NOTES

STRENGTHENING STATE CONSTITUTIONS

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INTRODUCTION

The "issue of whether pregnant pigs should be singled out for special protection is simply not a subject appropriate for inclusion in our State constitution; rather it is a subject more properly reserved for legislative enactment."[1] So said Justice Pariente when evaluating ballot eligibility for a citizen-proposed amendment to the Florida Constitution. The amendment passed. Thus, the Florida Constitution regulates the proper confinement of pregnant pigs.[2] Odd amendments such as Florida's, far from being anomalies, are routine. But they should not be. Instead, state constitutional amendment procedures should be strengthened. A constitution is a fundamental law that should not fluctuate with the political wind.

State constitutions are much easier to amend than the Federal Constitution. They freely use a host of procedures, including ballot initiatives, legislative proposals, and constitutional conventions. Consequentially, state constitutions hold numerous provisions typically contained in state statutes or even administrative regulations.[3] State

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1 Advisory Op. to the Att'y Gen. Re Limiting Cruel & Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597, 600 (Fla. 2002) (Pariente, J., concurring).

2 FLA. CONST. art. X, § 21 (ensuring pregnant pigs can turn around "freely" in their enclosures or while tethered). Unfortunately, the burning public desire to protect the pregnant pigs flamed too hot, and the two unconstitutional farmers slaughtered the pigs and went out of business. *See* Ken Thomas, *Pregnant Pigs in Fla. to Be Slaughtered*, EDWARDSVILLE INTELLIGENCER (Dec. 11, 2002), https://www.theintelligencer.com/news/article/Pregnant-Pigs-in-Fla-to-Be-Slaughtered-10520074.php [https://perma.cc/2W2N-7A7W].

3 Among many others, see, for example, ALA. CONST. art. IV, § 65 (prohibiting bingo); OKLA. CONST. art. II, § 11 (permitting impeachment of public officials for

constitutions are longer, more detailed, and much more amended than the Federal Constitution. As a result, states treat their constitutions more like codebooks than constitutions.

But constitutions are not codebooks. They are fundamental organizing documents. Such simple amendment procedures undermine constitutionalism. Strengthening amendment requirements for state constitutions would revive the veneration due constitutions as the fundamental law of a polity. Such higher law should be protected with more stringent amendment procedures.

Further, strengthening amendment requirements would shield state constitutions from fluctuating with every political wind. Currently, national political controversy often produces a flurry of reactionary state constitutional amendments facilitated by simple amendment procedures. However, such reactionary construction of fundamental law denies deliberation and ruins reverence for constitutions. Heightening amendment requirements would force states to deliberate proposals and separate constitutional change from political reactionism. Better-drafted language that serves to reinspire the veneration that state constitutions lack would result.

This Note argues that state constitutions should have more difficult amendment procedures than most states currently do. Part I highlights the ease of amending most state constitutions by evaluating state constitutional amendment procedures. Next, Part II argues that because constitutions are fundamental, organizing laws, their amendment procedures should reflect such status. Finally, Part III of this Note examines state constitutional amendments that resulted from national political turmoil and argues amendment procedures should be stringent enough to temper such reactionism. If a constitution is to be a constitution, it must be resilient enough to function as one. State constitutions largely fail to be so.

I. STATE CONSTITUTIONS ARE TOO AMENDABLE

A. Amendment Procedures

State constitutions may be amended in a variety of nuanced ways. Even with all the variety though, nearly all state amendment procedures have two things in common. One is that the voting public must ratify amendments.[4] Second, every state constitution allows its

intoxication); OR. CONST. art. I, § 39 (regulating the sale of liquor by the individual glass); TEX. CONST. art. III, § 47 (allowing bingo for charitable purposes).

4 *See* 51 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 8–9 tbl.1.4 (2019) (showing the constitutional amendment procedure of each state). Delaware is the sole state that does not require the public to ratify amendments. *See* Donald S. Lutz, *Toward a Theory*

legislature to write and propose amendments.[5] But beyond these two commonalities, states provide for a host of other amendment procedures. Those include citizen-initiated amendments, convention-framed amendments, and commission-referred amendments.[6]

Legislature-crafted amendments are the primary method of amending state constitutions.[7] Every state constitution permits legislature-crafted amendments.[8] All amendments proposed by the legislature must go to the voters for ratification before appearing in the constitution.[9] States vary in their rules for legislature-crafted amendments. Seventeen states allow a simple legislative majority to present a proposed amendment to the public for ratification.[10] The remainder require some heightened legislative threshold ranging from a two-thirds to a three-fifths majority with a variety of procedural rules interspersed.[11] Only a handful of states demand the legislature pass the proposed amendment in two separate legislative sessions.[12] These rules combine to burden legislature-crafted amendments with varying degrees of procedural difficulty. Ten states permit the "easiest route": majority approval in a single legislative session.[13] Twenty-five more "set a higher threshold": passing the legislature with a supermajority in a single session.[14] Eleven states heighten the requirements more; they insist on a majority vote in two successive legislative sessions.[15] Only four states impose a supermajority requirement in successive sessions.[16]

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of Constitutional Amendment, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 247 (Sanford Levinson ed., 1995); Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 76 n.39 (2019) ("Delaware is unique in that it allows the legislature to amend the constitution without a public referendum provided that a proposed amendment is approved by supermajorities in both houses in two successive legislative sessions.").

5 *See* John Dinan, *State Constitutional Developments in 2016*, *in* 49 COUNCIL OF STATE GOV'TS, *supra* note 4, at 3, 12–13 tbl.1.2 (2017) (showing the constitutional amendment procedure of each state).

6 John Dinan, *Constitutional Amendment Processes in the 50 States*, STATE CT. REP. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/72VW-WXFJ].

7 *See id.* ("State legislatures generate more than 80 percent of constitutional amendments that are considered and approved around the country each year.").

8 Marshfield, *supra* note 4, at 76.

9 *See* COUNCIL OF STATE GOV'TS, *supra* note 4, at 8 tbl.1.4. Again, this excepts Delaware.

10 *Id.* at 8–9 tbl.1.4.

11 *Id.* Note the footnotes on page 9 of this source for the procedural requirements. *Id.* at 9 tbl.1.4.

12 *Id.* at 8–9 tbl.1.4 (showing only twelve states require two sessions).

13 Dinan, *supra* note 6.

14 *Id.*

15 *Id.*

16 *Id.*

All states but three allow the public to ratify the amendment with a simple majority.[17] The remaining three require a supermajority.[18]

While all states allow legislature-crafted amendments, only seventeen permit citizen-initiative amendments.[19] Again, procedures vary. But all require a certain number of signatures to place the proposed amendment on the ballot.[20] Of those, many states require the signatures to come from across the state.[21] Private citizens draft the initiatives themselves.[22] If they gather sufficient signatures, they go on the ballot. Interestingly, except in one state, the citizen-initiative procedure entirely cuts out the legislature.[23] The legislature cannot prevent the proposed amendment from reaching the ballot.[24] Once on the ballot, the public ratifies the proposed amendment. The ratification procedures are generally the same for legislature-crafted amendments and initiative amendments.[25] These procedures again combine in varying ways to change the adoption's degree of difficulty. Illinois and Massachusetts are the most difficult states in which to adopt an initiative amendment.[26] But Arizona, California, Colorado, Ohio, and South Dakota are comparatively easy.[27]

Finally, the "vast majority" of states permit constitutional conventions to amend their constitutions.[28] Once again, procedures vary. Typically, the legislature sparks the process and puts a referendum on the ballot that asks whether to call a constitutional convention.[29]

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17 *See* COUNCIL OF STATE GOV'TS, *supra* note 4, at 8 tbl.1.4.

18 *Id.* The supermajority ranges from fifty-five percent all the way up to two-thirds. *Id.*

19 *See* COUNCIL OF STATE GOV'TS, *supra* note 4, at 10 tbl.1.5. Since the last publication of this source, a Mississippi Supreme Court ruling rendered Mississippi's citizen-initiative provision unusable "until it is revised to accurately reflect the number of congressional districts from which signatures have to be collected to qualify initiated amendments for the ballot." Dinan, *supra* note 6.

20 *See* COUNCIL OF STATE GOV'TS, *supra* note 4, at 10 tbl.1.5.

21 *Id.*

22 *See* Marshfield, *supra* note 4, at 77.

23 Massachusetts requires citizen-initiated amendments to garner the support of one-fourth of state legislators. *See* Dinan, *supra* note 6.

24 Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Apr. 18, 2023), https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments/ [https://perma.cc/ZT4S-M5E5] ("[V]oters can bypass state legislatures to place constitutional amendments directly on the ballot . . . .").

25 Dinan, *supra* note 6. Nevada is the sole exception. *See id.*

26 Paul Rader, *How Do States Amend Their Constitutions?*, MEDIUM (Nov. 1, 2018), https://paulrader-42650.medium.com/how-do-states-amend-their-constitutions-3549e4f2cf90 [https://perma.cc/CUE3-WCU4].

27 *Id.*

28 Marshfield, *supra* note 4, at 77.

29 G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 25 (1998) ("Popular participation in the initiation of constitutional change occurs not only through the constitutional initiative but through popular votes on legislative proposals to call constitutional

Fourteen states require the legislature to periodically poll the public on whether to call a convention.[30] Upon passage of the permitting referendum, the public elects special convention delegates.[31] The convention confers and places its proposed amendments on another ballot referendum that must pass again.[32] A few states do not require a ballot referendum.[33] In four other states, the constitution does not demand legislative approval; instead, a citizen initiative calls the convention.[34] Even if a state lacks a constitutional provision permitting a convention, the "power to call a convention is understood to be inherent in the people and their representatives."[35] State legislatures have "assumed" such power.[36] Several state courts have ruled on whether a legislature may call a convention sans a permitting state constitutional provision.[37] The constitutional convention traditionally was the primary way to amend state constitutions, but none have occurred in decades.[38] Since the Founding, "[t]here have been 239 separate constitutional conventions, and since the beginning of the republic there has never been a three-year period in which at least one state constitutional convention" has not met.[39] Florida provides for a commission-referred amendment process and empowers a commission to put amendments directly on the ballot for ratification.[40] It is the only state with such a procedure.[41] Of all the amendment methods, citizen-initiative and legislature-proposed amendments are utilized the most. Ninety-nine

conventions and on the selection of delegates to those conventions."); Marshfield, *supra* note 4, at 77.

30 TARR, *supra* note 29, at 25.

31 Marshfield, *supra* note 4, at 77.

32 *Id.*

33 Dinan, *supra* note 6.

34 *Id.*; *see also* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY app. at 197–99 (G. Alan Tarr & Robert F. Williams eds., 2006); Marshfield, *supra* note 4, at 77.

35 William B. Fisch, *Constitutional Referendum in the United States of America*, 54 AM. J. COMPAR. L. 485, 492 (2006).

36 TARR, *supra* note 29, at 25.

37 *See, e.g.*, Collier v. Frierson, 24 Ala. 100 (1854); State v. Am. Sugar Refin. Co., 68 So. 742 (La. 1915); State *ex rel.* Wineman v. Dahl, 68 N.W. 418 (N.D. 1896); *In re* Op. to the Governor, 178 A. 433 (R.I. 1935).

38 Marshfield, *supra* note 4, at 77 ("Although the convention was the dominant method of state constitutional amendment during the nineteenth and much of the early twentieth century, there have been no convention-generated amendments in over thirty years.").

39 Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 388, 394 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

40 Dinan, *supra* note 6.

41 *Id.*

percent of modern state constitutional amendments originate from initiative or legislature-crafted proposals.[42]

B. Amending with Abandon

States exhibit little hesitation in using their constitutional amendment procedures. The frequency of state constitutional amendments is perhaps "the most salient difference between state constitutionalism and national constitutionalism."[43] This difference means the U.S. Constitution and "state constitutions differ dramatically in their rigidity: the average annual amendment rate for state constitutions is five times higher than the rate for the U.S. Constitution."[44] State constitutions fundamentally differ from the national Constitution in their length as well. While the Federal Constitution comes in at 7,591 words, the average state constitution is 39,000[45] but can range from 8,565 to 402,852 words.[46]

The Federal Constitution is famously difficult to amend.[47] Article V provides two methods. First, the Constitution may be amended when two-thirds of each house proposes an amendment that three-fourths of states ratify.[48] Or, two-thirds of the states may convene a constitutional convention to propose amendments for ratification by three-fourths of states.[49] Hurdling either method is exceedingly difficult. However difficult it is to get a supermajority of both the House

42 Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 488–89 (2016).

43 TARR, *supra* note 29, at 29; *see also* Hall, *supra* note 39, at 394–95 ("On average, each state constitution has been amended four times more frequently than the federal document."); Lutz, *supra* note 4, at 247 ("[T]he average amendment rate is much higher for the state constitutions than it is for the national Constitution.").

44 Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2011 (2022).

45 *State Constitution*, BALLOTPEDIA, https://ballotpedia.org/State_constitution [https://perma.cc/D64F-DJPQ].

46 *See* COUNCIL OF STATE GOV'TS, *supra* note 4, at 5 tbl.1.3.

47 Albert, *supra* note 44, at 2007 (compared with global constitutions, the U.S. Constitution "top[s] the global charts on constitutional rigidity" having only "an extraordinarily low rate of success" of "0.002%" passage); *see also* Jill Lepore, *The United States' Unamendable Constitution*, NEW YORKER (Oct. 26, 2022), https://www.newyorker.com/culture/annals-of-inquiry/the-united-states-unamendable-constitution [https://perma.cc/QQU6-7692]; Jesse Wegman, Opinion, *Thomas Jefferson Gave the Constitution 19 Years. Look Where We Are Now.*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/2021/08/04/opinion/amend-constitution.html [https://perma.cc/KTZ8-L4GJ]. Amazingly, the U.S. Constitution was once thought to be "*too easy* to amend." Albert, *supra* note 44, at 2009. "The rapid succession of successful amendments [in the Progressive Era] caused observers to wonder whether the hyper-amendability of the Constitution risked making it as easily amendable as an ordinary statute." *Id.*

48 U.S. CONST. art. V.

49 *Id.*

and Senate to agree, persuading three-quarters of the states to ratify is even more challenging. As a result, the country has added only twenty-seven amendments.[50]

Not so with state constitutions. States amend their constitutions with impunity. As of 1996, the states had proposed over 9,500 constitutional amendments and had adopted 5,900.[51] In the following twenty-three years, states added almost 1,700 more amendments.[52] This profound amendment rate is the most "striking contrast" between state constitutions and the Federal Constitution.[53] The contrast is indeed glaring. The rate of state amendments is about nine and a half times the rate of federal amendments.[54] State constitutions' greater length partly causes the profound difference in amendment rate.[55] After all, greater length insists upon greater amendment because there are just more provisions that seem to need amendment. Not only that, but state courts tend to uphold even the most drastic changes to constitutions proposed through amendment processes.[56]

Yet constitutional length alone does not explain the rate difference. The sheer detail of state constitutions contributes. State constitutions "address almost every aspect of public life—from contentious cultural issues . . . to high-stakes regulatory and structural issues such as taxation, education financing, public debt, judicial review, and redistricting. State amendments have become a go-to political device for citizens, interest groups, and public officials."[57] This detail marks another distinct difference between state constitutions and the Federal Constitution. "Whether one examines the structure of state constitutions, the range of topics they address, the level of detail they encompass, the changes they have undergone, or the political perspectives

50 *Amendments to the U.S. Constitution*, NAT'L ARCHIVES FOUND., https://www.archivesfoundation.org/amendments-u-s-constitution/ [https://perma.cc/VU4W-FKVN].

51 TARR, *supra* note 29, at 24.

52 Marshfield, *supra* note 4, at 79.

53 TARR, *supra* note 29, at 23.

54 Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 359 (1994).

55 *Id.* at 358.

56 *See, e.g.*, Omaha Nat'l Bank v. Spire, 389 N.W.2d 269, 274 (Neb. 1986) (refusing to entertain the argument that an amendment could not proceed as it conflicted with the core of the constitution then in effect); Associated Indus. of Okla. v. Okla. Tax Comm'n, 55 P.2d 79, 82 (Okla. 1936) ("Subject to the limitations imposed by the Federal Constitution, the reserved power of the people of the state to amend their Constitution *is unlimited*." (emphasis added)); 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 3 (2006) ("Other than these relatively rare federal constitutional restrictions, . . . there are no legally enforceable restrictions on the content of what may be placed in the state constitution.").

57 Marshfield, *supra* note 4, at 79.

underlying them, the conclusion remains the same: state constitutions are different."[58]

All of this detail combined with an ever-changing political sphere means states amend with abandon. It helps reinforce a "culture of frequent recourse to amendment" in the states.[59] The simplicity of state amendment procedures produces a public consciousness that people should utilize these simple procedures. And utilize them they do. Repeatedly amending state constitutions underscored in the public's mind that state constitutions were there to be amended. The public came to view state constitutions as "an appropriate means of bringing about changes in governance" instead of other methods such as judicial interpretation or, appallingly, simple legislation.[60] So, state polities used constitutional amendments "as a means to govern the daily affairs of government and the people, to structure how public institutions work, and to express the deepest values of the polity."[61] That understanding is challenging to curb. Even after some states strengthened their constitutional amendment procedures, the high rate of amendment continued. "[P]resumably," it did so "because residents are prone to view amendments as an appropriate means of bringing about changes in governance."[62] Of course, governance needs to adjust to the changing needs of a polity. Because state constitutions, facilitated by simple amendment procedures, became the preferred method for bringing about this adjustment, "constitutional amendments 'are relatively ordinary events in . . . political life.'"[63] Frequent amendments reinforced a state political culture quite willing to amend, which, in turn, produced more amendments. Thus, state constitutions slipped into a cycle of amending that tougher procedures did not always combat.

C. Consequences of Amendment Culture

Such capricious amending is not without consequences. The rapid and ill-deliberated process in most states produces constitutions that "are riddled with piecemeal amendments that have compromised

58 TARR, *supra* note 29, at 6.

59 RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 113 (2019).

60 *Id.* at 114 (quoting JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 29 (2018)).

61 *Id.*

62 DINAN, *supra* note 60, at 29.

63 David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2088 (2010) (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1163 (1999)).

their coherence as plans of government."[64] Amendment procedures, particularly citizen-initiative procedures that abrogate the role of the legislature, enable amendments that receive little consideration as to how they fit the broader constitutional structure or impact the state. The most amended state constitutions incorporate three to four amendments *per year*.[65] Even amendments that may receive legislative approval are not necessarily thoughtfully considered. States treat their constitutions as a repository of thoughts about government. Such an approach produces a "vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements."[66] The piecemeal nature of state constitutions, facilitated by simple amendment procedures and emphasized by a culture of amendment, gives birth to constitutions that "do not reflect the fundamental values, and ultimately the character, of the people of the states that adopt them."[67]

Far from being simply piecemeal and ill-considered, simple amendment procedures incentivize states to treat their constitutions much more like statutory compilations than high, fundamental law.[68] Incessant amendments have "transformed the short, principle-oriented charters of the early republic into 'super-legislative' documents."[69] Distinguishing why state constitutions are meaningfully different from a conglomeration of superstatutes grows more and more difficult.[70] Professor Albert Sturm laments the loss of distinction between constitutional and statutory law: "With regard to substantive content, large parts of state constitutions are no more basic or

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

65 Dinan, *supra* note 6.

66 James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

67 Jeffrey A. Parness, *Failed or Uneven Discourse of State Constitutionalism?: Governmental Structure and State Constitutions*, 5 ST. THOMAS L. REV. 155, 155 (1992).

68 *See* Ruth Gavison, *What Belongs in a Constitution?*, 13 CONST. POL. ECON. 89, 91 (2002) (highlighting how even "apparently minor changes in an existing constitution" or "significant amendments" can both produce "a change in the basic framework of government").

69 JEFFREY S. SUTTON, STEPHEN R. MCALLISTER, RANDY J. HOLLAND & JEFFREY M. SHAMAN, STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE 1028 (4th ed. 2023) (quoting James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 829 (1991)).

70 *See* STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 34 (1996); ALBERT L. STURM, METHODS OF STATE CONSTITUTIONAL REFORM 2–3 (Univ. of Mich., Mich. Governmental Stud. No. 28, 1954). Indeed, "[t]here seem to be no limits on what can pass through state constitutional amendment procedures." Marshfield, *supra* note 4, at 65.

fundamental than the products of the regular legislative process."[71] Simple amendment procedures cause states to question whether something belongs in a constitution or rather in a statute compilation. No clear distinguishing principle exists. State constitutions are fundamentally power-limiting documents instead of power-granting documents, like the Federal Constitution.[72] The deep desire to limit the general police powers of states, while commendable, placed "a growing body of detail in state constitutions" that "practically erased any valid distinction" between constitutional and statutory law "that could once be made."[73]

The detail, wrought in part by the amendment process, demanded ever-more amending "to render them reasonably adequate to serve their purpose."[74] As amendments proliferated, they facilitated a culture that prevented states from "develop[ing] a sharp distinction between 'higher,' constitutional lawmaking and 'ordinary,' statutory lawmaking. State constitutions never attained any mythic status."[75] Consequentially, constitutions, filled with details, are "perennially shifting"[76] and can waver "with every legislative or popular whim."[77] The wavering with every election cycle places proposed amendments with "detailed technicalities" before the electorate, further waning its interest in upholding constitutions as a form of higher law.[78] But much of the electorate surely senses that "such matters requiring frequent alteration and adjustment should be left to the legislature."[79] In

71 STURM, *supra* note 70, at 3. Treating constitutions as statutes also affects the interpretive methods used to interpret those constitutions. *See* Marcus Teo, *Interpreting Frequently Amended Constitutions: Singapore's Dual Approach*, 42 STATUTE L. REV. 364, 364 (2021) ("In a time where many constitutions are as frequently amended as ordinary statutes, purposive constitutional interpretation is both commonplace and normatively justifiable.").

72 *See* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 710 (2016) (noting that state constitutions do not typically contain grants of power but only limit states' police power); Ilya Shapiro, *State Police Powers and the Constitution*, CATO INST. (Sept. 15, 2020), https://www.cato.org/pandemics-policy/state-police-powers-constitution [https://perma.cc/CXK5-9QJ8].

73 STURM, *supra* note 70, at 2; *see also id.* at 148–49 ("The addition of trivia and detail gradually erased the traditional distinction in substantive content between matters es[s]entially constitutional and matters essentially statutory in nature. Moreover, the addition of minutiae has had the cumulative effect of necessitating more amendments . . . .").

74 *Id.* at 3.

75 Pozen, *supra* note 63, at 2088; *see also* Hall, *supra* note 39, at 389–90 ("Populist and majoritarian impulses in the states produced documents of ever greater length that were more like codes than fundamental laws.").

76 Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1679 (2014).

77 James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 985 (1993).

78 STURM, *supra* note 70, at 3.

79 *Id.*

response, voters seem to have largely abandoned the "concept of a constitution as limited to fundamental law."[80]

Nevertheless, the incessant adjustment continues. It marches on so that "state constitutions have assumed the characteristics of a legal code."[81] Losing the distinction deteriorates the status of state constitutions in both the public's and scholars' eyes.[82] Their minutiae-ridden clauses neither reflect well the character of a state nor inspire the same level and amount of scholarship as the Federal Constitution.[83] Incessant amendment that produces lengthy codebooks is partly to blame for the "underlying attitude toward state constitutions that treats them with considerably less reverence than is accorded the Constitution of the United States."[84] State constitutions, of course, must be given due consideration and attention. They are the fundamental governing documents of a state. But when states do not concern themselves with treating them as such,[85] the public and academia may lack interest to

80 *Id.* at 9.

81 *Id.* at 8; *see also id.* at 148 ("No longer were many state constitutions confined solely to matters of fundamental character.").

82 *See* Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 165 (1984) (expressing doubt about what Georgians truly thought of the adoption of their tenth constitution: "as a solemn and far-reaching political act or as a technical overhaul interesting only politicians and lawyers, as launching a new high-tech ship of state or as scraping the barnacles off an old, familiar one"); *see also* Margaret Center Klinglesmith, *Amending the Constitution of the United States*, 73 U. PA. L. REV. 355, 371 (1925) (showing that states "no longer have any constitutional law, since all law is reduced to one level"); Versteeg & Zackin, *supra* note 76, at 1679 ("The ease with which US state constitutions can be revised has led many scholars of American constitutionalism to impugn their design. . . . [They] dub them merely 'legislative' or 'statutory' in character.").

83 *See, e.g.*, DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 107–08 (1988) (arguing that others often think of state constitutions as "wordy patchworks of compromises having little rhyme or reason"); Gardner, *supra* note 66, at 819–20 (state constitutions do not reflect the character of a state because otherwise state citizens would be "a frivolous people who are unable to distinguish between things that are truly important and things that are not"); A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 866 (1968) ("[C]ommentators speak with one voice when they submit that such detail is simply not compatible with the traditional assumption that a constitution is properly the repository of the fundamental ordering principles of society, and that all else should be left to the statute books."); John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 68 (1991) (highlighting the "vivid contrast" of state constitutions with the good design of the Federal Constitution).

84 JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 27 (2005); *see also* Hall, *supra* note 39, at 395 ("All this activity suggests a key feature of state constitutions: they have increasingly become codes rather than fundamental frames of government. . . . As stable representations of fundamental principles and timeless structures they pale before the federal Constitution.").

85 As evidenced by the fact that in some states, the "same methods are used for the enactment of statutes and the adoption of constitutional amendments, thus nullifying the

do the same. States, "[f]ar from viewing their constitutions as sacrosanct and above politics, . . . treat[] them as political documents to be changed in accordance with the shifting needs and opinions of their citizens."[86] Professor Hans A. Linde, a former Oregon Supreme Court justice, summarizes the problem in particularly colorful language, arguing that state constitutions are "dusty stuff—too much detail, too much diversity, too much debris of old tempests in local teapots, too much preoccupation with offices . . . and forever with money, money, money. . . . [N]o grand vision, no overarching theory, nothing to tempt a scholar aspiring to national recognition."[87] The Federal Constitution is fossilized. State constitutions are fluid. The Federal Constitution is a paragon of generalization. State constitutions are riddled with marginalia. The Federal Constitution is constitutional. State constitutions are statutory. All of these contrasts are either caused or facilitated by incessant amendments made possible by low procedural hurdles to change state constitutions. "If sclerosis has characterized the American experience of formal constitutional change, 'amendmentitis' may be the more plausible diagnosis for the states."[88] This "amendmentitis" afflicts states with a vision of their constitution as a codebook of slightly more important law.

II. EASY AMENDMENT PROCEDURES UNDERMINE CONSTITUTIONS AS FUNDAMENTAL LAW

But constitutions are not codebooks. Nor should they be! Instead, constitutions should immortalize the fundamental law of a government. They crystallize governing principles, give effect to the political principles of a populace, and trace the boundary lines between public powers and private rights. Because written constitutions fill these functions, Chief Justice Marshall's observation that they are the "greatest improvement on political institutions" rings true.[89] States do not treat constitutions as their organizing law. But constitutions are core to a constituency. State constitutions should enshrine the integral principles of a polity and not be easily amendable.

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old distinction." STURM, *supra* note 70, at 2–3; *see also* Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 146 (1995) ("In the fifteen states that permit use of the initiative for both statutes and constitutional amendments, however, none requires more votes to adopt an amendment than to enact a statute.").

86 G. Alan Tarr, *Introduction* to CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS, at xiii, xv (G. Alan Tarr ed., Contributions in Legal Stud., No. 81, 1996).

87 Linde, *supra* note 82, at 196.

88 Pozen, *supra* note 63, at 2089.

89 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

A. History of Fundamentalness of Constitutions in American Constitutional Theory

The American Framers thought long about the role of constitutions in a polity. Their study of political thought and the role of constitutions closely informed their framing of the national Constitution. However, their historical and theoretical insights are not bound to the national Constitution. Instead, America's history of constitutional theory informs how constitutions should govern a people. This Section explores the constitutional theory that undergirded the framing of the national Constitution and argues that the Framers' insight should be applied to state constitutions as well. Of course, this historical inquiry is not meant to craft an originalist-style argument that state constitutions *must* apply the theories and approach that informed the Framers. After all, constitutions are still the articulation of the voice of a polity. Rather, this Section is simply designed to highlight the Framers' and the public's views on constitutions at the time of the Framing and argue that prudence counsels those views should continue in state constitutions.

1. Permanence and Popular Sovereignty

The framing of the Federal Constitution provides much insight into why constitutions should be inherently distinct from statutory law. The Framers tarried long over how to craft a document stiff enough to form a lasting government and malleable enough to alter that did not have the "prolixity of a legal code."[90] They began by examining Western political thought. Philosophers from Hippodamus and Solon and Lycurgus to John Locke all emphasized the importance of legal stability.[91] "[N]o thinker surveyed [by the Framers] appeared oblivious to the need for legal stability . . . . In short, the consensus was that legal change should be both accommodated and limited."[92] Underscoring the emphasis on stability, John Locke went so far as to write an unamendable constitution.[93] The Framers operationalized political philosophers' pontifications about the need for legal stability by crystallizing fundamental principles in a written higher law and giving it a

90 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

91 JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT 15–17 (1992).

92 *Id.* at 16.

93 Albert, *supra* note 44, at 2013 ("[T]he Fundamental Constitutions of Carolina, written by John Locke, were designed to be 'perpetually established' with no fixed-term duration. . . . The text emphasizes its intended unamendability in the very last article, stressing its 'sacred and unalterable form' . . . ." (first quoting FUNDAMENTAL CONSTS. OF CAROLINA of 1669 pmbl.; and then quoting *id.* § 120)).

method to change. Article V represented the first "concrete mechanism" for legal change.[94] Despite being a "New World mechanism," Article V "ha[s] roots deep within Western political thought."[95] The Framers crafted Article V to protect a document they designed to be "truly fundamental and distinguishable from ordinary legislation."[96]

Such a document must preexist government in some sense. If, like statutes, constitutions are merely creatures of a legislature, then constitutions are logically subservient to a legislature.[97] The government, acting through the legislature, would be the highest actor. However, the Framers thought of written constitutions as giving voice to a sovereignty and principles that themselves give birth to a particular government and legislature. Thomas Paine promulgated this view, arguing that a constitution is "a thing *antecedent* to a government, and a government is only the creature of a constitution."[98] Paine explicitly distinguished a constitution from laws. "A constitution, therefore, is to a government, what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; . . . government is in like manner governed by the constitution."[99] This philosophy stands in contrast to how the British conceived of their constitution. The British Constitution neither preexists government nor is it singularly written.[100] It breathes by the grace of Parliament and the Crown.[101]

Not so with the American view of constitutions. Paine rather found popular sovereignty the better justification for foundational law. While the British "constitution" served to limit the government in some fashion, it also proceeded from the government.[102] The Crown or Parliament held sovereignty and vested it in government. However,

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94 VILE, *supra* note 91, at 16.

95 *Id.* at 17.

96 Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 917 (1993).

97 *See id.* at 918 ("A constitution thus could never be an act of a legislature or of a government.").

98 THOMAS PAINE, RIGHTS OF MAN (1791), *reprinted in* SELECTED WRITINGS OF THOMAS PAINE 172, 201 (Ian Shapiro & Jane E. Calvert eds., 2014).

99 *Id.*

100 *See* POL. & CONST. REFORM COMM., HOUSE OF COMMONS, THE UK CONSTITUTION: A SUMMARY, WITH OPTIONS FOR REFORM 5 (2015) ("These laws and rules are not codified in a single, written document.").

101 *See id.* at 6 ("Constitutional laws and rules may be enacted, amended or repealed by Parliament using its ordinary legislative procedures."); PAINE, *supra* note 98, at 201 ("Can then Mr. Burke produce the English Constitution? If he cannot, we may fairly conclude, that though it has been so much talked about, no such thing as a constitution exists, or ever did exist, and consequently that the people have yet a constitution to form.").

102 *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 348, 363 (1998).

the Framers designed the American constitutional experiment differently.[103] They argued the fundamental law that both forms and constrains government must come from the people and do so in written form. Paine wrote a constitution must be written because it "is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none."[104] Having a written constitution makes popular sovereignty possible.[105] Paine wanted the written constitution so fundamental and entrenched in the polity's minds that he wrote it should be a "body of elements, to which you can refer, and quote article by article."[106] In this sense, a "constitution was like the Bible, possessed by every family and every member of government."[107] Because they created it, they should be able to change it—but not easily. James Wilson, a framer of the Constitution, understood that popular sovereignty justified the Constitution. He proclaimed that the people, and not the legislature or government, should have "the right to mould, to preserve, to improve, to refine, and to finish it as they please."[108] Comparing the right of the people over their government to the right of God over His creation, Wilson observed that a constitution must be "in [the people's] hands . . . as clay in the hands of the potter."[109]

2. Written and Fixed

Of course, a constitution springing from the font of public sovereignty and stable enough to constrain the government must also be fixed. If the public is to be able to quote it article by article, then those articles must be girded against change. Written form serves this necessary goal, but so does imperviousness against erratic amendment. These theoretical underpinnings guided the Framers and the public to hold constitutions higher than normal legislation.[110] In creating the Federal Constitution, they designed an amendment process that was "public, formal, highly deliberative" and that "distinguished between

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103 *See id.* at 363 (explaining how American revolutionary thought sought to shift sovereignty from the government to the people).

104 PAINE, *supra* note 98, at 201.

105 *See* Marshfield, *supra* note 4, at 90 ("Written constitutions were tied closely to the emerging commitment to popular sovereignty."); *see also* WOOD, *supra* note 102, at 306.

106 PAINE, *supra* note 98, at 201.

107 Wood, *supra* note 96, at 920.

108 1 THE WORKS OF JAMES WILSON 304 (Robert Green McCloskey ed., 1967).

109 *Id.*; *cf. Isaiah* 64:8 (King James 1769) ("But now, O LORD, thou art our father; we are the clay, and thou our potter; and we all are the work of thy hand." (italicization omitted)); *Romans* 9:21 (King James 1769) ("Hath not the potter power over the clay . . . ?").

110 *See* Lutz, *supra* note 4, at 240 ("Constitutional matters were considered more important in 1789 America than normal legislation . . . .").

constitutional matters and normal legislation."[111] They innately understood that the amendment process must be challenging to accomplish this separation. For "[a] process that is too easy does not provide enough distinction between constitutional matters and normal legislation, thereby violating the assumption of the need for a high level of deliberation and debasing popular sovereignty."[112]

A difficult amendment process gives life to the theories of popular sovereignty on which the justification for the American government rested. And it crystallizes the decisions of the public so only they can change them. Founder Samuel Adams emphasized these ideas and wrote that "in all *free* States . . . the Constitution is fix[e]d."[113] The Framers "ensured that the Constitution would not likely be disturbed by such continual innovations as to undermine faith in the structure and basic principles of the regime."[114] Their distinguishing of constitutions from regular legislation and their challenging of amendment procedure brought life to theories of popular sovereignty and legal stability "that earlier thinkers had advocated."[115] This distinction between statutory and constitutional law, effectuated by a difficult amendment process, lies at the heart of treating constitutions as *lex superior*.[116]

Having a fixed and written constitution furthers constitutional entrenchment. Fixed and entrenched constitutions are necessary when the resultant government is the product of a delicate and "complex set of checks-and-balances. A structure like this should be amended with care, since one apparently local change may frustrate the effectiveness of the system as a whole."[117] Thus, having fixed and more difficult-to-amend constitutions is more crucial "when the constitutional arrangement is the product of a serious compromise."[118] American constitutions are almost exclusively the product of popular compromise and granular structural negotiations. Historians have spilled much ink

111 *Id.*

112 *Id.*

113 Letter from the House of Reps. of Mass. to the Speakers of Other Houses of Reps. (Feb. 11, 1768), *in* 1 THE WRITINGS OF SAMUEL ADAMS 184, 185 (Harry Alonzo Cushing ed., 1904) (emphasis added).

114 VILE, *supra* note 91, at 16.

115 *Id.* at 16–17; *see also* Wood, *supra* note 96, at 917 ("[The Framers] showed the world how written constitutions could be made truly fundamental and distinguishable from ordinary legislation, and how such constitutions could be interpreted on a regular basis and altered when necessary.").

116 *See* JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 8 (1996) ("Some countries attempt to make a sharp separation between constitutional law and ordinary law by treating the constitutional document in a special way – the Lex Superior approach. Constitutional rules may have to be changed in a special fashion that is different from the way ordinary law is made.").

117 Gavison, *supra* note 68, at 93.

118 *Id.*

examining these debates and compromises. At the federal level at least, these debates and compromises produced a mindset that understood "the formal entrenchment of the canonical text against subsequent legal change . . . to define the boundaries of constitutional law in America."[119] But state constitutions are rarely less delicate and debated than the Federal Constitution. Fixed and entrenched constitutions should be no less essential at the state level. The "nature and purpose of constitutions" are such that entrenchment is "not just the hallmark of constitutions, but their raison d'être."[120] As Madison argued, "because a constitution is written for the ages to come," it should be an "entrenched . . . spare framework[] of government, enshrining broad commitments rather than detailed policy choices."[121] Madison and Jefferson provided much of the foundational theory of the role of constitutions during the Founding Era.

B. Madison and Jefferson's Conflicting Views

Madison and Jefferson famously argued over the proper resiliency of constitutions and the respect they should garner. Madison advanced a view of constitutions as a type of higher law that should be venerated and difficult to amend.[122] His view rests on the idea that earlier generations should be able to bind later ones through constitutional law in the interests of stability and protecting a constitution as a higher law.[123] Societies, Madison argued, should "revere the document because this would, in his view, generate a stable regime reinforced by a long-enduring constitutional text."[124] Such veneration and difficulty in amending would guard against the public viewing their constitution as a "flawed document full of errors and defects."[125] Madison's approach certainly still rooted a constitution in popular sovereignty. However, once the public vested its sovereignty in a written document, then it should not be able to so easily change that document. After all, "[w]ho would revere a . . . constitution that was more

119 Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399, 404 (2008).

120 Versteeg & Zackin, *supra* note 76, at 1700.

121 *Id.* at 1701 (citing Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Orientated Constitutions*, 93 AM. POL. SCI. REV. 837, 837–38 (1999)).

122 *See* THE FEDERALIST NO. 49, at 339–40 (James Madison) (Jacob E. Cooke ed., 1961).

123 *See id.* (allowing for constitutional amendment for "certain great and extraordinary occasions" but not allowing for easy amendment because it would "carry an implication of some defect in the government" and disturb "the public tranquility by interesting too strongly the public passions").

124 Albert, *supra* note 44, at 2016.

125 *Id.*; *see also* THE FEDERALIST NO. 49, *supra* note 122, at 340.

often under revision than not?"[126] Madison's conception envisioned "legal stability as a precondition for justice and republican government."[127] He understood that making a constitution resistant to amendment would risk "encrusting some legal imperfections."[128] Nevertheless, stability should reign. Separating constitutional law from the mechanics of ordinary legislation at least allows for minimizing the imperfections until public sentiment rises sufficiently high to amend.

Jefferson, in contrast, advocated revising constitutions every nineteen years.[129] Jefferson held veneration less sacred than Madison. In Jefferson's mind, veneration was an active "vice."[130] The problem with veneration was that it caused the public to "look at Constitutions with sanctimonious reverence, [and] deem them, like the ark of the covenant, too sacred to be touched. [T]hey ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment."[131] He instead raised popular sovereignty above all else. Jefferson argued that "the earth belongs in usufruct to the living," concluding that the living should write their fundamental law.[132] This idea led to his proposal to have constitutions expire after nineteen years. The living, and not past, generations should govern the living. If past generations wrote the governing, fundamental law for a polity that had little say in composing it, those past generations' governance over the present could be "arbitrary and even despotic."[133] Holding the voice of the living as the highest value meant making "democratic legal and constitutional amendment relatively easy."[134] Jefferson's approach rested not on venerating the dead hand of the past but instead on honoring the voice of living majorities. None of this is to say that Jefferson viewed constitutions on the same level as ordinary law, however.[135] His motivation for forming a "real

126 Albert, *supra* note 44, at 2016.

127 John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 L. & SOC. INQUIRY 501, 503 (1997) (book review).

128 *Id.*

129 Versteeg & Zackin, *supra* note 76, at 1668.

130 Albert, *supra* note 44, at 2020 ("Veneration, thought Jefferson, reinforced the view that the Constitution was a sacred jewel to be kept as close as possible to its original form.").

131 Letter from Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval) (July 12, 1816), *in* 10 THE PAPERS OF THOMAS JEFFERSON: RETIREMENT SERIES 222, 226 (J. Jefferson Looney et al. eds., 2013).

132 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 392, 396 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (emphasis omitted).

133 Ferejohn, *supra* note 127, at 502.

134 *Id.*

135 Wood, *supra* note 96, at 923 ("No one wrestled more persistently with this problem of distinguishing between statutory and fundamental law than Jefferson."). Jefferson's view that the people should be able to easily modify their constitution necessarily proposed

constitution"[136] for Virginia was that he viewed the existing one as a mere "ordinance" that held "no higher authority than the other ordinances of the same [legislative] session."[137] Jefferson, though he differed with Madison on the veneration due to a constitution and how amendable it should be, nevertheless knew it must be distinct from and higher than ordinary law. "If the constitution were to be *truly fundamental* and immune from legislative tampering, somehow or other it would have to be created, as Jefferson put it, 'by a power superior to that of the legislature.'"[138] His answer was to have amendments happen not from any "ordinary acts of assembly" but instead "special conventions to form and fix their governments."[139] While Jefferson unabashedly favored vesting the power to amend easily in the hands of the people, he nonetheless vehemently opposed frequent constitutional amendments. He observed that "I am certainly not an advocate for frequent [and] untried changes in laws and constitutions. . . . [B]ut I know also that laws and institutions must go hand in hand with the progress of the human mind."[140] Thus Jefferson, for all his lofty talk of letting the current generation craft their governing documents, nonetheless understood the value of stability. His proposition to open constitutions for amending only every nineteen years struck this balance in his mind. Such a proposition would strengthen state constitutional amendment procedures far beyond their current levels.

Madison's view won out in respect to the Federal Constitution.[141] Jefferson's, in large part, clearly won out in respect to state constitutions. Americans venerate the Federal Constitution and shudder at the thought of amending it. It is foundational law, and while differing theories on how to interpret it abound, most agree that it still commands some degree of loyalty. Not so in the states. Jefferson's low view of veneration and his proposition that constitutions should be simple to amend in deference to popular sovereignty reigns in the states.

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difficulties with his desire to have constitutions on a higher plane than ordinary law. How, after all, does one truly distinguish between laws of the same modifiability?

136 Thomas Jefferson, Answers to Démeunier's First Queries (Jan. 24, 1786), *in* 10 THE PAPERS OF THOMAS JEFFERSON 11, 18 (Julian P. Boyd et al. eds., 1954).

137 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 122 (William Peden ed., Univ. of N.C. Press 1982) (1785).

138 Wood, *supra* note 96, at 923–24 (emphasis added) (quoting JEFFERSON, *supra* note 137, at 123–24).

139 JEFFERSON, *supra* note 137, at 125.

140 Letter from Thomas Jefferson to "Henry Tompkinson" (Samuel Kercheval), *supra* note 131, at 226.

141 *See* Serkin & Tebbe, *supra* note 72, at 705 ("Americans commonly *regard* the Constitution as exalted. . . . [T]hey venerate it. Viewed in historical perspective, the Constitution's universal popularity is actually remarkable . . . .").

C. Historical State Constitutions' More Difficult Amendment Procedures

However, state constitutions did historically hew closer to Madison's view that a constitution should be distinct, higher, more difficult to amend, and spring from the people. Early state constitutions better accomplished the true role of a constitution through being "relatively succinct frameworks of government."[142] The view of constitutions as distinct, fundamental law prevailed.[143] However, state framers early on "groped with the problem of distinguishing their fundamental laws from ordinary legislation."[144] Difficult amendment procedures for state constitutions were the solution. Five eighteenth-century constitutions provided no method at all for amendment.[145] Others had strict amendment procedures.[146] If amendment procedures appeared in state constitutions, then the barriers to proposing those amendments were usually challenging to surmount.[147] These "burdensome amendment requirements" even persisted into the nineteenth century.[148] But for eighteenth-century state constitutions, "relatively little time was spent deliberating over the best processes for constitutional amendment."[149]

Instead, the Revolutionary-era public understood constitutional conventions to be the ideal way to amend or revise a constitution.[150]

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142 SUTTON ET AL., *supra* note 69, at 1028.

143 *See* TARR, *supra* note 29, at 35.

144 Wood, *supra* note 96, at 922.

145 TARR, *supra* note 29, at 34–35 (showing New York, Virginia, North Carolina, New Jersey, and Pennsylvania's 1790 constitution specified no "mechanism at all for their amendment or revision," *id.* at 35); *see also* STURM, *supra* note 70, at 6 ("Some of the earliest state constitutions contained no provision for amendment.").

146 Wood, *supra* note 96, at 922 ("Delaware provided that five-sevenths of the assembly and seven members of the upper house could change those parts of the constitution that were alterable. Maryland said that the constitution could be changed only by the two-thirds votes of two successive separately elected assemblies."); William B. Fisch, *supra* note 35, at 488 (describing various revolutionary-era amendment processes).

147 *See* John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 285 (2016). "An initial period of experimentation in the founding era led to creation of amendment processes in some states." *Id.* at 291.

148 TARR, *supra* note 29, at 35 ("New York's constitution of 1821 prescribed that amendments had to pass two successive legislatures [with difficult procedures]. Several other states retained similar requirements until the 1850s . . . .").

149 Marshfield, *supra* note 4, at 106; *see also* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 32–33 (2006).

150 *See* Fisch, *supra* note 35, at 492 ("Historically, the preferred vehicle for major revisions of existing state constitutions and creation of new ones has been the popularly elected convention . . . ."); Marshfield, *supra* note 4, at 92 ("Thus, early constitutionalists were in need of a new institution that was *distinct* from ordinary government, more closely tied to the people, and sufficiently practical, to create a constitution by and for the people."

Jefferson himself, the leader of the popular-sovereignty camp, disliked legislative involvement in constitution making and advocated conventions as the solution because "[c]onventions and the process of ratification ma[ke] the people the actual constituent power."[151] Jefferson wrote, "[T]o render a form of government unalterable by ordinary acts of assembly, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments."[152] Jefferson's view spread; conventions wrote Massachusetts's 1780 constitution and New Hampshire's 1784 constitution.[153] By this time, "the proper pattern of constitution-making and constitution-altering was set: constitutions were formed or changed by specially elected conventions and then placed before the people for ratification."[154]

Of course, this is exactly the model the Framers used when they set out to form a Federal Constitution. The power of the constitutional convention is still felt today, albeit watered-down by erratic and frequent state constitutional amendments. Nevertheless, constitutional conventions "were the most distinctive contributions the American Revolution made to Western politics."[155] Professor Jonathan L. Marshfield advocates restoring some limits on state constitutional amendment procedures and vesting sole power to create and destroy state constitutions in conventions.[156] He analyzed all 233 state constitutional conventions since the Founding and concluded that "the underlying

(emphasis added) (citing WOOD, *supra* note 102, at 307; MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 22 (1997))); Wood, *supra* note 96, at 924.

151 Wood, *supra* note 96, at 924.

152 JEFFERSON, *supra* note 137, at 125.

153 Wood, *supra* note 96, at 924.

154 *Id.*; Marshfield, *supra* note 4, at 88 ("[I]n the state constitutional tradition, the doctrine of popular sovereignty presumes that a convention is necessary for the foundational act of creating government."). Remarkably, some state amendment procedures allow state constitutions to be *entirely replaced* by a simple amendment without the deliberation of a convention or the specific sovereign mandate a dedicated convention carries. *See, e.g.*, Wheeler v. Bd. of Trs., 37 S.E.2d 322, 329 (Ga. 1946) (permitting Georgia's 1945 constitution even though it was adopted through the amendment procedures of the 1877 constitution then in effect without a convention); Smith v. Cenarrusa, 475 P.2d 11, 17–18 (Idaho 1970) (permitting the legislature to propose a wholly new constitution through amending the constitution in effect); A.E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1, 33–34 (1974) (claiming that Virginia's 1970 constitution was lawful because of Virginia Supreme Court precedent even though it was merely enacted through a single amendment to the 1902 constitution).

155 Wood, *supra* note 96, at 924 (citing 1 R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760–1800, at 213–17 (1959)).

156 Marshfield, *supra* note 4.

logic of state constitutional theory is inconsistent with the presumption of a limitless amendment power."[157]

Thus, state amendment provisions are properly understood "as affirmative delegations of power that are entirely derivative of the existing constitution and necessarily inferior to the people's sovereign constituent power institutionalized in the convention."[158] If, as the Founding public seemed to have understood, special constitutional conventions are the only proper authority to fully fashion and fell constitutions, then it follows that state constitutions should not be fully amendable outside of these processes. Instead, they should only provide for amendment through more challenging amendment procedures. The amendment processes of states gradually loosened beginning in the Jacksonian Era and loosened drastically in the Progressive Era.[159] The Reconstruction Era was a brief respite[160] in the long deterioration in the difficulty of state constitutional amendment procedures.[161]

Constitutions are the cornerstones of a constituency's governance. They are not mere statutory laws and should not be easily changed by procedures similar to how statutes are enacted. Instead, constitutions are to be venerated, stable, foundational, and sufficiently principle focused so that they do not become encumbered with the details of a government best left to the statutory compilations. In the American constitutional tradition, constitutions are the manifestation of a transfer of sovereignty from the people to their government. The transfer of sovereignty cannot be built on a fickle foundation. Instead, issues of such weight demand crystallization in written form. The weight of written form waxes worthless if the words continually change. Madison and Jefferson held fundamentally different views on constitutions. Madison considered constitutions worthy of veneration, fundamental, quite distinct from statutes, and fixed. Jefferson actively opposed constitutional veneration. He believed the people should be permitted to easily amend constitutions to modify their grant of sovereignty. Yet Madison and Jefferson agreed on fundamental facets of constitutions. Both deeply opposed treating constitutions as supercodebooks. Jefferson specifically complained of too-frequent amendments. Even though Jefferson supported more easily amending constitutions, he also believed, along with many of the states at the time,

157 *Id.* at 71.

158 *Id.* at 88.

159 *See* Dinan, *supra* note 147, at 291.

160 *See id.* ("The Reconstruction Era is the one period when multiple states moved in a different direction and made it more difficult to amend their constitutions.").

161 The story of state constitutions succumbing to the pressures of populism is far beyond the scope of this Note.

that most significant constitutional change should only occur at the hands of a constitutional convention with specially elected delegates. State constitutions nearer the Founding reflect these ideas in more difficult amendment processes. But as states moved away from these fundamental ideas, the ravages of the Progressive Era sufficed to ensure state constitutions did little to protect themselves as ultimate law.

State constitutional amendment procedures should be strengthened to restore the fundamentality of constitutions. Incautiously amending constitutions hollows out governmental stability, derides the import of the people's transfer of sovereignty, and produces a government lacking guidance from high principles crystallized in written form.

III. EASY AMENDMENT PROCESSES PRODUCE POLITICAL REACTIONISM

Insufficient guardrails against easy amendments produce populaces that treat their constitutions not as repositories of elemental organizing principles of government but instead as repositories of erratic reactions to political moments. State constitutions are often amended in the heat of whatever salient political controversy stirs up the public. Many states clamored to amend their constitutions in the wake of the rise of same-sex marriage,[162] following the overruling of *Roe v. Wade*,[163]

162 See, for example, ARK. CONST. amend. LXXXIII; GA. CONST. art. 1, § IV, para. I; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; and UTAH CONST. art. I, § 29 for some of these now-defunct provisions. *See also States with Voter-Approved Constitutional Bans on Same-Sex Marriage, 1998–2008*, PEW RSCH. CTR. (Nov. 13, 2008), https://www.pewresearch.org/religion/2008/11/13/states-with-voter-approved-constitutional-bans-on-same-sex-marriage-1998-2008/ [https://perma.cc/NF96-JJDU] ("In the five years since [Massachusetts's high court legalized same-sex marriage], 26 states have amended their constitutions to ban gay marriage. Before the Massachusetts ruling, only three states had passed constitutional amendments prohibiting the practice . . . .").

163 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); *see, e.g.*, Jackie Fortier, *California Voters Enshrine Right to Abortion and Contraception in State Constitution*, NPR (Nov. 9, 2022, 1:39 AM), https://www.npr.org/2022/11/09/1134833374/california-results-abortion-contraception-amendment-midterms [https://perma.cc/J5PH-QKBW] ("Proposition 1 was a direct response to the U.S. Supreme Court's *Dobbs v. Jackson Women's Health Organization* ruling."); Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022, 12:23 AM), https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results [https://perma.cc/TA9Y-D589] ("The amendment adds another layer of protection in Vermont that abortion rights advocates say is necessary in the wake of the U.S. Supreme Court's decision to overturn *Roe v. Wade*."); Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022, 3:43 AM), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778

after *Kelo v. City of New London*,[164] following the Affordable Care Act,[165] and during periods of national anti-Catholic sentiment,[166] among other examples. State constitutions' amenability to prevailing national political winds means amendment initiatives and ratification elections attract significant investment from interest groups seeking to influence whatever nationally trendy amendment is on the ballot.[167] Strengthening the states' amendment procedures may insulate state constitutions against political fluctuation unless the issue becomes salient enough to warrant a constitutional amendment.

Constitutional amendments are favorite remedies for interest groups and those seeking to steel their views against the wavering of majorities. The Federal Constitution alone has had over 10,000 proposed amendments,[168] evidencing an unquenchable appetite for

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[https://perma.cc/A4A8-MZP7] ("The amendment vote all but ensures Michigan will remain a haven for abortion access in the midwest post-*Roe* . . . .").

164 545 U.S. 469 (2005); John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2125–26 (2013) ("[V]oters in eleven states approved significant constitutional amendments [responding to *Kelo*]. Seven states approved amendments in 2006, followed by Nevada in 2008, Texas in 2009, Mississippi in 2011, and Virginia in 2012." (footnotes omitted)).

165 Pub. L. No. 111-148, 124 Stat. 119 (2010); Alex Ebert, *Abortion Bans Trip over States' Past Efforts to Fight Obamacare*, BLOOMBERG L. (Aug. 22, 2022, 12:34 PM), https://www.bloomberglaw.com/bloomberglawnews/health-law-and-business/X823A78G000000 [https://perma.cc/J942-7N5P] ("Alabama, Arizona, Oklahoma, Ohio, and Wyoming added 'health care freedom' provisions to their constitutions."); *see also* ALA. CONST. art. I, § 36.04; ARIZ. CONST. art. XXVII, § 2; OKLA. CONST. art. II, § 37; OHIO CONST. art. I, § 21; WYO. CONST. art. I, § 38.

166 U.S. COMM'N ON C.R., SCHOOL CHOICE: THE BLAINE AMENDMENTS & ANTI-CATHOLICISM 5 (2007) (statement of Anthony R. Picarello, Jr., Vice President & Gen. Couns., Becket Fund for Religious Liberty) ("Blaine Amendments are state constitutional amendments that were passed in the latter half of the 19th Century out of the nativist sentiment then prevalent in the United States. They expressed and implemented that sentiment by excluding from government funding schools that taught 'sectarian' faiths (mainly Catholicism) . . . . Although Blaine's amendment narrowly failed, it triggered a broader movement to add similar amendments to state constitutions that did not already have them . . . . [T]he current total [is] approximately thirty-five.").

167 *See, e.g.*, Avery Kreemer, *Campaign Filings Show Nearly $20 Million Contributed to Official Issue 1 Campaigns; 84% from Outside Ohio*, DAYTON DAILY NEWS (July 28, 2023), https://www.daytondailynews.com/local/campaign-filings-show-how-millions-have-been-spent-for-against-ohio-issue-1/KKI3XBRZFNFLVOZNXI6EW2LFKY/ [https://perma.cc/U24A-XWAM]; *see also Ballot Measure Campaign Finance, 2022*, BALLOTPEDIA, https://ballotpedia.org/Ballot_measure_campaign_finance,_2022 [https://perma.cc/529M-X76V] (finding $1.1 billion contributed to statewide ballot measures, many of which included state constitutional amendment proposals); *2023 Ballot Measures*, BALLOTPEDIA, https://ballotpedia.org/2023_ballot_measures [https://perma.cc/43H5-5TUT] (finding $189.62 million contributed to off-year statewide ballot measures, many of which included state constitutional amendment proposals).

168 RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA, at xii (1993).

amendment. But Article V raises such high walls against the onslaughts of proposed amendments that only the most strongly supported hurdle the barrier. So interest groups and other entities with narrow political pursuits naturally turn to easier targets: state constitutions. As political gridlock paralyzes at the national level, and sometimes in the states, state constitutional amendments, especially ones that can pass through citizen initiatives,[169] become more and more tantalizing. Initiatives to amend constitutions are "increasing in number" and "in many states the incentive structure encourage[s] interest groups to propose constitutional amendments rather than statutes because the requirements and methods of disclosure to the voters [are] very similar."[170] Whenever a political moment of any import happens, state constitutional amendment proposals often follow. This phenomenon has prompted some scholars to argue that state constitutions do not reflect "distinctive state political cultures" but instead enshrine whatever "political forces prevail[ed] nationally at the time they were adopted."[171] If national forces and historical movements compose the primary influences on state constitutional creation, they surely affect the amendments states adopt as well. A few examples of recent, and historical, political winds that blew amendments into constitutions illuminate this phenomenon and emphasize the need to strengthen state amendment procedures to reestablish the canonical, fundamental nature of state constitutions lost since the Founding.[172] Detractors who argue that constitutional reactionism is a proper antidote to national controversy due to the sovereignty over constitutions resting with the people must contend with the fact that many of these amendments and initiatives are passed with such low voter turnout that they can hardly be considered the sovereign choice of the people.[173]

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169 *See* Daniel B. Rodriguez, *Change That Matters: An Essay on State Constitutional Development*, 115 PENN ST. L. REV. 1073, 1074 (2011) ("[T]he availability of direct constitutional change through the initiative system in many states obviously amplifies the persistent political considerations in the law.").

170 ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 391 (2009).

171 G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in* CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 86, at 3, 4.

172 Examples, a few highlighted for this Note, abound. In fact, "many of the provisions that pad later state constitutions in comparison to their federal and early state counterparts consist of deliberate public responses to specific acts of governmental malfeasance." GARDNER, *supra* note 84, at 27. Gardner goes on to explain how debt restrictions were adopted in response to "a series of disastrous public works expenditures," the bill title amendments resulting from the Yazoo scandal of 1795 that sold public lands to speculators at rock-bottom prices, and the many constitutional implementations of the Progressive Era all grew out of distinct controversies that found their resolution in state constitutional change. *See id.* at 28, 27–28.

173 *See, e.g.*, TARR, *supra* note 29, at 32 ("Although one might assume that popular ratification of a constitutional amendment indicates public agreement with the change, this

Perhaps one of the earliest national sentiments that produced a spate of ill-considered state constitutional amendments was the anti-Catholic view that washed over the country in the late nineteenth century. The infamous Blaine amendments resulted.[174] At the behest of President Ulysses Grant, Representative James Blaine proposed the Federal Blaine Amendment in 1875.[175] The amendment would have augmented the Establishment Clause to prohibit aid to "any religious sect."[176] After narrowly failing at the federal level, the states began adopting similar amendments motivated by anti-Catholic sentiment. By 1890, twenty-nine states had already adopted similar amendments to their constitutions.[177] For some states, Congress even demanded a Blaine-like provision to be in the state's constitution before it would admit it into the Union.[178] While the stringent amendment procedures of Article V prevented Congress from being overpowered by the national majoritarian bigotry, easier amendment processes in the states were no such match. States, of course, had varying procedures for amending their state constitutions at the time the Blaine amendments were sweeping state legislatures. But self-evidently none of them were as stringent as Article V's procedures.

The Blaine story reveals how majoritarian sentiment in response to a perceived political problem can have devastating effects on state constitutions when they are seen as automatic solutions to whatever ills the populace thinks need solving. Blaine amendments still produce

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may be a rash conclusion. . . . Amendments have been ratified in Louisiana by as few as 6 percent of registered voters, and figures from other states are not much better."). Florida's proposed right-to-privacy amendment was defeated in 1978 because it appeared on the ballot with other unpopular proposals but then easily passed only a few years later when those proposals did not appear alongside it. *See id.*

174 *See generally* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–74 (2020) (Alito, J., concurring).

175 Ethan Szumanski, *The Future of the Freedom of Religion on State No-Aid Provisions: The Effect of* Espinoza v. Montana Department of Revenue, 62 S. TEX. L. REV. 13, 17 (2022) ("President Grant . . . proposed a constitutional amendment to Congress 'that would deny public support to religious institutions.'" (quoting Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 670 (1998))).

176 Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556 (2003) (quoting H.R.J. Res. 1, 44th Cong., 4 CONG. REC. 205 (1st Sess. 1876)).

177 *See* Viteritti, *supra* note 175, at 673.

178 *See, e.g.*, Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 676–77 (requiring the state constitutional conventions of Montana, the Dakotas, and Washington State to put a Blaine Amendment provision into their constitutions that could not be amended without congressional consent). "Most of the states that adopted Blaine language did so without pressure from the federal government." DeForrest, *supra* note 176, at 573.

much litigation today,[179] and parental choice and religious schools are still some of their primary victims.[180] Strengthened state constitutional amendment procedures may not have held back all of the Blaine amendments. But at the very least, they may have provided more opportunity for deliberation and given the public more time and recourse to cool the bigotry and consider whether constitutions are proper repositories of perceived solutions to illusory fears. The Blaine amendments represented one of the first national pushes for state constitutional amendments. Even so, such treatment of state constitutions was not unprecedented. By the time the Blaine amendments burst on the constitutional scene, "state constitutions had already begun to evolve from basic charters of government and protections of rights to encompass, in addition, *policy* matters that could have been left to the state legislature."[181]

The most salient recent story of a national political controversy finding its way into state constitutions has been the response to *Dobbs v. Jackson Women's Health Organization*'s[182] overruling of *Roe v. Wade*.[183] Following *Dobbs*, every state has taken action to respond.[184] The controversy after *Dobbs* was virulent and strong enough to prompt pro-life and pro-choice advocates to immediately work to entrench their positions on the state level. Many have done so through passed or attempted state constitutional amendments.[185] The first election after *Dobbs* saw Michigan, California, and Vermont enshrine a right to abortion in their state constitutions.[186] At the same time, Kansas voters

179 See *Blaine Info Central: Dismantling Discriminatory Blaine Amendments*, BECKET, https://www.becketlaw.org/research-central/blaine-amendments-info-central/ [https://perma.cc/5V9P-49PR] for a long list of cases turning on state Blaine amendments. *E.g.*, *Espinoza*, 140 S. Ct. 2246; Taxpayers for Pub. Educ. v. Douglas Cnty. Sch. Dist., 351 P.3d 461 (Colo. 2015); Moses v. Ruszkowski, 458 P.3d 406 (N.M. 2018).

180 *See Blaine Info Central*, *supra* note 179 ("[T]hey are now used to discriminate against any and all religions . . . . [M]any of them limit educational choices for children . . . .").

181 WILLIAMS, *supra* note 170, at 362.

182 142 S. Ct. 2228 (2022).

183 410 U.S. 113 (1973).

184 Gabrielle M. Etzel, *One Year After* Dobbs*: The Abortion Battle in All 50 States*, WASH. EXAM'R (June 23, 2023, 9:00 AM), https://www.washingtonexaminer.com/policy/healthcare/states-abortion-legislation-post-dobbs [https://perma.cc/G3UF-866J] ("After the overturning of *Roe v. Wade*, each state has acted in some capacity to address abortion policy . . . ."); *see also* Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html [https://perma.cc/X2LZ-5TCV] ("Both sides of the abortion debate will also devote new energy . . . into efforts to explicitly protect or restrict abortion protections in state constitutions, which are far easier to amend than their federal counterpart.").

185 *See supra* note 184.

186 *See* CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; VT. CONST. ch. I, art. 22; Laura Kusisto & Jennifer Calfas, *Abortion-Rights Supporters Prevail in Midterm Ballot Measures*,

failed to amend their state constitution to overturn a state supreme court decision protecting abortion,[187] and Kentucky voters rejected a constitutional amendment explicitly disclaiming a state constitutional right to abortion.[188] Many other states are expected to see abortion-amendment proposals appear on the ballot in November 2024.[189] Following the Affordable Care Act's passage in 2010,[190] five states reacted and passed amendments upholding choice in healthcare.[191] These reactionary amendments have come back in the current abortion debate to exhibit a particularly interesting double dose of amendment reactionism. A Wyoming district judge blocked an abortion-restriction law because it violated Wyoming's post-Obamacare constitutional amendment guaranteeing the right to make one's own healthcare decisions.[192]

WALL ST. J. (Nov. 9, 2022, 6:36 PM), https://www.wsj.com/articles/abortion-rights-supporters-prevail-in-midterm-ballot-measures-11667986139?mod=article_inline [https://perma.cc/6DJD-LFXN].

187 *See* Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment [https://perma.cc/VR4P-82WS].

188 Melissa Chan, *Kentucky Voters Reject Anti-abortion Ballot Measure, NBC News Projects*, NBC NEWS (Nov. 9, 2022, 12:32 PM), https://www.nbcnews.com/politics/2022-election/kentucky-voters-reject-anti-abortion-ballot-measure-rcna56313 [https://perma.cc/9Y2G-63UW].

189 *See* Adam Edelman, *Abortion Rights Groups Seek Ballot Measures in 9 More States in 2024*, NBC NEWS (Nov. 22, 2023, 8:00 AM), https://www.nbcnews.com/politics/2024-election/abortion-rights-groups-seek-ballot-measures-9-states-2024-rcna125177 [https://perma.cc/5F9W-GL2E] (noting Nebraska, South Dakota, Florida, Nevada, Arizona, Maryland, New York, Colorado, and Missouri will all likely have abortion ballot initiatives in the 2024 election); Kurt Erickson, *Group Seeking Referendum on Abortion in Missouri Begins Collecting Signatures*, ST. LOUIS POST-DISPATCH (Nov. 20, 2023), https://www.stltoday.com/news/local/government-politics/group-seeking-referendum-on-abortion-in-missouri-begins-collecting-signatures/article_c17eef44-87c8-11ee-a7a0-af352645d177.html [https://perma.cc/X54V-FMT3]; Amelia Templeton, *Oregon Democrats Propose Constitutional Amendment on Abortion, Same-Sex Marriage, Gender-Affirming Care*, OPB (Apr. 19, 2023, 2:08 PM), https://www.opb.org/article/2023/04/19/oregon-constitutional-amendment-proposal-abortion-gender-affirming-care-marriage-election-2024/ [https://perma.cc/7D6M-G3K4]. In the spirit of political reactionism, the Oregon amendment also seeks to constitutionalize gender-affirming care and same-sex marriage for fear of further overruling at the Supreme Court or "[c]onservative and Christian activists[']" recent push "to pass a slate of bills in other states under the umbrella of parents' rights, which have taken aim at gender-affirming care, drag performers and transgender athletes." *See id.*

190 Pub. L. No. 111-148, 124 Stat. 119 (2010).

191 *See* Jacob Gardenswartz, *Red States' Anti-Obamacare Laws Can Be Weaponized Against Their Abortion Bans*, NEW REPUBLIC (Aug. 8, 2022), https://newrepublic.com/article/167309/anti-obamacare-laws-abortion-bans [https://perma.cc/5W6A-7L93].

192 Annika Kim Constantino, *Wyoming Abortion Ban Blocked Due to Obamacare-Era Amendment*, CNBC (Mar. 24, 2023, 3:29 PM), https://www.cnbc.com/2023/03/24/wyoming

Ohio's recently passed abortion amendment showcases the public's attachment to its ability to easily amend constitutions in reaction to national controversies. Ohio amended its state constitution to enshrine abortion rights.[193] Ohio provides for a citizen-initiative amendment process that is one of the easiest in the nation. An amendment proposal will appear on the next ballot if ten percent of the total number of people who voted for the governor in the previous election sign an initiative petition.[194] Once on the ballot, a simple majority may ratify the amendment.[195] Republican leaders in Ohio sought to amend the state constitution to be more difficult to amend in anticipation of an abortion amendment.[196] They even scheduled a special election in August ahead of the November abortion vote.[197] The proposal would have increased the ratification threshold to sixty percent,[198] which would put Ohio out of step with most other ratification thresholds.[199] Voters rejected the amendment on amendments and affirmed that the pervasive appeal of direct democracy, even for constitutional matters, persists.[200] A similar Republican-led measure has been proposed in Missouri[201] while deeper consideration of state constitutional

-abortion-ban-blocked-due-to-obamacare-era-amendment.html [https://perma.cc/FCN4-7DCZ].

193 Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023, 11:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 [https://perma.cc/FCN4-7DCZ].

194 48 COUNCIL OF STATE GOV'TS, THE BOOK OF STATES 13 tbl.1.3 (2016).

195 *Id.*

196 *See* Laura Barrón-López, Gabrielle Hays, Ali Schmitz & Matt Loffman, *Republicans Work to Thwart State Constitutional Amendments Protecting Reproductive Rights*, PBS NEWS HOUR (May 11, 2023, 6:25 PM), https://www.pbs.org/newshour/show/republicans-work-to-thwart-state-constitutional-amendments-protecting-reproductive-rights [https://perma.cc/R5NE-RC8D].

197 *Id.*

198 *Id.*

199 *See Issue I Doesn't Align Ohio with Other States' Constitutional-Amendment Powers. It Puts Ohio in a Difficulty Category All Its Own: Editorial*, CLEVELAND.COM (Jul. 7, 2023, 5:58 AM), https://www.cleveland.com/opinion/2023/07/issue-i-doesnt-align-ohio-with-other-states-constitutional-amendment-powers-it-puts-ohio-in-a-difficulty-category-all-its-own-editorial.html [https://perma.cc/FY43-5Z3R].

200 *See* Jo Ingles, *Ohio Voters Resoundingly Rejected a Proposed Change to the State's Constitution*, NPR (Aug. 9, 2023, 5:23 AM), https://www.npr.org/2023/08/09/1192866153/ohio-voters-resoundingly-rejected-a-proposed-change-to-the-state-s-constitution [https://perma.cc/E2UM-24YZ].

201 *See* Jason Rosenbaum, *Missouri Republicans Are Still Trying to Make the State Constitution Harder to Amend*, ST. LOUIS PUB. RADIO (June 20, 2023, 3:00 AM), https://www.kcur.org/politics-elections-and-government/2023-06-20/missouri-republicans-are-still-trying-to-make-the-state-constitution-harder-to-amend [https://perma.cc/QMH7-HEEK].

amendment procedures spreads in the wake of the clear and prevalent political reactionism of the current moment.[202]

Unfortunately, these efforts to heighten ratification thresholds themselves appear blatantly political and reactionary.[203] Republicans and social conservatives traditionally embraced using easy amendment procedures to enact their favored policies. As recently as 2016, "[s]ocial conservatives . . . view[ed] the constitutional initiative process as a means of placing issues on the policy agenda and, at times, securing favorable outcomes."[204] Yet when those same easy amendment procedures are used for opposite goals, conservatives find themselves the defenders of constitutional honor. Conservatives successfully harnessed easy amendment procedures to enshrine reactionary traditional-marriage amendments in state constitutions. Beginning in

202 *See Arkansas Issue 2, 60% Supermajority Vote Requirement for Constitutional Amendments and Ballot Initiatives Measure (2022)*, BALLOTPEDIA, https://ballotpedia.org/Arkansas_Issue_2,_60%25_Supermajority_Vote_Requirement_for_Constitutional_Amendments_and_Ballot_Initiatives_Measure_(2022) [https://perma.cc/NNA8-AXS7] (Arkansas rejecting a 60% threshold with 59% voting "no"); John Dinan, Commentary, *State Battles Over Abortion Are Leading to State Constitutional Amendments | Analysis*, PA. CAP.-STAR (Apr. 16, 2023, 6:30 AM), https://www.penncapital-star.com/commentary/state-battles-over-abortion-are-leading-to-state-constitutional-amendments-analysis/ [https://perma.cc/4NBG-XMS9] ("[O]pponents of abortion rights are considering making changes to amendment rules to make it more difficult for amendments to get approved."); Abe Kwok, *Why Not Raise the Bar on Ballot Measures to Change the Arizona Constitution?*, AZ CENT. (Aug. 15, 2023, 11:25 AM), https://www.azcentral.com/story/opinion/op-ed/abekwok/2023/08/15/arizona-tougher-change-state-constitution-ballot-initiative/70593533007/ [https://perma.cc/SMD2-AKNJ] ("[R]aising the approval threshold to 60% to change the state constitution . . . isn't outrageous."); *South Dakota Constitutional Amendment C, 60% Vote Requirement for Ballot Measures Increasing Taxes or Appropriating $10 Million Measure (June 2022)*, BALLOTPEDIA, https://ballotpedia.org/South_Dakota_Constitutional_Amendment_C,_60%25_Vote_Requirement_for_Ballot_Measures_Increasing_Taxes_or_Appropriating_%2410_Million_Measure_(June_2022) [https://perma.cc/K37J-Q3PP] (South Dakota rejecting a 60% threshold for certain topics with 67% voting "no").

203 *See* Edward L. Lascher Jr. & Joshua J. Dyck, *Ohio Voters Kept It Easy to Pass a Constitutional Amendment Protecting Abortion—But Also for the Majority to Someday Limit Other Rights*, CONVERSATION (Aug. 17, 2023, 8:33 AM), https://theconversation.com/ohio-voters-kept-it-easy-to-pass-a-constitutional-amendment-protecting-abortion-but-also-for-the-majority-to-someday-limit-other-rights-211329 [https://perma.cc/T7U8-N53L] ("Both advocates and opponents saw the voting threshold change as potentially critical to the fate of an Ohio abortion rights measure already slated to be on the ballot in November 2023."); Patrick Marley & Rachel Roubein, *Ahead of Abortion Vote, Ohioans Weigh Making It Harder to Amend Constitution*, WASH. POST (Aug. 6, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/08/06/ohio-august-election-abortion-state-constitution/ [https://perma.cc/AUV4-PU6E] ("Supporters of abortion rights and other advocates for keeping the citizen initiative process intact have accused Republican lawmakers of trying to thwart the will of the majority and weaken voters' voices. . . . The special election . . . has turned into a proxy fight over abortion . . . .").

204 Dinan, *supra* note 147, at 307.

1998, thirty states passed constitutional amendments that addressed the issue in some fashion, often by upholding the traditional definition of marriage as between one man and one woman or banning same-sex unions.[205] While generalized reactions to the growing same-sex movement spurred the amendments, the Massachusetts Supreme Judicial Court's 2003 decision holding that denial of same-sex marriage licenses violated the state constitution sparked a wave of amendments.[206] States flooded voters with proposed amendments in 2004 and 2006.[207]

The conservative-led reaction following *Kelo v. City of New London* offers another excellent example of amendment reactionism.[208] The Supreme Court's controversial *Kelo* decision permitted eminent domain for a public purpose.[209] Following the narrow decision, states rushed to pass legislation and reactionary state constitutional amendments steeling them against low eminent-domain requirements.[210] So again, politically motivated groups used easy amendment procedures, regardless of the wisdom of the underlying policy goals, to enshrine national consternation into fundamental law.[211] The success of this amendment reactionism led social conservatives to vehemently oppose

205 *See* MOVEMENT ADVANCEMENT PROJECT, LGBTQ POLICY SPOTLIGHT: UNDERNEATH *OBERGEFELL*: A NATIONAL PATCHWORK OF MARRIAGE LAWS 2–3 (2022); *Hawaii Gives Legislature Power to Ban Same-Sex Marriage*, CNN (Nov. 3, 1998), https://www.cnn.com/ALLPOLITICS/stories/1998/11/04/same.sex.ballot/ [https://perma.cc/X2UB-C4WM].

206 *See* John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1018–19 (2007) ("Out of a concern with preventing future decisions of this sort by their own state courts, voters in thirteen states in 2004 approved amendments preventing imposition of same-sex marriage . . . . Two more states approved such amendments in 2005 . . . . And voters in another eight states approved amendments in 2006 . . . ." *Id.* at 1019).

207 *See id.*

208 *See* John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 39 (2016) (finding state constitutional amendments to have been frequent vehicles for responding to *Kelo* and noting twelve states passed amendments in the years following *Kelo*).

209 Kelo v. City of New London, 545 U.S. 469, 484 (2005) (holding that because the eminent-domain plan "unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment").

210 *See* Wesley W. Horton & Brendon P. Levesque, Kelo *Is Not* Dred Scott, 48 CONN. L. REV. 1405, 1414 (2016) ("*Kelo* has elicited a public uproar that would make Chicken Little proud."); Dinan, *supra* note 208, at 39.

211 Interestingly, the ease of amending the state constitution turned out to be a much better predictor of whether or not the state passed a traditional-marriage amendment than was the voting public's view of same-sex marriage in that state. *See* Arthur Lupia, Yanna Krupnikov, Adam Seth Levine, Spencer Piston & Alexander Von Hagen-Jamar, *Why State Constitutions Differ in Their Treatment of Same-Sex Marriage*, 72 J. POL. 1222, 1222 (2010). This phenomenon underscores the truly substantive effect easy amendment procedures can have on state constitutions and how arguments that easy amendment procedures are more representative of the state's population may not be as sound as they appear on the surface.

"efforts to increase barriers to amending state constitutions."[212] Today though, those wishing to make state constitutions harder to amend are "almost entirely from one party (Republican) and wish to do so mostly because of one issue (abortion)."[213] Consequentially, voters, no matter the wisdom of strengthening amendment procedures, simply see efforts to do so as "smack[ing] of hypocrisy" because "[o]nly now, when the rules aren't yielding desired results, do they question those rules' legitimacy."[214]

Existing state constitutional amendment procedures encourage political reactionism in state constitutional law. Since the late nineteenth century, political controversies on the national stage have caused states to rush to amend their constitutions on their preferred side of the issue. Of course, states should and must be allowed to put fundamental principles in their constitutions, even if such provisions come about through national conversations. But, encouraging a culture of reactionism in state constitutions both undermines the purpose of constitutions and prompts voters to view them as simple repositories of "important things." When states rashly pass amendments, the deliberation required for matters of constitutional caliber is lacking. Sometimes, those amendments even come back years later to produce completely unintended results. The use of amendments following the Affordable Care Act as vehicles to strike down abortion bans exemplifies this lack of deliberation. Strengthening amendment procedures would guard against knee-jerk reactions and produce better-deliberated amendments more geared toward content deserving of constitutional inclusion. As the heightened procedures produce less reactionism, the public may gradually come to see constitutions less as vehicles for its favorite policies but instead as venerable, organizing documents of governmental principles. More constitutional constitutions would surely result. Some states understand the pitfalls of such a system produced by easy amendment procedures. However, in reacting against the reactionary amendment trend, the former champions of easy amendments are now their greatest foe. Voters see through the motivation. Such raw stonewalling puts even further distaste in the public's mouth for strengthened amendment procedures. Nevertheless, state amendment procedures should be strengthened to guard against the depredations of raw political pursuits living in state constitutions. Yet

212 Dinan, *supra* note 147, at 308.

213 Adam Carrington, *Making State Constitutions Harder to Amend: Good Idea, Bad Timing*, WASH. EXAM'R (May 17, 2023, 6:00 AM), https://www.washingtonexaminer.com/restoring-america/patriotism-unity/making-state-constitutions-harder-to-amend-good-idea-bad-timing [https://perma.cc/W5LF-YJ68].

214 *Id.*

for now, "the content of the state constitution itself [will be] a battleground for hot-button, highly contested matters."[215]

CONCLUSION

State constitutions are filled with provisions that surely do not belong in constitutions. Instead of written restraints on government crystallizing fundamental, organizing principles of a polity, they hold lengthy and detailed provisions reminiscent of a statutory codebook. These oddities are often caused by easy amendment procedures for state constitutions. States can largely amend their constitutions with abandon. And amend they have. Such treatment of state constitutions produces a culture of amendment in states that causes the people to view them not as venerable and principled documents enshrining how they restrain their state governments, but instead as vehicles to react to national controversies or methods to safeguard their favorite policy preferences.

However, state constitutions should not be policy repositories. Instead, they should be treated as constitutions. One way to encourage such treatment is to strengthen their amendment procedures. Doing so would revive the veneration due to constitutions as fundamental law and encourage the enshrinement of principles and not policies. Further, strengthening amendment requirements would shield state constitutions from political reactionism. National political moments often produce a spate of state constitutional amendments. Such reactionism denies deliberation and undermines constitutional reverence. Scholars and the public often view state constitutions as lesser than the Federal Constitution because they embrace lesser matters in their text. This reactionism may largely dissipate if states strengthen their procedures.

This Note does not analyze the best methodology for amendment provisions. The answer likely begins with heightening ratification thresholds to ensure only the most agreed-upon and fundamental provisions make the cut.[216] But it does highlight the current amendment procedures, call for a return of state constitutions to fundamental law, and recognize that political reactionism comes from easy amendment processes. "Intuition suggests that it *should* be significantly more difficult to adopt a constitutional amendment than a statute. A state

215 WILLIAMS, *supra* note 170, at 360.

216 *See* Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 149 (1995) ("[O]f the 100 initiative amendments that appeared on state ballots between 1978 and 1988, only nine would have been adopted under a two-thirds rule as opposed to the thirty-six that were in fact adopted under the prevailing simple majority rules.").

constitution is, after all, a fundamental law."[217] States should give effect to this intuition and strengthen their constitutions against the procedures that currently undermine their core pursuits and turn them into reactionary repositories of political controversies.

217 *Id.* at 146.