARR, UNDERSTANDING STATE CONSTITUTIONS, supra note 9, at 26–27 (describing instances and practice by state courts).
432 See id.
politics. The whole idea behind extra-conventional amendment was to protect popular sovereignty by using the constitution to limit and constrain extra-conventional political processes. Thus, allowing ordinary politics to resolve amendment disputes is in tension with a core assumption in state constitutional design. Finally, it is important to note that the proposed doctrine recognizes limits on only extra-conventional amendment. In my framework, changes made by a convention are theoretically unlimited (subject to federal law, of course). This distinction is crucial for understanding the court’s role in enforcing limits on amendment. The doctrine would require courts to regulate the outer boundaries of extra-conventional amendment, but it would not establish the judiciary as the final arbiter of constitutional content. That sacred position belongs to the constitutional convention. Thus, the judicial role is only to ensure that reforms follow the proper pathway and not to prevent the people from making any changes they desire.

Another related cost of the doctrine is that it would create significant barriers to constitutional change because conventions are too risky and costly. This concern is surely true to a degree. A limitless amendment power facilitates wholesale change quickly and without many political barriers. However, more frequent use of state conventions is plausible and should be taken more seriously. Unlike the Federal Constitution, where a convention is very unlikely and risky, the states have a long history of successfully utilizing the convention. Concerns about a runaway convention and constitutional regression are significantly lessened at the state level because all state constitutions must comply with minimum standards set by the federal constitution. Stated simply, there is far less risk in holding a state constitutional convention than holding a federal convention. Conventions are surely a more difficult pathway to reform, but they are not impractical nor impossibly dangerous at the state level. Although my proposed doctrine would likely frustrate some reforms by requiring a convention, it would not make those changes impossible.

A final concern is that, in reality, conventions may be no better than ordinary political processes for creating a constitution. Scholars have argued, for example, that although conventions are meant to be independent of existing government, they are often populated by legislators and officials

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433 See supra Part II.
434 See supra Sections III.A and III.B.
435 See Tarr & Williams, supra note 36, 1083–84.
436 Of course, the contemporary public seems less inclined to authorize conventions. See Benjamin & Gais, supra note 180, at 54–55.
with party affiliations. Consequently, delegates “may be affected by the same interest groups that seek to influence the legislative and executive branches.” This is a real concern, and it is likely a principal reason why voters in many states have rejected recent convention calls. There seems to be a popular perception that the convention is itself captured, and, therefore, the electorate is better off retaining the status quo than creating opportunities for further distortion.

However, these critiques of the convention do not prove that ordinary amendment actors are better situated to formulate foundational change. It proves only that the convention may be no better. In fact, there is compelling evidence that this critique of the convention is overstated and oversimplified. Professor Alan Tarr has found, for example, that notwithstanding party influence in a convention, delegates often “view themselves and their responsibilities as distinctive, more concerned with the future of the state than with immediate political advantage.” Professor Bruce Ackerman has also suggested that convention delegates distinguish between ordinary politics and higher-law-making and recognize an obligation to “rise above politics” during the convention. The convention is surely not perfect, but there is evidence to believe that it still performs its essential function better than an ordinary legislature or private group.

Furthermore, the proposed doctrine may help mediate known defects in contemporary state amendment politics. There are, for example, longstanding concerns about the reliability of referenda results to approximate a constituency’s collective preferences. These concerns relate to voter turnout, ballot fatigue, and voter information deficiencies. Additionally, scholars have long suspected that special interest spending has a significant distorting effect on referenda. To the extent popular sovereignty has been reduced to nothing more than a referendum, this may

437 See Tarr, supra note 158, at 18.
438 See id.
439 See WILLIAMS, supra note 9, at 388. (“The public seems to view a constitutional convention as political business as usual by the ‘government industry.’”).
440 See Tarr, Explaining State Constitutional Changes, supra note 158, at 21.
441 See ACKERMAN, supra note 151, at 10; see also ELMER E. CORNEWELL, STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 56–86 (1975) (suggesting delegates approach duties from a statesmanship perspective).
442 See Marshfield, supra note 7, at 477 (summarizing these concerns); Staszewski, supra note 82, at 398 (exploring agency problems inherent in referendum).
be concerning.444 Because my framework would channel fundamental change into the constitutional convention, some of these concerns may be mitigated regarding deep constitutional reform if we assume that the convention would be more deliberative and publicly accountable than ordinary amendment processes.

There are also concerns about democratic defects in the initiative processes.445 Many scholars note that special interests have captured the initiative by industrializing signature-gathering, spending significant money to undermine otherwise popular initiatives, and even introducing poison initiatives that have the effect of confusing voters and retaining the status quo.446 There are also real concerns that the initiative is prone to abuse by majorities because it removes constitutional policy from public deliberation and exposes minorities to the privately expressed preferences of a majority.447

The doctrine proposed will not comprehensively fix these problems. But it can work to cabin their impact. By enforcing limits on extra-conventional amendment, courts would ensure that foundational change would not occur without clear popular consent: either by explicit constitutional language allowing amendment actors to exercise the constituent power, or by channeling foundational change into a convention with more democratic accountability and popular salience. In this way, the doctrine could operate as a check on legislatures and private groups who might capitalize on referendum defects to destroy the constitutional framework in their favor. In short, the doctrine could promote more deliberation and accountability regarding at least core constitutional issues.

CONCLUSION

Contemporary state jurisprudence is moving towards a doctrine that allows ordinary amendment procedures to fundamentally alter state constitutions. This doctrine is at odds with the underlying logic and historical development of state constitutional amendment procedures. In the state tradition, ordinary amendment actors are presumed unqualified to destroy or recreate a constitution. Only a convention of specially elected delegates is presumed to have that authority on behalf of the people. Consequently, state courts should enforce inherent limits on extra-conventional amendment in

444 Of course, there are counterarguments to this concern: namely that not-voting is in effect voting, or that popular sovereignty is premised on consent, which can be demonstrated by waiving the right to vote.
445 See Garrett, supra note 67, at 985.
446 See id.; Marshfield, supra note 7, at 477–78.
447 See Garrett, supra note 67, at 985.
the states. A state doctrine of unconstitutional constitutional amendment would not only honor the rationales underlying state constitutionalism, but it would also respond to various known defects in contemporary state constitutional politics.

APPENDIX A

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<th>State</th>
<th>Convention Year(s)</th>
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<sup>a</sup> See John J. Dinan, The American State Constitutional Tradition 302 n.13 (2009) (listing specific page numbers and formal titles for all convention debates addressing amendment rules).

<sup>b</sup> In 1857, Minnesota held two concurrent, partisan conventions. See id. at 12.
APPENDIX B

FIGURE 1: TEMPORAL DISTRIBUTION OF CONVENTION DEBATES BY DECADE (1810–2019)

Figure 1 shows the number of convention debates by decade where amendment rules were explicitly discussed.
Figure 2 illustrates the thirty-nine states with convention debates where amendment rules were explicitly discussed. Hawaii and Alaska have responsive convention debates but are not included in the figure.