

Vol. 1

# State Constitutions

for the Twenty-first Century

The Politics of State Constitutional Reform

Edited By  
G. Alan Tarr and Robert F. Williams

State Constitutions for  
the Twenty-first  
Century

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Vol. 1

SUNY series in American Constitutionalism  
Robert J. Spitzer, editor

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G. Alan Tarr  
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Robert F. Williams

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# Introduction

G. Alan Tarr

If one compares American state constitutions with their federal counterpart, one is immediately struck by how differently the documents deal with constitutional change. Although the framers of the federal Constitution wanted to make constitutional change easier than it had been under the Articles of Confederation, they remained wary of an excessive “mutability of the laws,” and they worried that too frequent constitutional change would undermine popular attachment to the fundamental law.<sup>1</sup> The Federal Constitution makes no express provision for its own replacement—any convention proposing a new national constitution would, like the Philadelphia Convention of 1787, be operating on the fringes of legality. It provides two mechanisms for proposing amendments (proposal by Congress or by constitutional convention), but it requires supermajorities in both instances: a two-thirds majority in each house of Congress to propose an amendment or petitions from two-thirds of the states to call for a convention. Finally, the Constitution requires an extraordinary, geographically dispersed majority (three-quarters of the states) to ratify proposed amendments.<sup>2</sup>

In contrast, from the outset most states made the amendment of their constitution, the replacement of their constitutions, or both relatively easy, and over time the general trend has been to facilitate state constitutional amendment and replacement.<sup>3</sup> Many states expressly authorize the revision of their constitutions, and altogether the states have adopted 145 constitutions, an average of almost three per state.<sup>4</sup> (Louisiana holds the dubious distinction of having adopted eleven constitutions in less than two centuries, prompting one wag to describe constitutional change in Louisiana as “sufficiently continuous to justify including it with Mardi Gras, football, and corruption as one of the premier components of state culture.”<sup>5</sup>) The states have also developed an array of methods for proposing constitutional amendments—constitutional convention, proposal by



the legislature, proposal by constitutional commission, and proposal by initiative—and many state constitutions authorize multiple methods for proposing amendments. Most states have also adopted a simple majoritarian system for ratifying amendments—a majority of those voting on the proposal, regardless of turnout or voter drop-off, suffices for ratification. The effect of these arrangements is seen in the frequency with which states amend their constitutions. Current state constitutions contain more than 5,000 amendments, and most have been amended more than 100 times, Alabama's 1901 constitution more than 740 times.<sup>6</sup> If anything, the pace of amendment appears to have quickened in recent years—from 1994 to 2001 the states adopted 689 constitutional amendments.<sup>7</sup>

Given the frequency of constitutional change, it might seem odd to devote a volume to the obstacles to state constitutional reform and how they might be overcome. Yet despite the proliferation of constitutional amendments—or perhaps to some extent because of it<sup>8</sup>—state constitutional reform has been relatively infrequent during the twentieth and early twenty-first centuries. This is reflected in the decline in constitutional conventions: whereas the states convened 144 from 1800 to 1900, they called only 64 since then, and none since 1984. And whereas the states adopted ninety-four constitutions during the nineteenth century, they have adopted only twenty-three since then and only one in the past quarter century.<sup>9</sup>

Of course, it is possible to introduce significant constitutional reform without calling a convention or adopting a new constitution—amendments proposed by constitutional commissions, by initiative, or by state legislatures may also produce constitutional reform. But in thinking about constitutional reform, it is important to distinguish it from the ordinary constitutional change that is so prevalent in the states. Any alteration of a state constitution, no matter how technical or minor, qualifies as constitutional change. In contrast, constitutional reform involves a more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of state government or the public policy of the state.<sup>10</sup> The replacement of one constitution by another obviously qualifies as constitutional reform. So too may major constitutional amendments or interconnected sets of amendments. However, most constitutional change in the states does not qualify. Most amendments involve relatively minor adjustments, attempts to deal with specific problems without altering (or even considering) the broader constitutional founda-

tions of the state. This is particularly true of those constitutional amendments that are proposed by state legislatures (and state legislatures are the most prolific source of amendments). This is hardly surprising. From firsthand experience state legislators understand the adjustments needed in the law of the state, many of which—given the level of detail in state constitutions—must be accomplished via amendment. In addition, state legislators benefit from the political status quo and therefore are usually reluctant to introduce amendments promoting fundamental reform, as such amendments could jeopardize their position.

It may perhaps advance our understanding of the distinction between ordinary constitutional change and constitutional reform to recall the analogous distinction drawn by state courts between constitutional amendment and constitutional revision. Most states that employ the constitutional initiative permit it to be used to propose constitutional amendments but not constitutional revisions, and opponents of far-reaching initiatives have challenged them in court, asserting that the changes they contemplate amount to a revision of the state constitution. In ruling on such challenges, state judges have had to identify criteria for distinguishing amendments from revisions. Thus, the California Supreme Court noted that “our revision/amendment analysis has a dual aspect, requiring us to examine both the quantitative and qualitative effects of the measure on our constitutional scheme. Substantial changes in either could amount to revision.”<sup>11</sup> Similarly, the Florida Supreme Court asserted that an amendment “if approved would be complete within itself, relate to one subject and not substantially affect any other section or article of the Constitution or require further amendments to the Constitution to accomplish its purpose.”<sup>12</sup>

The distinction introduced here between constitutional reform and ordinary constitutional change, like the distinction between constitutional amendment and constitutional revision, is admittedly not an exact one. There will doubtless be close cases, and the line between constitutional reform and ordinary constitutional change is hardly precise. Nonetheless, the distinction is important because it underlines why frequent change is not the same as fundamental change. It also highlights why constitutional reform remains a crucial issue in the states.

It may well be, as the Virginia Declaration of Rights asserts, “[t]hat no free government, or the blessings of liberty, can be preserved to any people but . . . by a frequent recurrence to fundamental principles.”<sup>13</sup> But even if this is not the case, in the first decade of the twenty-first century,

reconsideration of the foundations of state constitutions is particularly timely. For one thing, we are asking more of the states than we have in the past. No longer are the states merely called on to address their traditional responsibilities. The federal government has devolved new responsibilities for policy development and implementation to the states, both because of budgetary problems at the national level and because of a perception that some endemic problems might be more effectively addressed at the state level.<sup>14</sup> State citizens too have increased their demands and expectations. The states are therefore being expected to address new problems and to generate novel solutions for long-standing, intractable ones. Are the states up to the challenge? During the 1960s and 1970s, various commentators raised questions about state governmental capacity, about whether the states had the ability to manage and implement programs to deal with their pressing problems.<sup>15</sup> These concerns about state capacity led to several noteworthy innovations, ranging from strengthening the governors' appointment, personnel, and budgetary powers to professionalizing state legislatures and consolidating state bureaucracies.<sup>16</sup> Despite these steps, questions about state capacity persist today. Because the states' constitutional arrangements have a major impact on state governmental capacity, constitutional reform may be crucial in determining how effectively the states meet their new responsibilities.

In addition, many state constitutions are quite frankly in need of major overhaul or replacement. As noted, the frequency of amendments to state constitutions has tended to obscure the infrequency of fundamental change, particularly during the twentieth and early twenty-first centuries. More than two-thirds of the states now operate under constitutions that are more than a century old. Of course, there is nothing intrinsically wrong with "old" constitutions—the federal Constitution was drafted more than two centuries ago, and few would wish to see it replaced. Indeed, one might argue that for constitutions, durability is a virtue rather than a vice. Yet, unlike the federal Constitution, contemporary state constitutions do not continue in operation because of popular veneration for the document or for its drafters—indeed, according to one survey, only 52 percent of respondents even knew that their state had a constitution.<sup>17</sup> Moreover, there are several reasons why these older state constitutions may be ripe for reexamination.

First, most existing state constitutions, written in the latter half of the nineteenth century, were not designed for the long haul. Their drafters by and large shared the Jeffersonian belief in constitution-making as a pro-

gressive enterprise.<sup>18</sup> Instead of emphasizing constitutional continuity and deference to the wisdom of the past, they asserted that the practices and institutional arrangements embedded in state constitutions needed to be constantly readjusted in light of changes in circumstances and in political thought. They also maintained that the experience of self-government in America constantly expanded the fund of knowledge about constitutional design, so that later generations were better situated to frame constitutions than were their less experienced, and hence presumably less expert, predecessors. Whether or not they were correct, this affected how they did their work and what they expected future generations to do with it. As William Andrews Clark, the chairman of Montana's 1889 convention, put it: "As the generations come and go, developing rapidly successive changes and conditions, requiring new methods and additional powers and restraints, we may expect that the genius and wisdom of our successors will eliminate, supplement, and amend" the work of the 1889 convention.<sup>19</sup> Thus, the very drafters of existing state constitutions expected that their work would be subject to periodic reexamination and reform and welcomed that prospect.

Second, the very character of current state constitutions implies the need for periodic reform. In comparison with the federal Constitution, state constitutions tend to be far more detailed and far more willing to elevate policy pronouncements to constitutional status.<sup>20</sup> For example, whereas article III of the Federal Constitution uses only 377 words to establish the federal judiciary, article VI of the New York Constitution uses 15,310 words to establish the state judiciary.<sup>21</sup> This propensity to detail and to constitutionalize legislation is particularly common in constitutions that were drafted during the late nineteenth century (when twenty-six of today's state constitutions were written) or that incorporate the constitutional initiative (as do eighteen state constitutions). Yet it is apparent in most other state constitutions as well, reflected in the fact that half of state constitutions are more than 25,000 words long. My point here is not to open a debate on whether it is wise to include extensive detail in state constitutions or to constitutionalize policy matters. That topic has been extensively debated, and there are respectable arguments on both sides of that issue.<sup>22</sup> Rather, my point is that the decision on constitutional detail, whichever way one goes, has foreseeable consequences. For the American states, which have by and large repudiated constitutional minimalism and embraced constitutional detail, the effects of that choice are highlighted in Chief Justice John Marshall's famous opinion in

*McCulloch v. Maryland* (1819). As Marshall observed, in order for a constitution to “endure for ages to come,” it could not “partake of the prolixity of a legal code,” but would rather have to confine itself to marking “great outlines” and “important objects,” lest it lose the capacity to respond to new situations.<sup>23</sup> Detail is the enemy of flexibility, and flexibility is the key to durability. In opting for constitutional maximalism the states recognized that, as changes in circumstances and attitudes occurred, their constitutions would become outdated and in need of reform. It is not surprising, therefore, that there has been little reverence for the founders of state constitutions and even less reluctance to tinker with their handiwork. The states have made it easy to introduce needed changes, and most state constitutions have been amended more than once for every year they have been in operation.

If a constitutional amendment indicates a defect in a constitution, then one could conclude from this proliferation of amendments that the older state constitutions—and the younger ones too, for that matter—have not survived because they have successfully solved the problems besetting the states. Yet it is also possible to view the frequent constitutional amendment in the states positively, treating it as an alternative mechanism for constitutional reform, the twentieth century’s analogue to the nineteenth’s reliance on constitutional conventions and constitutional revision. This seems far too sanguine an assessment. Although in some instances states have pursued fundamental reforms via amendment, usually amendment is not an adequate substitute for more comprehensive reform. Indeed, constitutional amendments typically correct specific problems in documents that were designed to meet the problems of another era, without consideration of the broader constitutional design.<sup>24</sup> Moreover, in many states the proliferation of piecemeal amendments, adopted at various times by majorities with quite different political agendas, has destroyed the coherence of state constitutions as plans of government.

Third, in assessing the need for state constitutional reform, one must acknowledge the distrust and dissatisfaction felt by citizens in many states with the governments created by their constitutions. This is not to say, of course, that state constitutions are to blame for all the deficiencies of state governments. Yet neither are they blameless—state constitutions do make a difference. This dissatisfaction is reflected in low voter turnout for state elections and in poll data on public attitudes toward state government.<sup>25</sup> These certainly belie any notion that the state constitutions have survived because of popular satisfaction with the governments they have created.

The dissatisfaction is indirectly reflected in the increasing resort to direct democracy for policy making in the states, which indicates a perception that state institutions are not appropriately responsive to citizen concerns.<sup>26</sup> Popular distrust is reflected as well in the adoption of constitutional amendments designed to chasten or thwart the institutions of state government by limiting the tenure of officials, reducing their powers, and transferring their policy-making responsibilities to the people. These reforms range from term limits for state legislators to constitutional restrictions on increases in the rate of state spending to the demand for referenda on all new taxes.<sup>27</sup>

Interestingly, whereas ordinary politics under state constitutions often produces popular distrust and disinterest, constitutional reform can sometimes have the opposite effect. In the past, campaigns for constitutional reform have had a transforming effect on many of those involved in them. For example, although many delegates to state constitutional conventions have been political novices, their experience as delegates has propelled many to pursue careers in public service. The delegates often cite the convention experience as among the most important in their lives, a chance to be statesmen rather than politicians. Ordinary citizens who have become involved in campaigning for constitutional initiatives also testify about how much they learned from the experience and how committed they became to staying involved in the political life of the state as a result.<sup>28</sup> For voters, too, constitutional reform can have an energizing effect. Data in several states that use the constitutional initiative indicate that it increases voter interest and turnout on election day.<sup>29</sup>

Finally, constitutional reform—particularly the adoption of a new constitution—can be a source of pride and a unifying force. Looking beyond the borders of the United States, one sees this in South Africa, where the postapartheid constitution has become a potent symbol of self-government and of national unity.<sup>30</sup> This is likewise true in several of the countries that emerged from communist rule in the late twentieth century. Within the United States, similar experiences are found in states such as New Jersey and Montana that adopted constitutions in the last sixty years.<sup>31</sup>

The chapters in this volume survey recent efforts to introduce constitutional reform, analyzing the factors that contributed to the success or failure of those efforts. These case studies have scholarly interest, as far too little is known about the politics of state constitutional reform and about

how that political activity fits into the broader scheme of state politics. The studies also have practical import for constitutional reformers, because their authors draw from the case studies broader lessons that might inform reform efforts in other states. Let me highlight key elements in each of these studies.

The Florida Constitution of 1968 provides for a unique system of constitutional reform, mandating the periodic establishment of a revision commission that has the authority to take its proposals directly to the voters, without legislative approval or review. In her chapter Rebecca Mae Salokar assesses Florida's experience with this innovative mechanism. She notes that in 1978, the first time the commission proposed amendments, none of its proposals were ratified. In 1998, in contrast, voters endorsed eight of the commission's nine proposals. In part, of course, differences in the substance of what was proposed explain the divergent outcomes. In part, too, factors outside the control of the commission may have influenced the results—in 1978, an initiative legalizing casino gambling was also on the ballot, prompting in response a major “vote no” campaign that affected the prospects of all ballot propositions. Yet in part differences in process help account for the commission's greater success in 1998. The 1998 commission better reflected the state politically and demographically, so there were no groups that opposed the commission's recommendations because they felt excluded from the process. The 1998 commission made a major effort to consult the public prior to developing its proposals, which gave them a greater legitimacy. And the 1998 commission had sufficient funding to publicize and explain its proposals prior to ratification, thus ensuring an informed decision. Salokar concludes that the learning experience from 1978 to 1998 bodes well for the continued success of the revision commission in the future.

In the mid-1990s the California Constitutional Revision Commission proposed a set of major constitutional amendments to the California Legislature, but the Legislature rejected all its proposals. The defeat of the Commission's proposed amendments stands in marked contrast to the virtually continuous amendment of the California Constitution via the constitutional initiative (as well as by amendments proposed by the Legislature). In his chapter Bruce Cain concludes that the disparity reflects the difficult set of veto points that proposals for constitutional revision must navigate, in contrast with the relatively straightforward path for constitutional initiatives. Once initiative proponents gather sufficient signatures, an initiative goes directly on the ballot, bypassing the legislature,

and merely needs to secure popular approval. In contrast, constitutional revision requires that a proposal secure the approval of the commission, of the legislature, and of the electorate, and at each point affected groups can block adoption. In theory the commission seems to offer a better approach to constitutional reform, with extended deliberation and an array of proposals closely tied to a set of articulated values, in contrast with the piecemeal and disjointed change produced by the initiative process. But in practice, Cain concludes, for commissions to be effective, they may need to tailor their proposals to suit those in a position to prevent adoption of the proposals, rather than submitting what they might view as simply the “best” recommendations.

Virginia in 1970 adopted a new constitution that was drafted by an eleven-member commission and revised by the Virginia General Assembly before submission to the electorate for ratification. The success of Virginia’s campaign stands in sharp contrast to the contemporaneous failure of reform efforts in New York, Rhode Island, Maryland, New Mexico, Oregon, Arkansas, and Idaho. In his chapter, A. E. Dick Howard analyzes why the constitutional reformers in Virginia succeeded and considers how political changes have altered the prospects for reform in the early twenty-first century. Howard credits the political realism of the drafters of the Virginia Constitution, who at times sacrificed theoretical elegance in order to avoid making unnecessary enemies and avoided altogether some issues that might have antagonized important blocks of voters. He also emphasizes the crucial role played by Virginians for the Constitution, a privately funded organization that led the campaign for ratification. This group created a grassroots network throughout Virginia, bringing information about the constitution to voters and countering the claims of opponents. The group also created a climate for approval by demonstrating the nonpartisan character of the constitution through endorsements from political leaders of all ideological stripes and from diverse community groups. Howard concludes that given the increased partisanship of contemporary politics, with powerful single-issue groups and pervasive popular distrust of government, the task of constitutional reform would be far more difficult today than it was in the past.

Alabama’s 1901 Constitution is the nation’s most amended, with more than 700 amendments as of 2003. Yet despite its manifest deficiencies, the numerous efforts in Alabama to promote constitutional reform, which began as early as 1915, have faltered. In his chapter Bailey Thomson examines the factors that frustrated reformers in the past and considers why the



current campaign, mounted by Alabama Citizens for Constitutional Reform (ACCR), has greater prospects for success. Whereas previous reform efforts were championed by political leaders who either failed to spend the necessary political capital for reform or fell victim to political intrigues, ACCR's campaign involves an independent citizens' group that has adopted a two-pronged approach. ACCR has mounted an effective grassroots strategy, making use of newspaper coverage and public events to inform and mobilize the state's population. It has also enlisted business leaders, representatives of other groups, and former officials from both political parties to demonstrate a broad consensus in favor of reform. These efforts have succeeded in placing constitutional reform on the political agenda, with both the incumbent Democrat and his Republican challenger endorsing reform in the 2002 gubernatorial election. When Republican Bob Riley was elected, one of his first acts was to appoint a commission to develop proposals on five constitutional reform issues, with the expectation that the commission over time would address other issues as well. While the ultimate outcome remains unknown at this writing, the Alabama experience demonstrates the possibilities of bottom-up constitutional reform.

Like Alabama, New York has experienced major problems attributable, at least in part, to constitutional deficiencies. Unlike in Alabama, however, the legislature is not an obstacle to constitutional reform, because New York is one of fourteen states in which the question of whether or not to call a constitutional convention is automatically placed on the ballot periodically. In his chapter Gerald Benjamin examines why, despite the problems with the government of New York, voters in 1997 overwhelmingly rejected calling a constitutional convention. Uncertainty about what a convention might propose was a major factor. The New York Constitution prescribes that the subject matter of the prospective convention cannot be limited in advance, and both legislators and powerful groups within the state were concerned more about how an unlimited convention might jeopardize their interests than about how constitutional reform might solve the problems plaguing government in New York. The failure to mount an effective campaign in support of a convention also was crucial. Governor Mario Cuomo had championed the idea of a convention, but after his defeat by Governor George Pataki, the main advocate of the convention no longer held political office, and Pataki's support for the convention was lukewarm. This lack of leadership, combined with limited funds and lack of organization, frustrated efforts

to inform and mobilize potential supporters. In contrast, groups against the convention united in opposition and, with the backing of organized labor, mounted a media blitz and worked the phone banks just before the election, claiming that the convention would be dominated by career politicians. Because voters typically do not have deep-seated convictions about whether or not a convention should be called, this opposition tactic proved effective: more than 60 percent of those voting on the question rejected a convention, and large numbers of voters failed to vote on the issue altogether.

Advocates of constitutional reform often assert that constitutional commissions and constitutional conventions are superior mechanisms of constitutional change, because they encourage due deliberation and a comprehensive consideration of the state constitution. However, as Anne Campbell's chapter demonstrates, the constitutional initiative can also be the vehicle for well-considered reform. Her case study of the adoption of a constitutional initiative on campaign finance reform in 2002 shows that use of the constitutional initiative to pursue one's goals is often a last resort, when reform through other political institutions is blocked by entrenched interests, either because the reform will alienate key constituencies or because it threatens the self-interest of politicians. In the case of campaign finance, sponsoring groups employed the constitutional initiative only after their proposals were twice blocked by gubernatorial vetoes and their successful statutory initiative was gutted by subsequent legislation. The constitutional initiative's long gestation during legislative consideration provided ample opportunity for full deliberation on its contents. Moreover, the prospect of defeat at the polls after a long and expensive effort to get on the ballot served to discipline the advocates of campaign finance reform, ensuring that they crafted a proposal that would win voter support. In this sense then initiative advocates find themselves in the same predicament faced by constitutional commission members, as described by Bruce Cain. Constitutional reformers must espouse not what they view as the best policy simply but rather good policy that seems likely to prevail at the polls. This, of course, is not necessarily a bad thing—the requirement of popular support for fundamental reforms is basic to our system of government.

Several conclusions emerge from these case studies. First, constitutional reform can be pursued through a variety of avenues, not just through constitutional conventions. This is important, given the apparent loss of interest in conventions—Virginia changed its constitution via

commission, Alabama chose a commission over a convention despite the preference of reformers, and New York overwhelmingly rejected a convention call. Second, good ideas are not enough to secure constitutional reform. Reformers need to inform and interest the public in reform, which means showing how it benefits them personally. However, if they succeed in this task, popular support for reform can be used as it was in Alabama to persuade politicians to take up the cause. Third, constitutional reform efforts must be pursued in a political context not of the reformers' making. In particular, reformers must deal with officials suspicious of how reform may affect their positions and their power and with established groups intent on protecting their interests. Reformers must avoid antagonizing potential opponents unnecessarily and may have to compromise in order to accommodate them. The failure of reform in New York is traceable to the reformers' inability to reassure powerful groups in the state that a convention would not propose changes detrimental to their interests. Fourth, despite the obstacles to reform identified by the authors, the conclusion is that reform can succeed. The reformers won in Virginia and Colorado, they largely won in Florida, and they may succeed in Alabama. They failed in California and New York, but even in those states the failure may be less than complete. In Florida, after the first commission's proposals were rejected, several were resubmitted and adopted as piecemeal amendments, and it may be that studies and proposals in California and New York will reemerge, as political developments underscore the need for constitutional reform. This in turn underlines a final point, made most eloquently by Governor George Busbee in 1983 during the successful campaign to revise the Georgia Constitution: "Constitutional revision is not for the faint of heart. It is not a Sunday drive in the mountains. It is an incredibly difficult, sometimes tedious, sometimes exhilarating, always challenging undertaking requiring the cooperation of all."<sup>32</sup>

The Ford Foundation has provided generous support for *State Constitutions for the Twenty-first Century*, and I gratefully acknowledge its crucial role in this project. Julius Ihonvbere, my program officer at The Ford Foundation, was an enthusiastic convert to the importance of state constitutional reform in the United States and recognized that constitution-makers in other federal systems could benefit a great deal from the state constitutional experience. The educational leadership at Rutgers University (Camden) has created a vibrant intellectual atmosphere that encourages scholarly endeavors. Provost Roger Dennis underwrote the creation

of the Center for State Constitutional Studies and has been among its strongest supporters ever since. Margaret Marsh, Dean of Arts and Sciences, and Rayman Solomon, Dean of the Law School, have provided steady encouragement for the Center's work on this project. Their support is most appreciated.

Robert Williams, Associate Director of the Center for State Constitutional Studies, has worked tirelessly on the project, and I have benefited immeasurably from his friendship, his wise counsel, and his good judgment. Sylvia Somers, the Center's invaluable Administrative Assistant, has helped to keep the project on course with her usual blend of efficiency, dedication, and good humor. I shall not attempt to thank individually the many scholars, officials, judges, and others who have contributed their insights and advice on this project—the list would be too long, and I would worry about leaving out important contributors. They will, I hope, find in *State Constitutions for the Twenty-first Century* ample evidence of how valuable their insights were.

A final note: Bailey Thomson, who authored the chapter on constitutional reform in Alabama, died shortly after completing the manuscript. All who knew him will miss his gentle demeanor, his professionalism, and his dedication to improving government in his home state.

## NOTES

1. See, for example, Federalist #10 and #49. For an exploration of leading founders' views on constitutional change, see Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy* (New York: Cambridge University Press, 1988).

On the difficulty of formally amending the Federal Constitution, in comparison with other national constitutions, see Donald S. Lutz, "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88 (June 1994): 355–70. Lutz emphasizes that this does not mean that the Federal Constitution is rarely changed, merely that it is rarely changed through the formal amendment process. Constitutional change can also be introduced through less formal channels—for example, through judicial interpretation. See also Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995).

2. The Federal Constitution requires that amendments be approved by three quarters of the states, expressed via vote in the state legislature or in a specially convened constitutional convention. This requirement ensures that no single section of the country can foist an amendment on another unwilling section. The emphasis on ratification of amendments by component units is typical of federal systems. See Daniel J. Elazar, *Exploring*

*Federalism* (Tuscaloosa, Ala.: University of Alabama Press, 1987), and Ronald L. Watts, *Comparing Federal Systems* (2d ed., Montreal and Kingston: McGill-Queen's University Press, 1999).

3. For an overview to the early twentieth century, see Walter F. Dodd, *The Revision and Amendment of State Constitutions* (Baltimore: Johns Hopkins University Press, 1910). For a perceptive review of the debates in state conventions about constitutional reform, see John Dinan, "The Earth Belongs Always to the Living Generation: The Development of State Constitutional Amendment and Revision Procedures," *Review of Politics* 62 (Fall 2000): 645–74.

4. *Book of the States 2001–2002* (Lexington, Ky.: Council of State Governments, 2002): 14, table 1.1.

5. Mark T. Carleton, "Elitism Sustained: The Louisiana Constitution of 1974," *Tulane Law Review* 54 (April 1980): 560.

6. *Book of the States*, p. 5, table B. These figures substantially underestimate the frequency of constitutional amendments in the states, because they do not include amendments to prior state constitutions.

7. *Book of States*, p. 5, table B.

8. In some instances, popular willingness to ratify amendments may encourage piecemeal change, whereas the electorate's rejection of proposed amendments may produce more comprehensive reform. For example, in Louisiana the legislature called the convention of 1972 only after voters rejected all fifty-three proposed amendments in 1970 and thirty-six of forty-two proposed amendments in 1972. See Lee Hargrave, *The Louisiana State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1991), p. 16.

9. *Book of the States*, p. 14. For discussion of the change and its causes, see Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938–1968* (New York: National Municipal League, 1970), and G. Alan Tarr, *Understanding State Constitutions* (Princeton, N.J.: Princeton University Press, 1998), chapter 5.

10. To avoid dispute about whether particular changes are positive or negative, the distinction between reform and ordinary change is drawn in terms of breadth of the changes, not in terms of whether the changes move the state in a progressive or regressive direction. For example, under this definition, the shift to a whites-only electorate in the South during the late nineteenth century qualifies as constitutional reform.

11. *Raven v. Deukmejian*, 801 P. 2d 1077, p. 1085 (Cal. 1990).

12. *Adams v. Gunter*, 238 So. 2d 824, p. 825 (Fla. 1970).

13. Virginia Declaration of Rights, sec. 15.

14. See, for example, Pamela Winston, *Welfare Policymaking in the States: The Devil in Devolution* (Washington, D.C.: Georgetown University Press, 2002); John Holahan, Joshua Wiener, and Susan Wallin, *Health Policy for the Low Income Population: Major Findings for the Assessing the New Federalism Case Studies* (Washington, D.C.: Urban Institute, 1998); and Timothy J. Conlan, *From New Federalism to Devolution: Twenty-five Years of Intergovernmental Reform* (Washington, D.C.: Brookings, 1998).

15. See, for example, the report of the Kestenbaum Commission, Commission on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* (Washington, DC, June 1955), Commission for Economic Development, *Modernizing State Government* (1967); and U.S. Advisory Commission on Intergovernmental Relations, *The Question of State Government Capability* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1983).

16. These reforms are summarized in Jon C. Teaford, *The Rise of the States: Evolution of American State Government* (Baltimore: Johns Hopkins University Press, 2002), chapter 8.

17. Advisory Commission on Intergovernmental Relations, *Changing Public Attitudes on Governments and Taxes, 1991* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1991), 14.

18. Christian G. Fritz, "Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate," *Hastings Constitutional Law Quarterly* 24 (winter 1997): 287–357, and Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal* 25 (summer 1995): 945–98.

19. Quoted in James J. Lopach. *We the People of Montana: The Workings of a Popular Government* (Missoula: Mountain Press, 1983), p. 7. For an overview that places the Montana constitutional experience in broader perspective, see G. Alan Tarr, "The Montana Constitution: A National Perspective," *Montana Law Review* 64 (Winter 2003): 1–21.

20. Constitutionalizing policy matters may be seen as a particular instance of constitutional detail. In elevating a policy to constitutional status, a state constitution is choosing to elaborate the policy rather than merely authorizing the legislature to act or providing broad guidelines for such action.

21. Christopher W. Hammons, "State Constitutional Reform: Is It Necessary?" *Albany Law Review* 64 (2001): 1330.

22. See Tarr, *Understanding State Constitutions*, chapters 4–5.

23. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, p. 406 (1819). For a contrary view on the relation between detail and durability, see Hammons, "State Constitutional Reform," pp. 1335–41. Hammons' conclusion that longer constitutions last longer is subject to two caveats. First, his conclusion may rest not on the length of the constitutions but on styles of state constitutional change—the long constitutions of the late nineteenth century have survived in part because the approach to constitutional change has shifted. Whereas nineteenth-century reformers emphasized wholesale constitutional revisions, twentieth-century advocates of change have opted more for constitutional amendment. Second, the durability of which Hammons speaks is not lack of change—longer constitutions are more frequently amended than short constitutions. Durability entails non-replacement, not the absence of constitutional change.

24. A perfect example is found in Alabama, where more than 700 amendments have made the 1901 Constitution unwieldy but have not introduced much reform, prompting continuing calls for its replacement. See Bailey Thomson, ed., *A Century of Controversy: Constitutional Reform in Alabama* (Tuscaloosa: University of Alabama Press, 2002).

25. See, for example, the poll data reported by the Council for Excellence in Government, found at: [www.excelgov.org/display/Content.asp?keyword=ppp070199](http://www.excelgov.org/display/Content.asp?keyword=ppp070199).

26. Data on proliferation of initiatives are found in Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence: University Press of Kansas, 2002), Appendix.

27. For term limits, see for example Oklahoma Constitution, art. V, sec. 9a and 10a, and Oregon Constitution, art. IV, sec. 4. For constitutional restrictions on state spending, see for example California Constitution, art. XIII B, and Colorado Constitution, art. 10, sec. 20. For limitations on state taxing power and the requirement of referenda or extraordinary majorities for new taxes, see for example California Constitution, art. XIII A, and Colorado Constitution, art. 10, sec. 20.

28. See Ellis, *Democratic Delusions*, pp. 116–23. Ellis emphasizes that such ordinary citizens are a small proportion of those proposing initiatives.

29. See Caroline J. Tolbert, Johan A. Grummel, and Daniel A. Smith, “The Effects of Ballot Initiatives on Voter Turnout in the American States,” *American Politics Research* 29 (November 2001): 625–48.

30. On the South African Constitution and its place in the postapartheid polity, see Heinz Klug, *Constituting Democracy: Law, Globalization, and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000), and George E. Devenish, *A Commentary on the South African Constitution* (Durban: Butterworths, 1998).

31. In both Montana and New Jersey, hour-long television documentaries—*For This and Future Generations* (Montana) and *The Opportunity of a Century* (New Jersey)—were produced by PBS marking the anniversary of the states' constitutions, and in each officials and citizens alike testified to their pride in the state constitution.

32. George D. Busbee, “An Overview of the New Georgia Constitution,” *Mercer Law Review* 35 (Fall 1983): 1.

# Part I

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## Constitutional Commissions and Constitutional Reform



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