POLICY PROVISIONS IN STATE CONSTITUTIONS: THE STANDARDS AND PRACTICE OF STATE CONSTITUTION-MAKING IN THE POST-*BAKER V. CARR* ERA

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ABSTRACT

The semi-centennial of the Michigan Constitution offers an opportunity to take stock of various features of post-*Baker v. Carr* state constitution-making, especially the continued reliance on policy provisions, which were often retained in state constitutions revised during this era and in many other cases added via the amendment process, even in the face of a near-universal scholarly consensus disfavoring the practice. My concern in this article is determining how to assess this divergence between mid-twentieth-century scholarly standards and the practice of state constitution-making over the last half-century. One might well view practitioners' departure from these scholarly standards as a source of concern and recommend that practice be brought into alignment with these standards. Such is the position taken by some analysts. Alternatively, and this is the position I defend in this Article, one might view practitioners' continued adoption of policy provisions as necessary and appropriate means of responding to recurring deficiencies in the operation of representative institutions, whether by removing matters from legislative purview in cases where legislators are at significant risk of acting irresponsibly, or securing passage of measures that command broad public support but are blocked in legislatures or by state courts, or safeguarding enduring commitments against short-sighted or passionate majorities. Mid-twentieth-century scholars were relatively unconcerned by these deficiencies in the operation of representative institutions and, at any rate, were confident that they could be addressed by means other than constitutional provisions. However, participants in state constitutional amendment and revision over the last half century, much like practitioners in prior eras and in keeping with the views of some scholars in prior years, have concluded that constitutional provisions are a necessary and proper means of addressing deficiencies in the political process and thereby securing more effective governance.

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I. INTRODUCTION

Adoption of the Michigan Constitution of 1963 can be seen as marking the start of the modern era of state constitution-making. For nearly a century and a half, from the 1770s through the 1910s, state constitutions were revised regularly, albeit with particular frequency in certain eras. An initial wave of constitution-making in the founding era was followed by bursts of activity in the Jacksonian Era, then during the Civil War and Reconstruction Era in southern states especially, and then in the Progressive Era.[1] The period from the 1920s to 1950s saw relatively few replacements or major revisions of existing constitutions.[2] But the U.S. Supreme Court's reapportionment ruling in 1962 in *Baker v. Carr*[3] set off another wave of extensive state constitutional revision,[4]

1. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 9-10 (2006) (detailing the waves of state constitution-making).

2. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 136-37 (2000).

3. 369 U.S. 186 (1962).

which brought new constitutions in ten states, bookended by the Michigan Constitution of 1963 and Rhode Island Constitution of 1986, along with frequent reliance on legislature-referred and citizen-initiated amendments.[5]

The semi-centennial of the Michigan Constitution offers a welcome opportunity to take stock of the distinctive features of state constitution-making in the post-*Baker* era, especially regarding the content of state constitutions. State bills of rights underwent several changes, as provisions banning sex discrimination and protecting a right to privacy were added in some states in the 1970s,[6] and victims' rights and hunting and fishing rights were added in some states in later years.[7] Framework provisions also came in for revision.[8] Changes to executive articles further enhanced gubernatorial power, by lengthening the governor's term to four years in all but two states and easing gubernatorial term-limits so that only one state still prohibits governors from serving consecutive terms.[9] At the same time, amendments to legislative articles introduced legislative term limits in nearly one-third of state constitutions.[10] Meanwhile, judicial articles were revised in various ways, often by replacing competitive judicial elections with merit-selection plans.[11]

These and other developments regarding rights and framework provisions are all worthy of attention; but I focus in this Article on policy provisions, which were often retained in state constitutions revised during this era and were in many other cases added to state constitutions

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4. DINAN, *supra* note 1, at 10. The *Baker v. Carr* decision lifted one of the major barriers to the calling of state constitutional conventions, insofar as mal-apportioned legislatures had in prior decades been hesitant to call conventions out of a fear that they would result in better representation for under-represented urban areas. *Id.* Additionally, this ruling, along with subsequent rulings over the next several years, necessitated the calling of conventions in many states in order to re-write apportionment rules in both houses and in many cases restructure the state senate to comply with the Court's one-person/one-vote requirement. *Id.*

5. *See* John Dinan, *State Constitutional Developments in 2012*, *in* 45 BOOK OF THE STATES 2013 3, 12 tbl.1.1 (2013) (indicating that new constitutions were adopted in Michigan (1963), Connecticut (1965), Florida (1968), Illinois (1971), North Carolina (1971), Virginia (1971), Montana (1972), Louisiana (1974), Georgia (1976 and 1983), and Rhode Island (1986)).

6. TARR, *supra* note 2, at 13 n.29.

7. John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2132-34 (2013).

8. TARR, *supra* note 2, at 156-57.

9. *Id.* at 156.

10. *Id.* at 160.

11. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 11 (2012).

via the amendment process.[12] To be sure, some policy provisions were eliminated.[13] Several new constitutions were much shorter than the constitutions they replaced, especially in some southern states that eliminated many constitutional provisions pertaining to particular local governments.[14] A number of longstanding provisions restricting state debt were also repealed or eased significantly.[15] On balance, though, state constitution-making was characterized by continued adoption of policy provisions of the sort that are virtually absent from the U.S. Constitution. Fiscal policy provisions limiting taxing and spending have been prevalent during this period.[16] Policy provisions have also been enacted in a wide range of other areas, such as regarding campaign finance, drug legalization, capital punishment, same-sex marriage, affirmative action, minimum-wage rates, stem-cell research, and environmental protection.[17]

Although the continuing reliance on policy provisions is in one sense unexceptional, in another sense it is notable in that these provisions were enacted in the face of a near universal mid-twentieth century scholarly consensus viewing them as inappropriate.[18] Prior eras had seen vigorous scholarly debate about the standards of state constitution-making, and it was not always possible to identify a clear scholarly consensus on the propriety of policy provisions.[19] Some scholars in prior years contended

12. TARR, *supra* note 2, at 145.

13. *See infra* note 14.

14. Prior to adoption of the Virginia Constitution of 1971, the Virginia Constitution was reported to be 34,250 words. Albert L. Sturm, *State Constitutions and Constitutional Revision, 1967-1969*, *in* BOOK OF THE STATES 1970-1971 19 (1970). The new Virginia Constitution was reported to be 8,000 words. Albert L. Sturm, *State Constitutions and Constitutional Revision, 1970-1971*, *in* BOOK OF THE STATES 1972-1973 21 (1972). Prior to adoption of the Louisiana Constitution of 1974, the Louisiana Constitution was reported to be 256,000 words. Albert L. Sturm, *State Constitutions and Constitutional Revision, 1972-73*, *in* BOOK OF THE STATES 1974-1975 23 (1974). The new Louisiana Constitution was reported to be 26,300 words. Albert L. Sturm, *State Constitutions and Constitutional Revision, 1974-1975*, *in* BOOK OF THE STATES 1976-1977 174 (1976). Prior to adoption of the Georgia Constitution of 1983, the Georgia Constitution contained over 500,000 words. Albert L. Sturm & Janice C. May, *State Constitutions and Constitutional Revision: 1980-1981 and the Past 50 Years*, *in* BOOK OF THE STATES 1982-1983 116 (1982). The new Georgia Constitution was reported to be 25,000 words. Albert L. Sturm & Janice C. May, *State Constitutional Changes*, *in* BOOK OF THE STATES 1984-1985 221 (1989).

15. *See, e.g.*, JOHN J. DINAN, THE VIRGINIA STATE CONSTITUTION 230 (Oxford Univ. Press 2011) (describing the easing of Virginia's debt limitations in the Virginia Constitution of 1971).

16. TARR, *supra* note 2, at 21.

17. *See infra* Part III.

18. *See infra* Part II.B.

19. *See infra* Part II.A.

that policy provisions should be avoided.[20] But others were ambivalent.[21] And still others viewed policy provisions as appropriate and necessary to respond to various problems of governance.[22] However, by the early 1960s, at the start of the modern era of state constitution-making, scholars were virtually unanimous in viewing policy provisions as inconsistent with standards of constitution-making.[23]

My aim is to account for this divergence between the mid-twentieth century scholarly standards of constitutionalism and the practice of constitution-making during the ensuing half century.[24] In particular, I argue that adoption of policy provisions in state constitutions in the post-*Baker v. Carr* era is in many cases a product of practitioners' determination that such provisions are a necessary and appropriate means of overcoming various deficiencies in the political process and thereby securing more effective governance.

Participants in state constitutional revision and amendment have been particularly concerned with addressing four perennial deficiencies in the operation of governing institutions. First, legislatures have been shown to be incapable of dealing responsibly with certain policy issues, especially when the weight of legislators' self-interest or influence of special interests makes it difficult for legislators to act in the public interest.[25] In a second set of cases, legislators turn out, for various reasons, to be unresponsive to the public and unwilling or unable to enact policies supported by a deliberative majority.[26] A third concern stems from court decisions overturning or blocking enactment of measures supported by a deliberative majority.[27] A final concern stems from the risk that short-sighted popular majorities will secure enactment of measures that fail to honor enduring policy commitments.[28]

My primary purpose, then, is to set out the logic underlying practitioners' continued adoption of policy provisions, by viewing them as motivated in many cases by a concern with overcoming various

20. *See infra* Part II.A.

21. *See infra* Part II.A.

22. *See infra* Part II.A.

23. *See infra* Part II.B.

24. In doing so I follow and build on the work of Alan Tarr and Robert Williams, specifically TARR, *supra* note 2, at 153-61; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 20-25, 359-64 (2009); FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 12-29 (2006); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 62-71 (4th ed. 2006).

25. *See infra* Part III.A.

26. *See infra* Part III.B.

27. *See infra* Part III.C.

28. *See infra* Part III.D.

deficiencies in the operation of representative institutions, whether by removing certain matters from legislative purview, securing passage of measures blocked in the legislature, enabling enactment of measures blocked by state courts, or safeguarding policy commitments against popular backsliding. Participants in state constitutional amendment and revision in the modern era, much like their predecessors in earlier eras, have concluded that effective governance requires that these deficiencies be addressed and that constitutional policy provisions are a necessary and appropriate means of doing so.

My secondary purpose is to draw lessons from this inquiry about the relationship between state and federal constitution-making and about the relationship between the standards and practice of state constitution-making. Although contemporary state constitutional practice is at odds with mid-twentieth century scholarly standards, which take their bearing in many respects from the federal model of constitutionalism, in another sense contemporary practice can be viewed as consistent with an alternative scholarly view that was occasionally articulated in prior eras and has resurfaced on occasion in more recent scholarship. According to this alternative view, the standards applicable to state constitution-making are distinct from the standards applicable to the U.S. Constitution and might be seen as dependent on and in some ways emerging out of the experience of governance at the state level.

The remainder of this Article proceeds in two parts. In one part I trace the evolving scholarly standards of state constitution-making.[29] I show that in prior eras scholars held mixed views on the propriety of policy provisions. I then explain the shift that took place, to the point that by the mid-twentieth century scholars were nearly unanimous in condemning policy provisions as inappropriate. In another part, I examine the modern practice of state constitution-making.[30] I argue that many policy provisions can be explained as responses to deficiencies in the operation of representative institutions. I also identify elements of continuity and change in the types of policy provisions enacted in the post-1960s period compared with prior eras.

II. STANDARDS OF STATE CONSTITUTION-MAKING

Although by the start of the modern wave of state constitution-making in the early 1960s scholars were virtually unanimous in discouraging constitutional policy provisions, there has not always been a clear scholarly consensus along these lines. As Frank Grad and Robert

29. *See infra* Part II.
30. *See infra* Part III.

Williams observed, "there has been a major shift over time in the ideas of what the function of a state constitution should be, and what matters are important enough to be contained therein."[31] As recently as the late-nineteenth and early-twentieth century, scholars and commentators engaged in vigorous debate about the propriety of including policy provisions in state constitutions. Some earlier scholars, to be sure, adopted a position in line with the modern view. But a fair number of other scholars in prior eras were ambivalent on this issue, viewing arguments in favor of policy provisions as relatively strong in comparison with arguments disfavoring them. And several scholars in prior eras embraced policy provisions as necessary and appropriate means of addressing recurring problems of governance.[32]

Mid-twentieth century scholarly standards can be distinguished from earlier understandings in several respects. Most important, mid-twentieth century scholars were more inclined than their predecessors to take their bearings from the U.S. Constitution, viewing it as the model to which state constitutions should conform.[33] This stands in stark contrast with scholars in earlier eras who often celebrated the distinctive features of state constitutions.[34] Additionally, as Alan Tarr has noted, mid-twentieth-century scholars adopted a distinct view of the capacity of governing officials to address policy issues in a responsible fashion.[35]

Commentators in prior eras were inclined to emphasize the various ways that legislators failed to secure the public interest and to view constitutional provisions as an important means of holding them accountable. Mid-twentieth-century commentators, by contrast, were more inclined to place trust in legislatures and rely on alternative means of holding them accountable other than by imposing constitutional restraints. Meanwhile, whereas prior commentators viewed constitutional provisions as occasionally necessary for constraining judges when they issued decisions blocking popular reforms, mid-twentieth-century commentators viewed such provisions as largely unnecessary on the ground that state courts were no longer playing an important blocking function.[36]

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31. GRAD & WILLIAMS, *supra* note 24, at 2.
32. *See infra* Part II.A.
33. TARR, *supra* note 2, at 153-57.
34. *Id.* at 82.
35. *Id.* at 153-57.
36. *See infra* Part II.B.

A. Constitutional Standards in the Late-Nineteenth and Early-Twentieth Century

Prior to the late nineteenth century, state constitutional scholarship generally took the form of compiling and comparing state constitutions for the purpose of identifying dominant trends and practices in constitution-making. To be sure, *delegates* in early and mid-nineteenth century conventions frequently debated the propriety of adopting policy provisions.[37] When delegates proposed policy provisions on subjects such as internal improvement and debt limitations and worker safety, other delegates usually responded not only by contesting the wisdom of the proposed policies but also by questioning the propriety of including them in state constitutions.[38] Supportive delegates were therefore led not only to defend the policies on substantive grounds but also to explain why these policies deserved to be elevated to constitutional status.[39] But there was little in the way of *scholarly* commentary critiquing the decisions made by participants in constitutional amendment and revision processes.[40] Scholars were generally content to chronicle the various decisions made by state constitution-makers, with an eye toward furnishing convention delegates around the country with compilations of state constitutions and thereby informing their work.[41]

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37. *See* Arthur Rolston, *Capital, Corporations, and Their Discontents in Making California's Constitutions, 1849-1911*, 80 PACIFIC HIST. REV. 521, 524-25 (2011) (discussing these debates in mid-nineteenth-century conventions). For particular examples of these debates in mid-nineteenth-century conventions, see DINAN, *supra* note 1, at 189-92 (discussing debates about proposals to regulate workers' safety).

38. *See, e.g.*, DINAN, *supra* note 1, at 189 (quoting comments of Milton Hay in the Illinois Convention of 1869-1870).

39. *See, e.g.*, *id.* at 191-92 (quoting the comments of Joseph Medill in the Illinois Convention of 1869-1870 and the comments of Thomas Ewing in the Ohio Convention of 1873-1874).

40. *See infra* note 41.

41. *See* Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199 (2000). To the extent that independent commentaries and critiques of the work of state constitution-makers were offered during this era, they appeared in journals of opinion such as the *American Review* and the *Democratic Review*. *See* Rolston, *supra* note 37, at 525 n.6. It would be difficult to identify from these opinion pieces any consensus in favor of, or opposition to, adoption of policy provisions in state constitutions. On one hand, some commentators criticized the adoption of policy provisions, such as when the *American Review* complained that delegates to the New York Convention of 1846 "instead of simplifying and condensing the Constitution, have entered into details which must create constant necessity for revision . . . ." *Responsibility of the Ballot Box; With an Illustration*, 4 AM. REV. 435, 439 (1846). On the other hand, other commentators praised adoption of provisions limiting legislative discretion regarding loaning of state credit and contacting debt, as when the rival publication, the *Democratic Review*, commended the

It was only in the late nineteenth-century, after six new northwest state constitutions were adopted in the year 1889 alone, that we see the emergence of a scholarly tradition concerned with critiquing the work of state constitution-makers.[42] In analyzing the conventions that produced inaugural constitutions for North Dakota, South Dakota, Montana, Wyoming, Idaho, and Washington in 1889 and replacement constitutions for Mississippi in 1890 and Kentucky in 1891,[43] scholars began to offer critical commentary on their work. In the process, they were led to develop standards of what was appropriate for inclusion in state constitutions. From the 1890s through the 1910s, as four more states drafted inaugural constitutions, seven other states replaced existing constitutions, and various other states undertook extensive constitutional revisions,[44] scholars engaged in extensive debate about the standards of constitution-making.

Some scholars during this turn-of-the-twentieth-century era took the position which would by the mid-twentieth century approach canonical status: that policy provisions were inappropriate.[45] This view was perhaps best expressed during this period by Thomas Cooley, who was the author of the leading text on state constitutional interpretation,[46] the first chair of the Interstate Commerce Commission,[47] and an invited speaker at the North Dakota Constitutional Convention of 1889.[48] Although at this convention Cooley prefaced his remarks on constitutional standards by saying: "it is entirely out of the question that I

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same convention for "placing restrictions upon the appropriation of State power and credit, to private uses." *The New York Constitutional Convention*, 19 DEMOCRATIC REV. 339, 342 (1846).

42. *See infra* note 43.

43. Dinan, *supra* note 5, at 12.

44. *Id.* Inaugural constitutions were adopted in Utah (1895), Oklahoma (1907), New Mexico (1911), and Arizona (1911). *Id.* New constitutions were adopted to replace existing constitutions in Alabama (1901), Delaware (1897), Louisiana (1898 and 1913), Michigan (1908), New York (1894), South Carolina (1895), and Virginia (1902). *Id.* Extensive revisions to existing constitutions were undertaken in Ohio in 1912 and Massachusetts in 1917-18. John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era,* 30 RUTGERS L.J. 933, 939 (1999).

45. *See infra* notes 49-56.

46. Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

47. William J. Fleener, Jr., *Michigan Lawyers in History—Thomas McIntyre Cooley: Michigan's Most Influential Lawyer,* 79 MICH. B.J. 208 (2000), *available at* http://www.michbar.org/journal/article.cfm?articleID=53&volumeID=3.

48. NORTH DAKOTA CONSTITUTIONAL CONVENTION, JOURNAL OF THE CONSTITUTIONAL CONVENTION FOR NORTH DAKOTA 52 (1889).

should undertake to be your advisor in regard to these matters,"[49] he went on to say in regard to proposed restrictions on corporations:

> [I]f I were to drop a single word of advice—although I scarcely feel that it is within my province to do that—it would be simply this: In your Constitution-making remember that times change, that men change, that new things are invented, new devices, new schemes, new plans, new uses of corporate power. And that thing is going to go on hereafter for all time, and if that period should ever come which we speak of as the millennium, I still expect that the same thing will continue to go on there, and even in the millennium people will be studying means whereby, by means of corporate power, they can circumvent their neighbors.[50]

Cooley continued, in language that would be quoted by several other scholars during the next decade:

> Don't, in your constitution-making, legislate too much. In your Constitution you are tying the hands of the people. Don't do that to any such extent as to prevent the Legislature hereafter from meeting all evils that may be within the reach of proper legislation. Leave something for them. Take care to put proper restrictions upon them, but at the same time leave what properly belongs to the field of legislation, to the Legislature of the future. You have got to trust somebody in the future and it is right and proper that each department of government should be trusted to perform its legitimate function.[51]

Amasa Eaton adopted a similar view in an analysis of recent state constitution-making published in the 1892 edition of the *Harvard Law Review*.[52] Eaton, who would later serve as president of the National Conference of Commissioners on Uniform State Laws,[53] took note of a

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49. NORTH DAKOTA CONSTITUTIONAL CONVENTION, OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA 66 (1889).

50. *Id.* at 66-67.

51. *Id.* at 67.

52. Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 53 (1892); *see also id.* at 109.

53. *Amasa M. Eaton Dies*, N.Y. TIMES, Oct. 4, 1914, *available at* http://query.nytimes.com/gst/abstract.html?res=F60B11F83E5B17738DDDAD0894D8415B848DF1D3.

number of "vexatious restrictions upon the power of the Legislature" included in recent state constitutions.[54] He went on to complain that these constitutions "all err in incorporating into the organic law matter that should have been left for legislation."[55] After quoting Cooley's admonition against legislating too much in constitution-making as well as his counsel that representative officials should be entrusted with the responsibility of governance, Eaton complained that:

> [T]hese principles were disregarded in the constitutions before us. It would seem instead as if the theory underlying them were that the agents of the people, whether legislative, executive, or judicial, are not to be trusted, so that it is necessary to enter into the most minute particulars as to what they *shall not* do.[56]

Although this view had a number of scholarly defenders, it did not go uncontested during this period. As John Hicks recounted in a book reviewing the convention debates leading to adoption of the new northwest state constitutions of the late 1880s, "[t]he question as to how much legislation might properly be included in a constitution occasioned much discussion. The advice given by Judge Cooley before the North Dakota convention represented the conservative sentiment, and was quoted everywhere."[57] But Hicks noted: "[t]he other side was ably presented to the same convention by Governor Mellette. He believed that the constitution framers should include in the fundamental law as much of the necessary legislation of the state as they could with safety."[58] Among other things, Mellette argued in the convention that:

> [I]f it is right, if you know what is the proper thing to embrace in your legislation, the more there is in the constitution the better for the people . . . . It is wise, in my judgment, after the people have decided in which direction their interests lie, to embody them in the fundamental law of the land and make it permanent.[59]

Hicks concluded that participants in state conventions of the 1880s sided not with Judge Cooley but with Governor Mellette: "[w]hatever merits

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54. Eaton, *supra* note 52, at 116.
55. *Id.* at 121.
56. *Id.*
57. JOHN D. HICKS, THE CONSTITUTIONS OF THE NORTHWEST STATES 53 (1924).
58. *Id.* at 54.
59. *Id.*

the respective arguments may have possessed, it was the latter course which was adopted."[60] The prevailing view at these conventions was that:

> The matter of leaving everything to the legislature . . . had been tested in the territorial status, with results that were fresh in the minds of every delegate. Everyone knew that the old legislatures had been open to corporate influence, and nearly everyone had suffered thereby. Far from being undesirable, it was one of the main objects of a constitution to settle certain problems, and thus to avoid the uncertainty and oppression that would be sure to follow the ill-considered legislation of partisan bodies.[61]

It was not only participants in state constitutional revision who took issue with the view that state constitutions should be shorn of policy provisions; other scholars, while generally approving of the admonition against adopting too much constitutional legislation, argued that state constitution-makers had good reason to adopt a number of policy provisions in light of the circumstances in which they found themselves.[62] Frances Thorpe, editor of a seven-volume compilation of state constitutions, adopted such a position in an article in the 1891 edition of the *Annals of the American Academy of Political and Social Sciences* reviewing recent state constitution-making.[63] Although Thorpe quoted Cooley's admonition against constitutional legislation with approval,[64] he nevertheless concluded:

> Whether it is better to limit a legislative body by specifying on what subjects legislation is forbidden, or to constitute the State legislature of such men as are capable of interpreting the essential interests of the State, and of discriminating between proposed legislative remedies, is a question on which men differ.[65]

Thorpe noted: "[a]t the present low ebb of ability and trustworthiness in State legislators, a condition for which the people themselves are

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60. *Id.* at 56.
61. *Id.* at 55.
62. Frances N. Thorpe, *Recent Constitution-Making in the United States*, 2 ANNALS AM. ACAD. POL. & SOC. SCI. 145 (1891).
63. *Id.*
64. *Id.* at 191.
65. *Id.* at 161.

responsible, the only escape from legislative evils seems to lie in the direction of sharp limitation on the powers of the legislature."[66]

Other scholars during this era adopted a similar position, arguing that recent conventions had likely gone too far in adopting constitutional legislation but nevertheless viewing a number of these policy provisions as an understandable response to prevailing conditions in which legislatures were no longer deserving of being entrusted with certain responsibilities.[67] In a 1904 article in the *Yale Review* assessing recent state constitution-making, John B. Philips acknowledged that "[t]he tendency everywhere in constitution-making is to include in the new instruments a great mass of law which has no connection with the framework of government."[68] However, Phillips also contended:

> The growth of opportunities in modern times have made it necessary to embody in the constitutions many things which were not considered by the constitution-makers of one hundred years ago. Intricate and complex have become the industrial relations of our time, and so great the consequent pressure upon the weaknesses of our legislators that it has become necessary to modify greatly the older constitutions in order to cope successfully with this new form of danger to the liberties of a people.[69]

The "[t]wo leading causes" of the growth of policy provisions, he argued, were "the outgrowing of the constitutions by modern industrial society, and the increasing distrust of the legislature by the people,"[70] and the "three prominent reasons for this distrust of the legislature" were "unwise laws, special legislation, and the power of the boss."[71]

This view of the propriety of policy provisions—that they were generally inappropriate but in some cases justifiable in light of current conditions—was echoed by other scholars, including James Q. Dealey, author of a 1915 book, *Growth of American State Constitutions*.[72] Dealey complained that recent conventions "dogmatically fix in the fundamental law provisions that must be largely superseded in a few

66. *Id.* at 161-62.

67. *See* John B. Phillips, *Recent State Constitution-Making*, 12 YALE REV. 389 (1904).

68. *Id.* at 396.

69. *Id.* at 389.

70. *Id.* at 392.

71. *Id.* at 394.

72. JAMES Q. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914 (1915).

years."[73] Focusing particularly on the extensive and detailed corporations articles included in the recent Virginia and Oklahoma constitutions, "both of which can be amended only with great difficulty," he concluded that "the work of conventions in respect to the regulation of social and economic interests is the least satisfactory of all their labors."[74] Dealey also wrote:

> There are few specialists, if any, who would with alacrity undertake to write out for a state constitution a detailed system of taxation, of finance, or education; of regulation for corporations, common carriers, or banks; or to define a policy toward labor, or state ownership of monopolies, or control over mining interests.[75]

He worried, in particular, that inclusion of detailed provisions regulating these policy areas could prove problematic unless amendment processes were made more flexible to enable these provisions to be updated as necessary.[76] Dealey therefore advised: "Conventions should recognize that much of their work is at the best transitory, and that if they persist in preparing lengthy and detailed constitutions, the method of amendment should be proportionately simple."[77]

At the same time that Dealey criticized a number of recent policy provisions, he nevertheless concluded in regard to the "steady increase in the length of constitutions"[78] that:

> The tendency to enlargement is not without justification. The proper solution of problems arising from the complexity of modern interests, demands more wisdom and knowledge than is usually found in legislatures, which are often incompetent and sometimes venal, so that the democratic demand for legislation through a constitutional convention, is really a demand for legislators of a high grade.[79]

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73. *Id.* at 229.
74. *Id.*
75. *Id.* at 229-30.
76. *Id.*
77. *Id.* at 230.
78. DEALEY, *supra* note 72, at 256.
79. *Id.*

He concluded: "[i]t seems plain that the really important lawmaking body at the present time is the convention. Its members are of a higher grade and turn out work distinctly superior to that of legislatures."[80]

If some scholars in this era condemned policy provisions and some others viewed policy provisions as generally inappropriate but in some instances justifiable, still others rejected the view that policy provisions were necessarily incompatible with standards of state constitution-making. Walter Dodd, author of numerous articles and books on state constitution-making, provided an extended defense of this position in an article, "The Function of a State Constitution," published in the 1915 edition of the *Political Science Quarterly*.[81] Dodd took note of the prevalence of policy provisions in recent state constitutions and observed: "[t]his tendency has been very much criticised [sic] on the ground that constitutions should contain only fundamental provisions subject to infrequent changes."[82] But in assessing this critique, Dodd pushed back against the idea that it was possible to advance general standards of constitution-making applicable to both federal and state constitutions.[83] He argued instead for a functional approach that would consider the different purposes served by different types of constitutions and assess the propriety of particular provisions by determining whether they fulfilled these purposes:

> [W]e should not be confused by the fact that the state instrument of government is called a "constitution." In politics generalizations are dangerous and are usually untrue. A state constitution is an instrument, a means to an end, and is of no importance for its own sake alone. It may be true that the national constitution should be primarily an instrument embodying fundamental provisions and defining the respective powers of the state and national governments. Yet this is not because the instrument is called a constitution; it is because the successful operation of a federal system requires some fairly permanent demarcation of national and state powers. There is no inherent reason why an instrument of state or national government should contain only provisions of fundamental law.

80. *Id.* at 268.
81. Walter F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915).
82. *Id.* at 215.
83. *Id.*

> A constitution must be judged not by its name, but by the function which it has to perform.[84]

Adopting such a functional approach, Dodd argued, would lead scholars to investigate whether inclusion of policy provisions served important and necessary purposes. As he wrote:

> The newer state constitutions are to a large extent not fundamental law in any proper sense, but this does not necessarily condemn them, unless we make the mistake of confusing the name with the substance. The important questions in order to determine the value of present state constitutions are: (1) what does the state constitution now do and (2) how well does it perform its present function?[85]

In his view, one of the primary functions of current state constitutions was "serving as an organ of popular will through the embodiment of legislation into the constitution itself."[86] Noting that "[t]he newer state constitutions have organized in detail departments and organs of government and have themselves introduced new legislation," he concluded: "[o]n the whole it can hardly be said that their activities in these fields have been less satisfactory than those of the legislatures."[87] He made clear that "[t]his paper does not seek to defend all that has gone into state constitutions, but it does suggest a possibility that there may be error in sweeping and positive condemnation of the newer tendencies with respect to these instruments."[88]

Dodd focused on two important purposes furthered by policy provisions. State constitution-makers might find it necessary to adopt provisions authorizing legislatures to enact certain policies, in response to state court decisions casting doubt on the legitimacy of legislative authority.[89] As he wrote: "grants of power and legislation in constitutions are in part fundamental law properly so called, in so far as they accomplish purposes which because of judicial decisions or for other reasons could only be accomplished by constitutional change."[90]

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84. *Id.*
85. *Id.*
86. *Id.* at 215-16.
87. Dodd, *supra* note 81, at 216.
88. *Id.*
89. *Id.*
90. *Id.* at 216 n.1. In the 1928 edition of his book, *State Government*, Dodd elaborated on the propriety of adopting state constitutional policy provisions in order to preempt and overturn state court decisions limiting legislative authority. WALTER F. DODD, STATE

Additionally, state constitution-makers might view policy provisions as an appropriate way of entrenching enduring commitments and thereby making it more difficult for legislatures to negate them. He concluded:

> The new role of the state constitution is no less important than the old. It is proper to put into these constitutions not only provisions regarding the framework of government and limitations upon legislative power, but also provisions which will leave to the legislature a free hand to do what it is desired that it should do, and matters ordinarily legislative in character but of such importance that it is desired to have them somewhat more difficult of change.[91]

In short, the scholarly tradition of critiquing state constitution-making that emerged in the late-nineteenth and early-twentieth century featured conflicting views about the propriety of adopting policy provisions. A number of scholars argued that policy provisions were incompatible with the standards of constitution-making. But other scholars held different views, with some scholars arguing that policy provisions should generally be discouraged but could be justified under certain circumstances and still others going so far as to defend policy provisions as compatible with a functional approach to constitution-making at the state level.

B. Standards of State Constitution-Making in the Mid-Twentieth Century

Although the 1920s through the 1950s featured relatively little activity on the state constitution-making front, with only four states replacing their constitutions and two states adopting inaugural

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GOVERNMENT 137-38 (2d ed. 1928). After noting that "courts are a conservative influence" and tend on occasion to "misinterpret[] the community need in holding a statute unconstitutional," he noted that "the effect of such a decision is apt to be overcome by the court itself." *Id.*

> But, [a] change of attitude upon the part of a court ordinarily takes some time, and it is often necessary to overcome more promptly the effect of a decision based upon broad constitutional guaranties. The more prompt method of overcoming state judicial decisions construing the state constitution is that of constitutional amendment. The popular will must finally control in any popular government, either through the education of the courts or through an express change in constitutional texts.

Id.

91. DODD, *supra* note 81, at 216.

constitutions,[92] there was no shortage of scholarly books and articles offering advice to state constitution-makers and urging constitutional revision. The National Municipal League played a prominent role, publishing a *Model State Constitution* in 1921 and issuing multiple editions in later years, capped off by a sixth edition in 1963 (later revised in 1968).[93] As Alan Tarr has noted, the *Model State Constitution* shifted in content and emphasis over the years;[94] but by the early 1960s, the standards advanced in the *Model State Constitution* were broadly representative of a near universal scholarly consensus expressed in numerous books, articles, and papers written in the several years prior to the post-*Baker v. Carr* era.[95] In fact, it is difficult to find any meaningful difference in the views of policy provisions articulated in Robert Dishman's 1960 book, *State Constitutions: The Shape of the Document*;[96] David Fellman[97] and Harvey Walker's[98] separate contributions to a 1960 volume, *Major Problems in State Constitutional Revision*; John Wheeler's 1961 edited volume, *Salient Issues in State Constitutional Revision*;[99] or Paul Kauper's 1961 paper, *The State Constitution: Its Nature and Purpose*, prepared for the Michigan Convention of 1961-62;[100] or the 1963 edition of the *Model State Constitution*.[101]

Although the standards in these early 1960s scholarly publications resembled the standards advanced by some scholars writing at the turn of the twentieth century, such as Thomas Cooley, they represented a notable departure from the views held by other scholars in this prior era, such as Walter Dodd.[102] These differences between early 1960s scholars and a number of scholars at the turn of the twentieth century centered in part

92. Dinan, *supra* note 5, at 12. New state constitutions were adopted during this period in Louisiana (1921), Georgia (1945), Missouri (1945), and New Jersey (1947). *Id.* Hawaii and Alaska adopted inaugural state constitutions in 1950 and 1956, respectively, that took effect upon statehood in 1959. *Id.*

93. TARR, *supra* note 2, at 154-55.

94. *Id.*

95. *See infra* notes 96-101.

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

97. David Fellman, *What Should a Constitution Contain?*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 137-58 (W. Brooke Graves ed., 1960).

98. Harvey Walker, *Myth and Reality in State Constitutional Development*, *in* MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 3-17 (W. Brooke Graves ed., 1960).

99. John P. Wheeler, Jr., *Introduction* to SALIENT ISSUES OF CONSTITUTIONAL REVISION (John P. Wheeler Jr. ed., 1961).

100. PAUL G. KAUPER, THE STATE CONSTITUTION: ITS NATURE AND PURPOSE (1961), *available at* www.crcmich.org/PUBLICAT/1960s/1961/memo202.pdf.

101. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963).

102. *See supra* Part II.A.

around the propriety of viewing the federal Constitution as a model.[103] But early 1960s scholars also differed from a number of scholars in prior eras in their confidence in the operation of representative institutions and their belief that any deficiencies in representative institutions could be addressed without adopting constitutional provisions.[104]

Early-1960s scholars invariably took their bearings from the federal Constitution and held it out as the ideal, in contrast with a number of scholars in earlier periods who viewed state constitutionalism as distinct from federal constitutionalism and tended to celebrate the distinctiveness of state constitutions.[105] Paul Kauper, in a paper prepared for the Michigan Convention of 1961-62, expressed the dominant scholarly sentiment of the time when he celebrated the U.S. Constitution as "a superb model of a compact, organic document that is logically arranged, internally coherent and drafted with the object in mind of stating broad, fundamental, and enduring purposes."[106] Like many other scholars at this time, Kauper quoted approvingly U.S. Chief Justice John Marshall's statement in the 1819 national bank case, *McCulloch v. Maryland*,[107] that the nature of a constitution "requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[108]

This view was widely shared by scholars writing in the early 1960s and serves in part to explain the distinctive view that took hold during this period, whereby state constitutions were deemed inferior insofar as they deviated from the federal document.[109] Robert Dishman wrote:

> The states have usually had a happier experience when they have borrowed from the constitution to the United States. Thanks, in part at least, to its tight organization and its terse but graceful phrasing, this constitution has been regarded from the first as a model, one might even say *the* model, of effective constitutional draftsmanship.[110]

Meanwhile, John Bebout, in his introduction to the sixth edition of the *Model State Constitution*, lamented the "departure of many state

103. *Id.*
104. *See infra* notes 106-111 and accompanying text.
105. *See infra* notes 106-111 and accompanying text.
106. KAUPER, *supra* note 100, at 13.
107. 17 U.S. 316 (1819).
108. KAUPER, *supra* note 100, at 12.
109. Baum & Fritz, *supra* note 41, at 201.
110. DISHMAN, *supra* note 96, at 5.

constitutions from the simplicity and clarity of the national prototype prepared by the convention of 1787."[111]

However, the early 1960s scholarly discouragement of policy provisions is only partly explained by scholars' celebration of the U.S. Constitution. This particular view of policy provisions also emerged out of, and can largely be explained by, these scholars' impressive level of confidence in representative institutions, in stark contrast with scholars in earlier years who emphasized the deficiencies of governing institutions and justified adoption of policy provisions as a means of constraining legislatures and occasionally courts.[112] By the 1960s, scholars were less concerned with constraining governing officials than with empowering them. Once again, Kauper expressed the dominant view of the scholarly community, when he argued in his paper for the Michigan Convention of 1961-62 that:

> [T]he effect of incorporating what are essentially legislative matters in a state constitution is to undercut the legislative process and to limit the area of legislative responsibility and discretion. . . . Despite changes of circumstances or results not anticipated, the legislature is powerless to correct the situation. Insofar as these provisions are effective, they often operate with a crippling effect on the power and responsibility of the legislature to deal adequately with problems pressing for solution.[113]

The authors of the *Model State Constitution* took a similar view, not only making the basic point that policy provisions limit the discretion of representative officials, but also defending the stronger claim that representative officials were deserving of trust and confidence. This premise was stated explicitly in the discussion of standards for drafting finance articles:

> The *Model State Constitution* is based upon confidence in the system of representative democracy. The finance article reflects these beliefs by leaving to the legislature and the governor, the people's elected leaders, broad responsibility for the conduct of

111. John E. Bebout, *Introduction* to NATIONAL MUNICIPAL LEAGUE, *supra* note 101, at viii.

112. *See supra* notes 31-35 and accompanying text.

113. KAUPER, *supra* note 100, at 14.

> the state's fiscal affairs with ample power to adjust needs to the rapid changes characteristic of modern times.[114]

Early 1960s scholars' willingness to place their confidence in representative institutions stemmed in part from a belief that conditions had changed to the point that legislative and judicial betrayals of the public trust that were so disconcerting to turn-of-the-twentieth-century scholars no longer posed such a problem. David Fellman made this case in his article, *What Should a State Constitution Contain?*, in the course of defending the idea that "the first requisite of a good constitution is brevity."[115] He argued, "there is reason to believe that prevailing conditions are such that the goal of a concise constitution is now feasible," in part because "there has been an observable decline in the legislative appetite for special legislation."[116] It was not only that legislators were behaving better, thereby removing the need for many of the constitutional policy provisions intended to constrain legislative action, but state judges were also behaving differently, in that "courts today rarely stand in the way of social legislation,"[117] so that there was no longer a need to adopt constitutional provisions authorizing policies blocked by court rulings.

Moreover, early 1960s scholars expressed confidence that any deficiencies in representative institutions could be addressed without resorting to constitutionally imposed constraints—the quality of legislators could be improved, the legislative process could be made more transparent, and the public could also be urged to take a more active role in holding officials accountable. Kauper's argument along these lines was once again broadly representative of the mid-twentieth-century scholarly consensus. In arguing that "[a] state constitution designed to meet modern needs moves in a negative direction if premised on an unwillingness to entrust the people's representatives with powers adequate to their tasks," Kauper noted a number of alternative means of holding representatives accountable in the event they betrayed this trust.[118] Kauper stated that:

> Improving the legislative process, attracting able men to the legislature and equipping them with the means and facilities conducive to well-informed and responsible discharge of their

114. NATIONAL MUNICIPAL LEAGUE, *supra* note 101, at 91.
115. Fellman, *supra* note 97, at 156.
116. *Id.*
117. *Id.*
118. KAUPER, *supra* note 100, at 15.

> tasks is a more constructive approach to the problem of responsible government than the process of popular lawmaking by means of constitutional revision or amendment or the placing of rigid constitutional limitations on the exercise of legislative powers.[119]

Some early 1960s scholars therefore put their faith in attracting higher-quality legislators and designing better legislative institutions, as when Harvey Walker urged state constitution-makers to include "only the fundamentals in our constitutional documents, leaving other matters to be acted upon by properly constructed and competent legislatures."[120] Other scholars placed their faith in the public, arguing that popular checks were even more effective than constitutional constraints. John Wheeler complained: "[t]he notion is still too widely accepted that the only insurance against irresponsible government is constitutional restraint; that for example, the only defense against a legislature spending a state into bankruptcy is a constitutional restriction on the power to appropriate."[121] It was preferable, he thought,:

> to give power to the organs of government and then to seek means to keep public officials honest and responsible than to deny them power. The constitution is a poor place to seek complete insurance against irresponsible government. There can be no substitute for a wise, concerned, informed and active citizenry.[122]

Fortunately, as David Fellman concluded, "modern means of mass communication are tremendously important checks upon improper legislation" and could be counted on to assist the public in holding representatives accountable.[123] In fact, Fellman argued, "[a]n effective free press is probably a more effective check than formal constitutional limitations. Furthermore, there is a growing public awareness that holding legislators politically accountable for what they do protects the public interest more surely than constitutional caveats which hamstring any sort of action."[124]

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119. *Id.*
120. Walker, *supra* note 98, at 13.
121. Wheeler, *supra* note 99, at xiii.
122. *Id.*
123. Fellman, *supra* note 97, at 156.
124. *Id.*

To speak of a scholarly consensus in place in the early 1960s is to not deny the presence of occasional dissenting voices during the ensuing half-century. One such alternative view was expressed by Frank Grad in a 1968 *Virginia Law Review* article *The State Constitution: Its Function and Form for our Time*,[125] later republished in revised form as a chapter in a 2006 book co-authored with Robert Williams.[126] Grad argued, in a manner reminiscent in some ways of Walter Dodd a half-century earlier, that "a consideration of the problems and criteria of constitutional inclusion and exclusion must concern itself with a balancing of the purposes of the constitution and the needs of government, rather than with an attempt to supply a fixed meaning for the valuative terms 'fundamental' and 'legislative.'"[127] Furthermore:

> [A]lthough constitutional brevity has generally been found to be of advantage to state government, it is only one of several values to be achieved, and not necessarily the most important one. To put the last point differently, the best state constitutions are usually brief—but they are not the best *because* they are brief, but because they best meet the needs of state government.[128]

In setting out various criteria for determining whether a particular provision merits inclusion in a state's "higher law, beyond change by normal lawmaking processes," Grad focused on "the importance of the provision to the people and to the effective government of the particular state," as well as "whether the policy embodied in the proposal is one likely to endure," and "whether adequate means other than inclusion in the constitution are available to achieve the particular objective."[129]

This alternative view was expressed infrequently, however, and was clearly a dissenting voice from a near universal scholarly view that policy provisions were incompatible with the standards of constitution-making. In general, and with some prominent exceptions in recent years,[130] the late twentieth century featured relatively little of the wide-

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125. Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968). Grad's article was based in part on a paper that was prepared as part of a State Constitutional Studies Program and circulated, along with other papers in the project, for several years prior to publication of the article. *Id.*

126. GRAD & WILLIAMS, *supra* note 24.

127. Grad, *supra* note 125, at 945.

128. *Id.*

129. *Id.* at 972.

130. Scholars who have departed from this dominant tendency in recent years include Alan Tarr, who has taken note of the arguments for and against adoption of policy provisions, with an eye toward understanding why state constitution-makers were led to

ranging scholarly debate about state constitutional standards that characterized the late-nineteenth and early-twentieth century.

III. THE PRACTICE OF STATE CONSTITUTION-MAKING IN THE POST-*BAKER V. CARR* ERA

In considering the practice of state constitution-making in the post-*Baker v. Carr* era, it becomes clear that participants in state constitutional amendment and revision have generally not adhered to the mid-twentieth-century scholarly standards. To be sure, these standards were not without influence.[131] Several of the constitutions adopted during this period were much shorter than the constitutions they replaced, due in part to the removal of policy provisions viewed by convention delegates or commission members as outdated.[132] These constitutions also pruned some longstanding fiscal policy provisions, such as by eliminating stringent restrictions on legislatures' ability to incur debt.[133] But what stands out from a review of the practice of state constitution-making in the modern era is the degree of continuity with prior state constitutional practice and the significant discontinuity with mid-twentieth century scholarly standards.

This divergence between standards and practice in the modern era has received some attention and explanation. Alan Tarr has noted that the assumptions underlying mid-twentieth century scholarly standards were

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adopt policy provisions and arguing that these were in some cases deliberative responses to problems of governance. *See* TARR, *supra* note 2, at 112-13. Similarly, Robert Williams has argued in various works that the dominant scholarly critique does not take adequate account of important differences in the nature of state and federal constitutions as well as the particular constitutional context in specific states. *See* WILLIAMS, *supra* note 24, at 23-25. Most recently, Emily Zackin has considered and rejected the prominent scholarly critique of the level of policy detail contained in state constitutions. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 18-19 (2013).

131. As one indication of this influence, it was not uncommon in constitutional conventions in the 1960s, just as in the several conventions held in prior decades in Missouri, New Jersey, Hawaii, and Alaska, for convention delegates to justify proposed changes by arguing that they were consistent with recommendations contained in the Model State Constitution. *See, e.g.*, OFFICIAL RECORD, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1961, at 1035 (Austin C. Knapp ed., 1964) (John Butlin Martin, chair of the committee on the executive branch at the Michigan Convention of 1961-62, argued "[e]xecutive budget provisions similar to those proposed herein are included in 3 of the 4 most recently adopted state constitutions (Missouri, Alaska, Hawaii) and are a key feature of the model state constitution.").

132. *See supra* note 14.

133. *See supra* note 15.

at cross purposes with the concerns of the citizenry, especially from the 1970s onward.[134] Scholarly reformers:

> celebrated activist government at a time when citizens were becoming increasingly skeptical about the efficiency and effectiveness of governmental programs. They praised the professionalization of state government at a time when citizens were primarily concerned about the responsiveness of public officials and about their ties to special interests. And they encouraged state governments to emulate the federal government at a time when citizens increasingly rejected this notion.[135]

In considering the influence of the *Model State Constitution* in particular, Frank Grad and Robert Williams concluded that "[w]hatever influence it once had on state constitutional amendment and revision, it is unlikely to have great influence today . . . . Persons involved in state constitutional amendment and revision soon realize that simplification and movement toward brevity, for their own sake, do not elicit much support."[136] In particular, Grad and Williams noted, practitioners have been led to adopt policy provisions for various reasons, including to "circumvent roadblocks in the legislative branch," "achieve the relative permanence of a state constitutional provision," "avoid legislative and judicial interference with the policy," and "overrule existing judicial interpretations of the state constitution."[137]

My concern is with determining how to assess this divergence between the standards and practice of state constitution-making over the last half-century. Although one might well view practitioners' departure from these standards as a source of concern and recommend that practice be brought in line with standards, one might more profitably take the different view that practitioners' continued adoption of policy provisions is in many cases a necessary and appropriate means of responding to recurring deficiencies in the political process. Mid-twentieth-century scholars were relatively unconcerned by these deficiencies and, at any rate, were confident that they could be addressed by means other than constitutional provisions. But participants in state constitutional amendment and revision over the last half century, much like practitioners in prior eras and in keeping with the views of some scholars in prior years, have concluded that effective governance demands that

134. TARR, *supra* note 2, at 157.
135. *Id.*
136. GRAD & WILLIAMS, *supra* note 24, at 3.
137. *Id*; *see also* WILLIAMS, *supra* note 24, at 29.

these deficiencies be addressed and that constitutional provisions are an understandable way of doing so.

A. Legislative Irresponsibility

One recurring challenge to effective governance, whether in the Jacksonian era, Progressive era, or modern era, is posed by legislative irresponsibility in handling various policies. On various occasions, state constitution-makers have concluded that legislatures are incapable of acting responsibly in a given policy area or at significant risk of acting irresponsibly, and in a manner not easily remedied through the electoral process.[138] At times, legislators have been deemed unfit to handle policy areas because of their tendency to act in a short-sighted fashion without due regard for the long-term interest and health of the polity.[139] At other times, legislators have been seen as overly susceptible to powerful special interests and thereby incapable of securing the public interest.[140] And on some occasions, state constitution-makers have been led to enact provisions removing certain issues from legislative control because legislators' self-interests are in tension with the public interest.[141]

1. Pre-1960s

The chief concerns about legislative irresponsibility in the Jacksonian era stemmed from state involvement in building roads, canals, and railroads.[142] During the 1820s and 1830s, states invested heavily in private companies that often took the lead in these projects.[143] When many of these projects failed in the late 1830s, and several states went bankrupt as a result, the view took hold that legislatures had forfeited the public trust in these areas and would need to be constrained from acting in such a short-sighted and speculative fashion.[144] As John Wallis explained:

> States had to come to grips with whether their current fiscal crises were the result of corrupt individuals manipulating the system for their own benefit or whether they were the result of

138. *See infra* Part III.A.1-Part III.A.2.
139. *See infra* Part III.A.1-Part III.A.2.
140. *See infra* Part III.A.1-Part III.A.2.
141. *See infra* Part III.A.1-Part III.A.2.
142. John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 212 (2005).
143. *Id.*
144. Rolston, *supra* note 37, at 530-31; *see also* Wallis, *supra* note 142, at 226, 230.

> systematically corrupt decisions made by state governments. Did the crises result from bad institutions or from bad individuals?[145]

Answering this question was crucial in determining how to proceed, because "[i]f it was bad institutions, then the appropriate remedy was to alter the institutions. If it was bad individuals, then the appropriate response was to vote the rascals out. States, in general, decided that bad institutions were the cause of the crisis," leading to adoption of constitutional constraints on legislative policy-making in various areas.[146] Beginning in the 1840s, with adoption of the Rhode Island Constitution of 1843, delegates to constitutional conventions adopted numerous provisions preventing legislatures from incurring debt.[147] In these conventions and others called during the remainder of the nineteenth century, delegates also barred legislatures from participating in internal-improvement projects by adopting provisions prohibiting the loaning of state credit or the purchasing of stock in private corporations.[148] Some states also adopted constitutional provisions restricting state chartering of banks.[149]

By the late-nineteenth and early-twentieth century, the chief concern was that the increasing size and power of corporations, especially railroads, made it difficult for legislatures to regulate these entities. As Morris Estee, a delegate to the California Convention of 1878-79, argued when the convention debated whether it was safe to leave the regulation of railroads and railroad rates to the legislature, the record was clear that legislators were incapable of handling this task in a responsible fashion:

> The question has been left to the Legislature for the last ten or fifteen years, and we know exactly what the Legislature has done, and we know what they could not do. I think I may safely say that no thoughtful man, who has been in the Legislature of

145. Wallis, *supra* note 142, at 234.

146. *Id.*

147. *See id.* at 231 n.35 (describing the origin of these provisions in the Rhode Island Constitution of 1843). The need for constitutional constraints on legislative contracting of debt is detailed in a June 1846 article in the *Democratic Review*, which noted that the New York Convention of 1846 "originated in one single cause—the improvidence of the Legislature in contracting debts on behalf of the state," and argued that the convention was called "after the state had been threatened with bankruptcy, and the people had been invoked in various quarters to provide by constitutional guarantees against the impending calamity and disgrace." *History of Constitutional Reform in the United States*, 18 DEMOCRATIC REV. 403 (1846).

148. Wallis, *supra* note 142, at 237.

149. *Id.* at 249-51.

> California, will state upon this floor that the Legislature can intelligently fix rates of freights and fares so that they will be just, and so that they will commend themselves to the consideration of the people as fair and just.[150]

Among other concerns, convention delegates concluded that railroad companies were in many cases able to use their financial resources to gain influence over legislators, whether by securing their election or applying pressure during the lawmaking process, so that legislatures were often powerless to enact necessary regulations.[151] As Justin Wellman, a delegate to the New Hampshire Convention of 1918, argued, the influence of corporate interests had become so great as to frequently prevent the legislature from acting in the public interest:

> In our Commonwealth the legislative machinery is entrusted to representative bodies who are nominally under public or popular control. Their output, however, with the exception of constitutional amendments, are not under public control. This lack of popular control is a fundamental defect in the machinery of government, which the growth of modern industrial conditions and their concomitant influence upon legislation has revealed.[152]

In response, in the late-nineteenth and early-twentieth century, delegates at constitutional revision conventions, as in California[153] and Virginia,[154] or inaugural conventions, as in Oklahoma,[155] transferred the task of regulating railroads and occasionally other corporations from legislatures to newly created commissions.[156]

Concerns about corporate influence over legislatures often focused on railroads; but railroads were not the only entities deemed to be wielding undue influence in the legislative process at the turn of the twentieth century. For instance, in adopting a "Forever Wild"

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150. Amy Bridges, *Managing the Periphery in the Golden Age: Writing Constitutions for the Western States*, 22 STUD. AM. POL. DEV. 32, 50 (2008) (citing DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1228 (1880)).

151. DINAN, *supra* note 1, at 85-88.

152. *Id.* at 87.

153. CAL. CONST. art. XII, § 22; *see also* 1 FRANCES NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS 440-41 (1909).

154. VA. CONST. art. XII; *see also* THORPE, *supra* note 153, at 7:3936.

155. OKLA. CONST. art. IX, § 15; *see also* THORPE, *supra* note 153, at 7:4303.

156. DEALEY, *supra* note 72, at 95, 229-34.

constitutional provision ensuring that certain lands should remain wild forest land in perpetuity, delegates to the New York Convention of 1894 were motivated by a concern that the state legislature was "unduly sympathetic to lumbering interests."[157] In recognition of this problem, in the years leading up to the 1894 convention the state legislature had established a commission charged with protecting the forest lands.[158] However, by the time the convention delegates assembled, as Emily Zackin explains in a recent book, they concluded that "the legislature (and its forest commission) could not be trusted to make decisions about the use or health of the state's wilderness," thereby prompting enactment of an amendment essentially removing the task from legislative control.[159]

2. Post-1960s

Concerns about legislative incapacity to act responsibly in various policy areas continued in the modern era, prompting enactment of other constitutional provisions that barred enactment of certain policies or limited legislative discretion in specified policy domains. Balanced-budget requirements, which had their origin in the 1840s with passage of debt-limit provisions, underwent a resurgence in the modern era, typified by the inclusion of a balanced-budget requirement in the Michigan Constitution of 1963.[160] These provisions, now in place in over two-thirds of the states, take various forms.[161] Some require gubernatorial submission of a balanced budget.[162] Others prohibit legislative approval of a budget that is out of balance.[163] Still others prevent actual expenses from exceeding actual revenues in a budget cycle.[164] The general concern motivating these various constitutional provisions is that representative officials, left to their own devices, cannot be counted upon to bring revenues in line with expenditures. This was due in part to legislators' penchant for focusing on short-term considerations rather than long-term

157. ZACKIN, *supra* note 130, at 30.
158. *Id.*
159. *Id.*
160. MICH. CONST. art. IV, § 31; MICH. CONST. art. V, §§ 18, 20.
161. For a list of states with constitutional balanced-budget requirements, see NATIONAL CONFERENCE OF STATE LEGISLATURES, FISCAL BRIEF: STATE BALANCED BUDGET REQUIREMENTS (2010), *available at* http://www.ncsl.org/documents/fiscal/statebalancedbudgetprovisions2010.pdf.
162. *Id.* at 3.
163. *Id.*
164. *Id.*

consequences.[165] Additionally, as delegate D. Hale Brake explained in the Michigan Convention of 1961-62, legislators face difficulties in rejecting expenditure requests because "nobody comes down to see the legislature saying, 'Don't spend money.' Everybody comes down to see the legislature saying 'Spend, spend, spend.' All the time it is more expenditures."[166] Arguing that legislators routinely "yield" to such pressures, he concluded that "[t]his proposal is going about as far as you can go in language to prevent that kind of thing."[167]

Additionally, from the late 1970s to the present, participants in state constitutional amendment and revision, often acting through the initiative process, have concluded that legislative discretion for imposing taxes and setting tax rates is in need of being curbed. The constitutional limits on taxation imposed in California in 1978 via the initiative process have attracted significant attention.[168] But California's Proposition 13 is just one of a number of tax-limitation amendments adopted in this era.[169] Some of these provisions require approval of new taxes or tax increases in a popular referendum or by a supermajority legislative vote.[170] Other provisions flatly prohibit the legislature from imposing certain taxes.[171] For instance, a provision in the Michigan Constitution of 1963 prohibits imposition of a progressive income tax.[172] Meanwhile, a provision added to the Michigan Constitution in 1974 via the constitutional initiative process disallows collecting sales taxes on food or prescription drugs.[173] Still other provisions limit the overall amount of annual revenue the legislature can collect, as with a 1978 initiated amendment to the

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165. Along these lines, in explaining his support for a wide-ranging set of budget proposals at the Michigan Convention of 1961-62, delegate Frank Staiger pointed to the budget deficit of the state in recent years, noting that it stood at $95 million in 1959, and though it dipped to $64 million in 1960,:

> [t]he following year, '61, we were right back up to $71 million again, and you have read in the papers the estimates for this year, that again there is going to be an additional deficit. I think this clearly indicates that Michigan, too, is ready for somewhat drastic action in this area.

OFFICIAL RECORD, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1961, at 1645 (Austin C. Knapp ed., 1964).

166. *Id.*

167. *Id.*

168. CAL. CONST. art. XIII-A.

169. For a list of states with constitutional provisions of this sort, see Bert Waisanen, *State Tax and Expenditure Limits—2010*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/issues-research/budget/state-tax-and-expenditure-limits-2010.aspx.

170. *Id.*

171. *Id.*

172. MICH. CONST. art. IX, § 7.

173. MICH. CONST. art. IX, § 8.

Michigan Constitution, the Headlee Amendment, spelling out a formula allowing a certain level of revenue based on the revenue taken in the prior year.[174]

Recent decades have also seen the adoption, generally via the initiative process, of constitutional provisions limiting the overall level or rate of growth of state spending, on the view that legislators cannot be counted on to act in a disciplined fashion in this area. The 1978 Headlee Amendment to the Michigan Constitution limiting overall revenue levels also limits the overall level of spending.[175] Other provisions adopted since the late 1970s take a similar approach. Colorado's Taxpayer Bill of Rights (TABOR) provision, enacted via the constitutional initiative process in 1992, is the best-known tax-and-expenditure limitation measure.[176] In addition to imposing various restrictions on tax policy, Colorado's TABOR amendment limits the rate of growth of state spending according to a formula that takes account of the rate of inflation and population growth.[177] A number of other states have adopted similar provisions limiting the annual rate of growth in state spending according to various formulas.[178]

Various constitutional amendments have also been adopted in recent decades directing the legislature to appropriate revenue for certain purposes. In some cases, these amendments have been enacted via the initiative process and are a means for the citizenry to constrain legislative discretion regarding spending. In a number of other cases, however, these amendments have been adopted via legislature-referred amendments, out of a recognition by legislators themselves that they are often incapable of resisting the temptation to take revenue raised and intended for one purpose and divert it to other purposes.[179]

A number of these constitutional provisions were enacted in response to attempted or actual legislative diversion of funds. A 1996 Virginia amendment prohibits funds in the government employees' retirement system from being diverted to the general fund or used for any other purposes.[180] Another Virginia amendment adopted in 2000 prohibits diversion of lottery proceeds.[181] When the Virginia lottery was initially approved, supporters promised that the proceeds would be spent solely on schools; but in fact, the proceeds were often used for various other

174. MICH. CONST. art. IX, § 26.
175. *Id.*
176. COLO. CONST. art. X, § 20.
177. *Id.*
178. Waisanen, *supra* note 169.
179. *See infra* notes 180-187 and accompanying text.
180. VA. CONST. art. X, § 11.
181. DINAN, *supra* note 15, at 225.

purposes.[182] The intent of the amendment proposed by the Virginia General Assembly and approved by Virginia voters in 2000 was to ensure that future lottery proceeds are only "expended for the purposes of public education."[183]

Other constitutional provisions establish trust funds as pre-emptive measures, as a way of ensuring that future legislatures will be suitably constrained. In recent decades, Michigan voters have approved a number of legislature-referred amendments along these lines. For instance, a 1994 amendment stipulates that "[s]ix percent of the proceeds of the tax on tobacco products shall be dedicated to improving the quality of health care of the residents of this state."[184] A series of 2006 amendments establishes various funds dealing with "conservation and recreation,"[185] "game and fish protection,"[186] and "nongame fish and wildlife,"[187] and specifies the purposes for which the proceeds can be allocated.

Finally, legislatures have been deemed incapable of handling redistricting policies in a responsible fashion, for obvious reasons, as legislators are naturally interested in protecting their own seats. They also have an interest in drawing district lines benefiting members of their party. John Hannah, chairman of the committee on legislative organization in the Michigan Convention of 1961-62, explained:

> [I]t is totally unrealistic to expect a legislature to redistrict and reapportion seats in its own body. Redistricting inevitably involves the possible denial of seats to members of the existing legislature, and conceivably a fair and equitable redistricting could deprive the most able and respected members of the legislature of their seats. Wholly aside from the political implications involved, the personal relationships alone work to delay, subvert, or prevent prompt and equitable reapportionment of itself by the legislature.[188]

In the belief that these incumbency and partisan interests are in tension with the public interest in drawing district lines that promote competitive elections and responsive legislators, various amendments have been approved to transfer control over redistricting to independent

182. *Id.*
183. VA. CONST. art. X, § 7-A.
184. MICH. CONST. art. IX, § 36.
185. MICH. CONST. art. IX, § 40.
186. MICH. CONST. art. IX, § 41.
187. MICH. CONST. art. IX, § 42.
188. OFFICIAL RECORD, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1961, at 2015 (Austin C. Knapp ed., 1964).

commissions. On several occasions, legislators themselves have recognized that they are no longer capable of handling this task in a responsible fashion and have created independent redistricting commissions via legislature-referred constitutional amendments.[189] But in other cases these commissions have been established by conventions or via the initiative process. The Michigan Convention of 1961-62 adopted a redistricting commission to handle the task of redistricting the state house and senate;[190] but the state supreme court later invalidated it because it was seen as part of an overall redistricting system that did not comport with the U.S. Supreme Court's reapportionment rulings in the 1960s.[191] Various other redistricting commissions established via the initiative process are still operating, as in Arizona in 2000 (for state legislative and congressional districts)[192] and in California (in 2008 for state legislative districts and then in 2010 for congressional districts).[193]

B. Legislative Unresponsiveness

Another longstanding challenge to effective governance is securing enactment of policies blocked by an unresponsive legislature and then preserving them against legislative interference. This can be distinguished from cases where legislatures are shown to be irresponsible in handling various policy issues and constitution-makers are led to limit legislative discretion or remove these areas from legislative control altogether. The concern here is that legislatures are insufficiently responsive to the citizenry and unwilling or unable, for various reasons, to enact policies that command broad public support. State constitution-makers are therefore led to overcome legislative resistance, whether due to special-interest influence, or legislators' self-interest, or legislative super-majority rules, by securing enactment of policies via constitutional conventions, commissions, or—increasingly in recent decades—the constitutional initiative process.

1. Pre-1960s

In the late-nineteenth century, constitutional conventions occasionally adopted policy provisions to bypass legislatures seen as

189. *See* WASH. CONST. art. II, § 43; MONT. CONST. art. V, § 14; IDAHO CONST. art. III, § 2.

190. MICH. CONST. art. IV, § 6.

191. *See In re* Apportionment of State Legislature—1982, 413 Mich. 96 (1982).

192. ARIZ. CONST. art. IV, pt. 2, § 1.

193. CAL. CONST. art. XXI, § 2 (amended 2008 and 2010).

beholden to powerful interest groups. When the Illinois legislature proved unreceptive to repeated calls for enactment of miner-safety rules for nearly a decade,[194] the Illinois Convention of 1869-70 adopted a provision stipulating "[i]t shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation . . . and the construction of escapement shafts or such other appliances as may secure safety in all coal mines."[195] Meanwhile, conventions routinely adopted provisions abrogating various common-law defenses relied on by railroads and other corporations to escape liability for injury or death suffered by workers.[196] In some states, legislatures were responsive to public calls to abrogate fellow-servant, contributory-negligence, and assumption-of-risk doctrines that had the effect of preventing employees from securing redress for workplace injuries; in these states there was no need to adopt constitutional provisions.[197] But in many other states, railroads and other corporations wielded such influence over legislators that statutory relief was not forthcoming.[198] In these instances, it was left to convention delegates to adopt constitutional provisions abrogating these various employer liability doctrines and preventing future legislatures from interfering with these policies.[199]

Conventions in the late-nineteenth and early-twentieth centuries also adopted policy provisions in cases when legislators' self-interest prevented adoption of policies that enjoyed broad public support. To take a leading example, railroad companies wielded political influence in part by offering free rail passes to legislators, judges, and other public officials.[200] Reformers frequently called for an end to this practice; but legislators had an interest in continuing to benefit from free passes.[201] As a result, convention delegates sometimes took it upon themselves to ban the practice, as when the California Convention of 1878-79 adopted a provision declaring in part: "No railroad or other transportation company

194. ZACKIN, *supra* note 130, at 1.

195. ILL. CONST. art. IV, § 29 (1870); *see also* THORPE, *supra* note 153, at 2:1022.

196. *See infra* note 199.

197. JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS 111 (1998).

198. DINAN, *supra* note 1, at 192 (discussing the view that corporation influence on the legislative process was preventing the Arizona legislature from enacting an employers' liability act).

199. *Id.* at 195.

200. WILLIAM ALLEN WHITE, THE OLD ORDER CHANGETH: A VIEW OF AMERICAN DEMOCRACY 78 (1910).

201. DINAN, *supra* note 197, at 105.

shall grant free passes, or passes or tickets at a discount, to any person holding any office of honor, trust, or profit in this State."[202]

2. Post-1960s

In the post-1960s era, constitutional provisions securing enactment of policies blocked by unresponsive state legislatures became even more prevalent, as the constitutional initiative process has offered another means, along with conventions, for overcoming legislative resistance to enactment of policies and minimizing legislative interference with these policies once in place. On a host of policy issues in the last two decades, legislatures have failed to enact policies that command strong public support, whether due to legislative inertia, interest-group capture or other reasons.[203] In response, supporters of these policies have resorted to the initiative process. Moreover, as a way of insulating these policies from possible legislative interference, they have occasionally relied on the constitutional initiative process, rather than merely passing these measures through the statutory initiative process.

To this end, legislative resistance to marijuana decriminalization policies in the late 1990s and early 2000s led supporters to resort to the initiative process on a number of occasions. In nine states, to be sure, legislatures embraced this policy without any need to resort to the initiative process.[204] But in another 11 states, supporters had to rely on the initiative process.[205] And in two of these states they relied on the *constitutional* initiative process, presumably as a way of preserving the policy against legislative interference.[206] Voters in Nevada gave final approval to a medical marijuana decriminalization amendment in 2000.[207] Colorado voters approved a similar medical marijuana amendment that year[208] and then approved an amendment in 2012 decriminalizing recreational marijuana.[209]

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202. CAL. CONST. art. XII, § 19.

203. *See infra* Part III.B.2.

204. *20 Legal Medical Marijuana States and DC*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited April 25, 2014).

205. *Id.* The 11 states that legalized medical marijuana through the initiative process are: California (1996), Alaska (1998), Oregon (1998), Washington (1998), Maine (1999), Colorado (2000), Nevada (2000), Montana (2004), Michigan (2008), Arizona (2010), Massachusetts (2012).

206. John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1026 (2011).

207. NEV. CONST. art. IV, § 38.

208. COLO. CONST. art. XVIII, § 14.

209. COLO. CONST. art. XVIII, § 16.

If the constitutional initiative process has been an occasional vehicle for overcoming legislative reluctance to decriminalize marijuana, it has been the primary means of limiting affirmative action in the face of widespread legislative resistance. On two occasions, in Arizona in 2010[210] and Oklahoma in 2012,[211] legislatures were willing to propose affirmative-action-ban amendments that were approved by voters. But in other states, legislatures have resisted such policies, prompting supporters to resort to the initiative process,[212] and generally the constitutional initiative process as a way of preventing legislative interference.[213] California voters approved an initiated amendment along these lines in 1996,[214] followed by voters in Michigan in 2006,[215] and Nebraska in 2008.[216]

In the early 2000s, supporters of minimum-wage increases relied on the constitutional initiative process to boost the minimum wage in the face of legislative resistance.[217] Once again, some state legislatures were receptive to public calls for a minimum-wage increase. But bills to raise the minimum wage stalled in other state legislatures, prompting supporters to resort to the initiative process.[218] In some states, supporters were content to secure passage of statutory minimum-wage-increase initiatives.[219] But on four occasions, in Florida in 2004,[220] and in Nevada,[221] Colorado,[222] and Ohio[223] in 2006, supporters won passage of

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210. ARIZ. CONST. art. II, § 36.

211. OKLA. CONST. art. II, § 36A.

212. In one instance in 1998 Washington voters approved a statutory initiative along these lines. Dinan, *supra* note 206, at 1017 n.58.

213. *Id.* at 1017.

214. CAL. CONST. art. I, § 31.

215. MICH. CONST. art. I, § 26. The Sixth Circuit held that the amendment violated the Equal Protection Clause, but this decision was subsequently reversed by the U.S. Supreme Court. Coal. to Defend Affirmative Action v. Schuette, 701 F.3d 466 (2012), *rev'd,* 134 S. Ct. 1623 (2014).

216. NEB. CONST. art. I, § 30.

217. Dinan, *supra* note 206, at 1018-19.

218. It should be noted that supporters of minimum-wage initiatives were also trying to advance additional goals aside from enacting policies blocked by legislatures. Supporters of these measures, no less than supporters of other measures in recent years such as stem-cell research measures, were also trying to stimulate voter turnout and thereby boost the prospects of congressional and presidential candidates seen as benefiting from higher turnout among groups supportive of these policies. *Id.* at 1019.

219. Citizen-initiated statutes were approved in Arizona, Missouri, and Montana in 2006. *Id.* at 1018 n.68.

220. FLA. CONST. art. X, § 24.

221. NEV. CONST. art. XV, § 16.

222. COLO. CONST. art. XVIII, § 15.

223. OHIO CONST. art. II, § 34a.

minimum-wage increases through the constitutional initiative process, in part as a way of protecting their policy gains against future legislative interference.

Constitutional initiatives were also approved in three states in the early 2000s to authorize and occasionally fund embryonic stem-cell research in the face of legislative resistance.[224] In California, the legislature authorized stem-cell research but was not prepared to support this research with state funds. The purpose of a constitutional amendment initiated and approved in 2004 by California voters was to create and fund an embryonic stem-cell research institute.[225] In other states, the legislature was even more hostile to embryonic stem-cell research, as in Michigan where the legislature adopted a statute banning this research, and in Missouri where legislators were considering enacting such a ban.[226] To overcome legislative opposition and authorize this research, supporters initiated and secured popular approval of constitutional amendments. Missouri voters approved such an amendment in 2006,[227] as did Michigan voters in 2008.[228]

Legislative resistance to these policies has been attributed to various factors, including the influence of powerful interest groups; but in other cases, constitutional initiatives have been passed to secure policies blocked in part due to legislators' self-interest. Campaign finance policies are a leading example in that supporters of stricter contribution limits, disclosure rules, and public financing have often encountered resistance in state legislatures.[229] At times, supporters have turned to enact such policies through the statutory initiative process,[230] as in Colorado in 1996.[231] However, statutory initiatives are in some cases susceptible to legislative reversal, as took place when the Colorado legislature "'gutted' the statutory campaign finance reforms in 2000."[232] In this context, placing campaign finance restrictions in the state constitution serves to insulate them from legislative reversal, as voters in

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224. Dinan, *supra* note 206, at 1020-21.

225. CAL. CONST. art. XXXV.

226. *Stem Cell Research*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 2008), http://www.ncsl.org/research/health/embryonic-and-fetal-research-laws.aspx.

227. MO. CONST. art III, § 38(d).

228. MICH. CONST. art. I, § 27.

229. DINAN, *supra* note 197, at 104-05.

230. *Id.* at 200 n.82.

231. Anne G. Campbell, *Direct Democracy and Constitutional Reform: Campaign Finance Initiatives in Colorado*, *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOL. 1: THE POLITICS OF STATE CONSTITUTIONAL REFORM 180 (G. Alan Tarr & Robert F. Williams eds., 2006).

232. *Id.* at 182.

Colorado accomplished by initiating and approving a 2002 constitutional amendment.[233] Meanwhile, to note just a few other examples, Florida voters approved an initiated amendment in 1976 that requires financial disclosure for candidates for public office,[234] as well as an amendment in 1998 that was submitted by the state's constitutional revision commission and provides public financing to candidates for state-wide office.[235]

The constitutional initiative process has also been used on several recent occasions to secure policies blocked on account of legislative supermajority rules. For instance, in California, supporters of a temporary increase in the sales tax and income tax rates were unable to secure the necessary two-thirds legislative supermajority to raise taxes.[236] Supporters, led by Governor Jerry Brown, overcame this obstacle in 2012 by initiating and winning popular approval for a constitutional amendment specifying various tax increases and the ways the additional funds could be spent.[237]

C. Judicial Obstruction

State courts can also present challenges to effective governance, by issuing decisions blocking policies supported by a deliberative majority of the legislature and citizenry. At times, state courts overturn policies that enjoy broad popular and legislative support; the challenge in these instances is to restore the invalidated policies. At other times, judicial decisions or doctrines raise doubts about whether proposed or enacted policies will survive state court review. The challenge in these instances is to insulate the policies from judicial reversal.

1. Pre-1960s

Although scholars disagree about the prevalence of state court reversals of labor reforms and other policies in the Progressive era, there is no denying that some state courts were quite active in overturning a variety of reforms that commanded strong popular and legislative support during the late-nineteenth and early-twentieth centuries.[238] The

233. *Id.* The constitutional provision is found at COLO. CONST. art. XXVIII.

234. FLA. CONST. art. II, § 8.

235. FLA. CONST. art. VI, § 7.

236. *California State Tax Increase Proposition (2011)*, BALLOTPEDIA (Sept. 20, 2012), http://www.ballotpedia.org/California_State_Tax_Increase_Proposition_(2011).

237. CAL. CONST. art. XIII, § 36.

238. For an argument that these state court decisions did not impose significant obstacles to enactment of labor reforms, see Melvin I. Urofsky, *State Courts and*

New York Court of Appeals attracted particular attention, whether for its 1885 decision striking down a state law restricting manufacturing of cigars in tenement houses,[239] its 1901 decision invalidating minimum-wage and maximum-hours requirements on public works projects,[240] or its 1911 decision invalidating a pioneering workers' compensation act.[241] The Colorado Supreme Court also blocked various progressive reforms, overturning an act limiting work hours for miners and smelters in 1899[242] and a statute limiting women's work hours in 1907.[243] The Ohio Supreme Court issued an 1896 decision overturning a mechanics' lien law designed to give workers a way to secure payment for their work when such payment was not forthcoming,[244] as well as a 1902 decision overturning a law limiting a day's work on public works projects.[245] These are but a sampling of the state court decisions invalidating progressive legislation during this period.[246] One could also point to the Michigan Supreme Court's 1891 decision invalidating a law providing for indeterminate sentencing, another popular Progressive-era reform.[247]

In seeking restoration of these invalidated policies, supporters frequently turned to the constitutional amendment process. In some instances, amending the constitution turned out to be unnecessary, because state courts changed course over time and upheld measures they had blocked earlier. For instance, after the Illinois Supreme Court issued an 1895 decision invalidating a law limiting women's work hours,[248] the court reversed itself a decade and a half later when presented with the same question.[249] But in many other states judicial self-correction was even longer in coming and for the most part not forthcoming at all. Supporters therefore proposed and won passage of constitutional

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Protective Legislation During the Progressive Era: A Reevaluation, 72 J. AM. HIST. 63 (1985). For an argument that state court rulings invalidated important labor reforms, see Paul Kens, *The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937*, 35 AM. J. LEGAL HIST. 70 (1991).

239. *In re* Jacobs, 98 N.Y. 98 (1885).

240. People *ex rel.* Rodgers v. Coler, 59 N.E. 716 (N.Y. 1901), *superseded by constitutional amendment*, N.Y. CONST. art. 1, § 17.

241. Ives v. S. Buffalo Ry. Co., 94 N.E. 431 (N.Y. 1911).

242. *In re* Morgan, 58 P. 1071 (Colo. 1899).

243. Burcher v. People, 93 P. 14 (Colo. 1907).

244. Palmer v. Tingle, 45 N.E. 313 (Ohio 1896).

245. City of Cleveland v. Clements Bros. Constr. Co., 65 N.E. 885 (Ohio 1902).

246. John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 989-1000 (2007).

247. People v. Cummings, 50 N.W. 310 (Mich. 1891), *superseded by constitutional amendment*, MICH. CONST. art. IV, § 45.

248. Ritchie v. People, 40 N.E. 454 (Ill. 1895).

249. Ritchie & Co. v. Wayman, 91 N.E. 695 (Ill. 1910); *see also* Dinan, *supra* note 246, at 992.

amendments explicitly authorizing enactment of the invalidated policies, whether limits on work hours for women or for persons in hazardous occupations, minimum-wage policies for women or on public works projects, workers' compensation acts, or mechanics' lien laws.[250] This is the origin, to take one example, of a 1902 amendment to the Michigan Constitution declaring that "[t]he legislature may, by law, provide for the indeterminate sentences, so called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."[251] Numerous other examples could be provided of court-overturning amendments enacted from the 1890s through the 1910s for the purpose of restoring popular reforms invalidated by state supreme courts.[252]

At times in the first half of the twentieth century, state constitutional amendments were adopted not for the purpose of restoring invalidated policies but rather with an eye toward insulating proposed or enacted policies from reversal.[253] The New York Convention of 1938 adopted a number of provisions along these lines. Although the New York Court of Appeals, the highest court in the state, had not invalidated social insurance provisions of the sort the legislature was seeking to enact, court decisions in other states raised the possibility that social insurance measures could be subject to legal challenge.[254] To ensure the legitimacy of these measures, delegates to the New York Convention of 1938 adopted several amendments, including one declaring that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[255] As one New York convention delegate, Edward Corsi, explained, this provision:

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250. *Id.* at 991-97.

251. MICH. CONST. art. IV, § 47 (1850). This provision was revised slightly in drafting the 1908 Michigan Constitution and took its current form in the 1963 Michigan Constitution, which states: "The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences." MICH. CONST. art. IV, § 45. *See* People v. Lorentzen, 387 Mich. 167, 179-80 n.26 (1972).

252. Dinan, *supra* note 246.

253. *See, e.g.*, ZACKIN, *supra* note 130, at 129-33 (discussing various amendments enacted for the purpose of preempting state court invalidation of labor laws).

254. Dinan, *supra* note 246, at 999 (discussing opinions of the Massachusetts Supreme Judicial Court).

255. N.Y. CONST. art. XVII, § 1.

> enables the Legislature to go ahead and meet the challenge of insecurity with such wisdom as it may have. Nothing in the Constitution, we say, shall prevent the Legislature from providing against poverty, sickness, old age, from protecting the blind, the deaf, the dumb, the physically handicapped, and the multitude of our citizens of tomorrow whose needs are the duty and responsibility of government.[256]

2. Post-1960s

After a period in the mid-twentieth century when state courts did not play an active role in overturning legislation, the 1970s brought a resurgence of state court decisions relying on independent interpretation of state constitutions. Many of these decisions involved interpretation of fair-trial guarantees and provided higher levels of protection for criminal defendants than are available as a result of U.S. Supreme Court rulings. Still other decisions overturned or put at risk policies in a range of other areas, including school financing, capital punishment, and same-sex marriage.[257]

The challenge in some of these cases has been to restore policies that were invalidated by a state supreme court but commanded broad support among the public and legislature. On various occasions, particularly regarding the death penalty, supporters of invalidated policies turned to the constitutional amendment process to reverse state court rulings. In decisions issued in the 1970s and 1980s in California, Massachusetts, and Oregon, state supreme courts invoked state constitutional provisions to invalidate death-penalty laws.[258] Supporters of capital punishment responded by enacting constitutional amendments—via the initiative process in California in 1972[259] and Oregon in 1984[260] and via legislative referral in Massachusetts in 1982[261]—making clear that the death penalty could not be interpreted as violating any provision of the state constitution. The California amendment, the first of these death-penalty authorization amendments to be adopted, states in full:

> All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty

256. Dinan, *supra* note 246, at 1000.
257. *Id.* at 1000-19.
258. *Id.* at 1006-09.
259. CAL. CONST. art. 1, § 27.
260. OR. CONST. art. I, § 40.
261. MASS. CONST. art. 116.

> are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.[262]

The challenge in other recent cases has been to insulate policies with broad popular and legislative support from judicial reversal in situations where court decisions raised the possibility that they might be invalidated. The thirty-one state constitutional provisions regarding same-sex marriage offer the leading example in recent decades. The first two of these amendments, adopted in Hawaii and Alaska in 1998, were enacted in response to decisions issued by courts in these two states suggesting that the state supreme courts could legalize same-sex marriage.[263] The Hawaii amendment is unique among these thirty-one amendments in simply preventing the state judiciary from legalizing same-sex marriage, by declaring that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[264] The Alaska amendment is typical of the remaining amendments in prohibiting recognition of same-sex marriage: "[t]o be valid or recognized in this State, a marriage may exist only between one man and one woman."[265] Each of the other same-sex marriage amendments, save for a California amendment in 2008,[266] was enacted by same-sex marriage opponents in response to state court decisions in *other* states, including a 2003 decision of the Massachusetts Supreme Judicial Court that raised the possibility that their own state court might issue a similar decision.[267]

D. Popular Backsliding

The citizenry can also present challenges to effective governance, in the sense that popular majorities are for various reasons led to support policies in tension with enduring principles or commitments. The concern in these cases is to constrain short-sighted or passionate

262. CAL. CONST. art. 1, § 27.

263. Dinan, *supra* note 246, at 1017-18.

264. HAW. CONST. art. I, § 23.

265. ALASKA CONST. art. 1, § 25.

266. CAL. CONST. art I, § 7.5. This state constitutional provision was held unconstitutional in Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) and later dismissed on standing grounds in Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

267. Dinan, *supra* note 246, at 1018-19.

majorities from contravening important policy commitments established by deliberative majorities. At the least, state constitution-makers have concluded, entrenching policy commitments in state constitutions and thereby erecting a higher barrier to reversing them can make it more difficult for popular majorities to engage in backsliding, even if it cannot ultimately prevent them from doing so through a subsequent amendment.

1. Pre-1960s

Lottery bans were among the first policy provisions added to state constitutions, beginning in the 1820s and continuing throughout the nineteenth century. Once the view took hold in the early nineteenth century that lottery-playing was injurious to the character and long-term interest of the citizenry and should be banned, the key decision for convention delegates was whether to place lottery bans in the state constitution.[268] The vast majority of state conventions that met during the nineteenth century concluded it was necessary and appropriate to do so.[269] Their chief concern was that the temptation to turn to lotteries was so strong, whether to raise revenue or gratify the desire for get-rich-quick opportunities, that it should be made difficult for future generations to give in to this temptation.[270] For instance, in defending adoption of a lottery ban in the New York Convention of 1821, delegate John Duer spoke of the "strong temptation to resort to lotteries as a mode of raising revenue; and from a temptation to which it was more than probable they would yield, the constitution should preserve them."[271] To be sure, if future generations ever became strongly committed to adopting lotteries, they could turn back to the constitutional amendment process and repeal the lottery-ban provisions. But this would be more difficult than if the ban rested on a statutory basis, and rightly so, in the view of many convention delegates.[272]

Liquor prohibition provisions were also enacted with regularity in the late-nineteenth and early-twentieth century and for similar reasons. As the view increasingly took hold that liquor consumption was inimical to the health of the citizenry and should be prohibited, some states adopted statutory liquor prohibition measures, especially in the 1850s,

268. DINAN, *supra* note 1, at 248-53.
269. *Id.* at 253.
270. *Id.* at 248.
271. *Id.* at 251.
272. *Id.* at 250 (referring to the comments of California Convention of 1849 delegates Kimball Dimmick and Lewis Dent).

during the first wave of prohibition activity.[273] But in the late-nineteenth century, a number of participants in constitutional amendment and revision concluded that liquor prohibitions should be enshrined in state constitutions as a way of making clear the importance of this commitment and making it more difficult for backsliding to occur.[274] In the words of George Willard, a delegate to the Michigan Convention of 1867:

> [T]here can be no greater moral influence exerted, than by putting in the Constitution of this State this declaration, that no man whatever shall be licensed to sell intoxicating drinks. Why? Because the people have pronounced it a great moral wrong. Every one throughout the State will regard this declaration as the expression of the moral sentiment of the people. Our children will grow up under the influence of this Constitution. As they read this provision in the organic law they will be led to see what the people have pronounced to be a wrong.[275]

Six states enacted constitutional liquor prohibition provisions in the 1880s.[276] Another nineteen states adopted such provisions from 1907 through 1919.[277]

2. Post-1960s

Although in the modern era several states adopted constitutional amendments authorizing the death penalty in response to state court decisions overturning death-penalty statutes, other states were committed to *prohibiting* the death penalty and sought to entrench this commitment against short-sighted and passionate popular majorities that might be tempted to reinstate capital punishment. In Michigan, the death penalty has been prohibited by statute since 1846, when the Michigan Legislature became the first state legislature in the country to ban capital punishment.[278] But when delegates assembled at the Michigan

273. *Id.* at 267 (noting an initial wave of thirteen states adopting statutory prohibition in the 1850s).

274. DINAN, *supra* note 1, at 262 (refrencing the comments of delegates to the Ohio Convention of 1850-1851 and the Ohio Convention of 1873-1874 and delegates to the Delaware Convention of 1896-1897).

275. *Id.* at 263.

276. *Id.* at 267-68.

277. *Id.* at 268.

278. Eugene Wangel, *Michigan & Capital Punishment*, MICHIGAN B.J. (2002), *available at* www.michbar.org/journal/pdf/pdf4article487.pdf.

Convention of 1961-62, they concluded that it was necessary and appropriate to enshrine this death-penalty ban in the constitution. T. Jefferson Hoxie, chair of the convention's committee on legislative powers, explained the committee's unanimous support for enacting a constitutional death-penalty ban by saying "[s]ince 1926 there have been 8 times that a majority of one of the houses of our legislature voted in favor of the death penalty. Thus there is potential danger, particularly after a sensational crime, of such legislation being adopted."[279] In fact, expanding on this fear, delegate Tom Downs noted that in 1929 a statute authorizing the death penalty "passed both houses, to be vetoed by Governor Green. In 1931 the capital punishment provision passed both houses, was signed by the governor, with the proviso for a referendum, and the people defeated this by a vote of 352,000 to 269,000. So capital punishment did not become the law."[280] Another delegate, Eugene Wanger, argued "it is both fitting and opportune for Michigan to step forward in the tradition which she began . . . over 115 years ago; and that the adoption of this provision would be a significant contribution to the concept of civilized justice which all of us seek to serve."[281] Accordingly, the Michigan Constitution of 1963 declares that "[n]o law shall be enacted providing for the penalty of death."[282]

Other examples could be provided of constitutional provisions enacted for the purpose of entrenching fundamental commitments against backsliding on the part of future generations, most notably the various environmental policy provisions adopted during this period. The environmental provision adopted in the Michigan Convention of 1963 is typical, in that it declares:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.[283]

In explaining the motivations underlying this provision, Frank Millard, a delegate to the Michigan Convention of 1961-62 argued:

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279. OFFICIAL RECORD, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1961, at 595 (Austin C. Knapp ed., 1964).

280. *Id.* at 596.

281. *Id.*

282. MICH. CONST. art. IV, § 46.

283. MICH. CONST. art. IV, § 52.

> We have to have some protection against the waste of our natural resources. We do that now. Our legislature does have control over the natural resources, the use of them, and I feel that in the future that this is more or less just a memorializing of the legislature, that they have the right, the power. We are not giving them any power. They have that power. We are just telling them to look out into the future for our natural resources, the air and the water, and to make some regulations so that they will not be used up for the other generations that are to follow.[284]

IV. CONCLUSION

Why have participants in state constitutional amendment and revision during the last half century departed from the prevailing scholarly standards at the start of this era, and what lessons might be drawn from analyzing the evolution of these scholarly standards and the logic underlying practitioners' continued adoption of constitutional policy provisions?

I have argued that continued adoption of policy provisions in the modern era is motivated in many instances by a concern with addressing various challenges to effective governance. Although in the early 1960s scholars downplayed the extent of deficiencies in representative institutions and the role of constitutional provisions in remedying any deficiencies that might surface, practitioners have long operated according to a different logic. In the view of participants in state constitutional amendment and revision, representative institutions fail on various occasions to secure the public interest, and constitutional provisions are a necessary and appropriate means of addressing these failures.

In particular, legislatures have been shown to be irresponsible in their handling of certain issues, prompting state constitution-makers to remove certain policy areas from legislative control or limit legislative discretion. Legislatures in other instances prove unresponsive, in that they are unwilling or unable to enact policies commanding broad popular support, leading supporters to secure enactment of these policies via constitutional conventions or initiative processes. At times, court decisions prevent enactment or enforcement of policies commanding broad public support, in which case supporters turn to the constitutional amendment process to restore invalidated policies or insulate proposed or enacted policies from judicial reversal. Finally, there is always a risk that

284. OFFICIAL RECORD, STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1961, at 2605 (Austin C. Knapp ed., 1964).

short-sighted or passionate popular majorities will fail to uphold enduring policy commitments; enshrining these commitments in constitutional provisions makes backsliding of this sort more difficult.

If participants in state constitutional amendment and revision have been consistent over time in seeking to address these deficiencies in the operation of representative institutions, scholarly standards of state constitution-making have undergone a notable evolution. By the early-1960s scholars were in near universal agreement in discouraging policy provisions as falling short of the model found in the short and spare federal Constitution and viewing such provisions as unhelpful and unnecessary in constraining legislatures and courts. But there has not always been such a strong scholarly consensus in favor of this position. In earlier eras, particularly at the turn of the twentieth century, scholars were more mixed and ambivalent in their views on policy provisions, with some scholars defending policy provisions as serving important functions of governance. Even in the modern era, occasional dissents have been registered from prominent scholars who have defended a functional approach that would examine on a case-by-case basis whether a particular policy provision contributes to better governance.

One of the benefits of analyzing the evolution of these scholarly standards, especially in comparison with the relative consistency of the practice of state constitution-making, is to contribute to a reconsideration of the suitability of the mid-twentieth century standards. Although mid-twentieth-century scholars invariably took their bearings from the U.S. Constitution, it might be more helpful to appreciate the distinctive logic underlying the state constitutional experience, as is well understood by some scholars in previous and later eras and is consistent with longstanding state constitutional practice. Moreover, although mid-twentieth-century scholars expressed confidence in the operation of representative institutions and the ability to address any deficiencies without resort to constitutional provisions, this is at odds with the views of some scholars in prior eras as well as the longstanding experience of participants in state constitutional amendment and revision. In short, state constitution-makers have long adhered to a different logic than mid-twentieth-century scholars and one that is eminently understandable in light of their experience with recurring deficiencies in the operation of representative institutions, whether due to legislative irresponsibility or unresponsiveness, judicial obstruction, or popular backsliding, and the necessity and propriety of addressing them through constitutional provisions.