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SIEPR Discussion Paper No. 08-22

**Malleable Constitutions:
Reflections on State Constitutional Reform**

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March 2009

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Abstract

While the U.S. Constitution is difficult to amend, most states constitutions are much easier to amend. This essay explores the implications of easily amended constitutions for the nature and quality of government. Theoretically, malleable constitutions can be more innovative and responsive to changes in society; however, malleable constitutions also are more likely to become another venue in which everyday interest-group policy conflicts are played out and less likely to reflect serious deliberation among both government officials and voters. Highly stable constitutions can provide more durable protection of individual rights and other benefits that flow from enabling citizens to take actions in reliance on the stability of government institutions. Our review of the experiences of state governance under malleable constitutions leads us to conclude that states can capture the benefits of both stability and malleability, and thereby improve their quality of constitutional governance, by establishing a brighter line between easy to accomplish amendments and more difficult to accomplish constitutional revisions and replacements. In particular, we recommend that constitutional provisions that establish individual political and human rights should be changed only through the revision process, while provisions about the details of governance institutions should be subject to change by an easier amendment process.

Forthcoming, *Texas Law Review*.

Malleable Constitutions: Reflections on State Constitutional Reform

by Bruce E. Cain and Roger G. Noll¹

Introduction

American federalism has produced curious and potentially significant differences in provisions for changing a constitution. Article V of the U.S. Constitution provides for only two difficult procedures for amendment and none for replacement.² Most state constitutions offer a variety of easier paths for both. But what are the political consequences of greater constitutional malleability? Constitutions with lower thresholds for amendment and revision should change more often, of course, but the implications for the content of the constitution are unclear. Does constitutional malleability mean that states with more malleable constitutions are more innovative and adapt more quickly to changing political circumstances and needs, or that the scope of constitutions simply expands to include issues that otherwise would be addressed in statutes? And does malleability affect important indicators of the quality of governance, such as policy outcomes, government efficiency (including freedom from corruption), and effective protection of individual rights?

Constitutions occupy the highest position in a hierarchy of law that also includes statutes, court decisions, and administrative rules and regulations. Although constitutions do not exist everywhere, when they do exist they typically are more difficult to change

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² By two-thirds majorities in both houses, Congress can propose an amendment, which must then be ratified by the legislature or a constitutional convention in three-quarters of the states. In addition, two-thirds of the state legislatures can request a constitutional convention to propose amendments, the results of which also must then be approved in three-quarters of the states.

than laws that are lower in the hierarchy.³ Theoretically, the rationale for creating a hierarchy of laws in which laws at the top are more difficult to change has two elements. First is the idea that temporary majorities should not be able to pass laws that weaken fundamental principles of governance, such as the existence of a democratic form of government or the basic rights of citizens. Second is the idea that society benefits if citizens can commit to and rely on stability in some aspects of governance, even if in so doing each citizen's independence of action is limited. Both notions imply that Constitutions should be somewhat difficult to amend, such as by requiring super-majorities, a deliberative process, and/or process with multiple veto gates.

On the other side of the ledger, malleable constitutions more easily accommodate adjustment to changes in society. Examples of changes that might have implications for the content of a constitution are expansion of territory, population growth, economic restructuring, a new external threat to sovereignty, or simply improvements in knowledge that have significant implications for designing governance institutions. The potential gains from periodic wholesale constitutional revisions motivated Jefferson's oft-cited view that constitutions should sunset every 19 years to enable each generation to design the government that best suits its needs.⁴

The existence of state constitutions and, implicitly, a hierarchy of state law is problematic. Article IV Section 4 of the Constitution stipulates that the federal government "shall guarantee to every state in this union a republican form of

³ Not all constitutions require constitutional amendments to be substantially more difficult to pass than statutes. For example, in Brazil, constitutional amendments must be passed only by a 60 percent majority in both houses of the national legislature (Article 60).

⁴ Thomas Jefferson, *Letter to James Madison*, 1789. Jefferson picked 19 years as the sunset period for a constitution because he believed that one generation should not impose its political values on the next and, according to mortality tables at the time, half of the adult population that was alive when a constitution was adopted would be dead nineteen years later. A compendium of Jefferson quotations on amending and replacing constitutions is posted at: <http://etext.virginia.edu/jefferson/quotations/jeff1000.htm>.

government,” but it does not explicitly require that states adopt a constitution. Typically Congress has required that a proposed state adopt a constitution prior to approval of statehood. Neither the U.S. Constitution nor Congress limits the scope of state constitutions except for the requirements that they must establish a democratic form of government and not explicitly override the U.S. Constitution.

As a practical matter, all state constitutions establish the governance institutions in the state and the powers and duties of government officials. Indeed, all states have adopted a government structure that very closely resembles the structure of the federal government, including separation of powers among three branches and subsidiary governments. State constitutions also contain provisions establishing the rights of citizens, including repetition and sometimes elaboration of rights in the U.S. Constitution as well as additional rights, such as guaranteeing a citizen’s right to fish (California: Article I, Section 25; Rhode Island: Article I, Section 17; Vermont: Chapter 2, Part 67).

The consequences of America’s ongoing experiment in constitutional governance are not clear and deserve more study. From a purely quantitative perspective, malleability is important. While the U.S. Constitution has been amended only 27 times, states have replaced and amended their constitutions much more frequently. Only 19 states still have their original constitutions, and most states have adopted three or more.⁵ Collectively states have held more than 230 constitutional conventions and have adopted 146 constitutions.⁶ They have added over 5000 amendments (over 100 per state)⁷ and have been the first to adopt important innovations in government structure and political

⁵ G. Alan Tarr, “Introduction,” in G. Alan Tarr and Robert F. Williams, eds., *State Constitutions for the Twenty First Century*, Vol. 3, p. 2.

⁶ Gerald Benjamin, “Constitutional Amendment and Revision,” in Tarr and Williams, *op. cit.*, p. 180.

⁷ G. Alan Tarr, “Introduction,” in Tarr and Williams, *op. cit.*, p. 2.

rights, including women's suffrage, the line-item veto, direct democracy, balanced budget requirements, and the direct election of upper houses in legislatures.

Closer examination reveals that amendment and revision trends have diverged, and as a consequence, the differences between the federal and state constitutions with respect to fundamental revision are less sharp than they once were. State constitutional amendment activity continues at a high level (e.g. 689 amendments in the period 1994-2001 alone), but the pace of state constitutional revision (i.e. defined as fundamental constitutional changes or total replacement) has slowed considerably. Consider the following. There were 144 constitutional conventions and 94 new state constitutions in the nineteenth century, only 84 conventions and 23 new constitutions in the twentieth, and none since 1984.⁸ Even in the 14 states that provide for automatic consideration of whether to call a constitutional convention, voters have become less interested in utilizing this opportunity for fundamental reform: only 4 of 25 such referenda have been successful and none in over a quarter century.⁹ Two thirds of the states now operate with constitutions that are over 100 years old.¹⁰

The emerging pattern of hyper-amendability combined with infrequent revision has significant political consequences. For legal, institutional and political reasons that are explored in more depth here, successful amendments tend to be narrow in scope, specific and less politically controversial than revisions. Ninety percent of amendments are proposed by legislatures, many under supermajority rules which dampen the potential scope and controversy of the measures considerably. As a consequence, despite the widespread unpopularity of legislatures, legislative constitutional amendments (LCAs)

⁸ *Ibid.*

⁹ Benjamin, *op. cit.*, p. 196

¹⁰ Tarr, *op. cit.*, Vol. 3, p. 3.

ironically pass at the high rate of 77%.¹¹ Because many amendments attempt to alter specific items in existing constitutions, the initial specificity of a state constitution breeds even more specificity, creating, in essence, a language and provision multiplier effect.

These trends raise important questions. First, why has the rate of state constitutional revision and replacement slowed down so dramatically? Second, what are the possible long term political and policy consequences of higher amendment rates but lower revision rates? Third, what do the experiences of US state constitutions teach us about constitutional adaptation?

The argument of this essay is as follows. Revision is more vulnerable to political derailment than amendment because its greater breadth unites heterogeneous opponents and because the revision process has more veto points and players. For legal, political and institutional reasons, amendments are more limited in scope and hence more feasible politically. Like legislative policy-making, amendments have become expressions of interest group and partisan contestation in which groups seek to lock in a likely temporary advantage over their competitors. The consequence is a growing lack of constitutional coherence and flexibility, a majoritarian drift in rights policies, and increasingly constrained legislative policy-making, especially in states that rely heavily on the popular initiative (so-called hybrid democracies).¹²

Formal Opportunities and Malleability

The rules setting forth the procedures for amendment and revision structure the

¹¹ Benjamin, *op. cit.*, p. 181.

¹² For an explanation of the term, see Garrett, Elizabeth (2005), 'Hybrid Democracy', *George Washington Law Review* Vol. 73, pp. 1096-130.

opportunities to propose or oppose potential constitutional reforms. While scholars debate whether most citizens are rational political actors, they generally agree that elected politicians and interest groups rationally pursue their objectives. As repeat players with high stakes in the outcome of electoral contests and government decisions, political leaders and interest groups pay close attention to the rules of the game and play strategically, even if imperfectly. Because state constitutions cover, often in great detail, a wide variety of potentially crucial topics, including individual rights, government structure, tax policies, the details of specific policies, and ceilings and floors on both total expenditures and spending on specific programs, policy skirmishes can escalate into constitutional battles. The rules that govern amendment and revision shape the strategies of these repeat political actors in predictable ways.

For this reason, we need first to examine the rules governing revision and amendment to understand why one is in decline and the other is a growth industry. While no “bright line” separates revisions from amendments, revision is meant to be a more qualitatively and quantitatively substantial change in the constitution.¹³ Revision can mean either the adoption of a new constitution or a substantial alteration to the principles, rights and governmental structures of an existing constitution. The revision process in most states is more lengthy and complex than the amendment process, typically requiring either a constitutional convention or a revision commission. Only six states explicitly allow the legislature to propose revisions by themselves, while in 41 states the legislature

¹³ See discussion in Benjamin, *op. cit.*, 178-9. The term revision, he points out, is only specifically referenced in the language of 23 state constitutions, and even then, the line is not clear and sharp. In California, the substantial change that might be considered a revision is acknowledged to have both quantitative and qualitative dimensions: many amendments to many parts of the constitutions can become a revision, or one single provision that profoundly altered the functions of a government branch could also qualify as a revision. The seminal California cases are *McFadden v Jordan* 32 Cal. 2d330,196 P2d787 and *Raven v Deukmejian* 801 P2d 1077 (Cal 1990)

can call a convention (over half require a supermajority vote to get the revision on the ballot). Fourteen state constitutions require that whether to call a convention must be placed on the ballot periodically. Only two states—Florida and South Dakota—permit the calling of a convention by popular initiative.¹⁴

Calling a convention usually requires majority approval by voters (in ten states a majority of those voting in the election as opposed to a majority voting on the question). Once approved, the process requires electing delegates, funding the convention's operations, establishing its rules and procedures, selecting leadership, and providing time for deliberation and the public dissemination of its results. Convention proposals then must be ratified by the voters, in some states by supermajorities.

A few states provide for a Constitutional Commission, which can propose both amendments and revisions in a more expeditious fashion and without the expense of electing convention delegates. Typically elected officials control appointments to revision commissions. Florida gives its two commissions the right to place measures directly on the ballot, thereby bypassing the legislature entirely, but most others like Utah, New Mexico or California require that a commission's revision proposals must be approved by the legislature before being submitted to a popular vote.

In sum, constitutional revision is normally a multi-step process that requires approval by both elected officials and the voters. Given the costs and professionalism associated with modern elections, constitutional conventions are particularly lengthy, expensive and uncertain paths that are quite vulnerable to being derailed at critical points. In addition, elected officials are likely to be more suspicious of independently elected convention delegates than appointed members of a revision commission.

¹⁴ Benjamin, *op. cit.*, pp. 178, 192

By comparison, there are typically more options and politically easier paths for making constitutional amendments. All states permit the state legislature to propose a legislative constitutional amendment (LCA) directly. The path through the legislature is no sure thing and shapes the substance of what gets approved. Only 9 states allow a simple majority of both chambers in a single session to pass an LCA, while 15 require passage in two successive sessions and 29 require supermajority approval. States with higher vote thresholds tend to produce a larger proportion of technical, specific and bipartisan amendments, which plausibly accounts for their higher rate of adoption by voters. In all but one state, LCAs must be ratified by the electorate, usually by a majority of those voting on the measure.¹⁵

In many states, some routes for passing constitutional amendments bypass the legislative hurdle. In some states, constitutional measures can be placed on the ballot directly by a constitutional revision commission or convention, and in others, by popular initiative (16 states). In states that allow them, an initiative constitutional amendment (ICA) makes the ballot if it successfully meets a minimum signature threshold (most commonly between 6 and 10 percent of the previous gubernatorial vote), with some states also having geographic distribution requirements for qualifying signatures. These states also typically allow initiative statutes to be placed on the ballot, with the difference between the requirements being that statutes require fewer valid signatures.

Some state constitutions limit the number of amendments that can be made per session, the number of times a measure can be re-submitted, whether separate votes must be taken on each amendment, and the number of subjects that can be covered by one amendment. Single subject and separate amendment regulations are meant to narrow the

¹⁵ Benjamin, *op. cit.*, pp. 178, 181-186

scope of proposed amendments and prevent them from becoming back door revisions.¹⁶ These requirements also protect voters from having to cast a take it or leave it vote on amendments that contain both popular and unpopular elements.

To summarize, most states offer several ways to amend the constitution. While the hurdles for successful amendments are not trivial, they are lower than for amending the US constitution, and not much higher than the hurdles for passing ordinary statutes. Successful amendment of the U.S. Constitution requires the approval of the legislatures of 39 states, so it is not surprising that state constitutions are amended much more frequently than the US Constitution. The process of amending state constitutions also is much easier than revising them, so it is also not surprising that states revise less frequently than they amend: rational political actors will seek the path of least institutional resistance and most likely success. And, because an initiative state constitutional amendment is not a great deal more costly to qualify and pass than an initiative statute, not surprisingly interest groups are likely to avail themselves of the constitutional option when feasible.

In theory, states that allow ICAs do not allow constitutional revision through the popular initiative process. Amendments that fundamentally change a state constitution or that are not confined to a single issue are, in theory, prohibited. State courts decide whether an amendment is impermissibly fundamental or broad. Nevertheless, amendments can still turn out to be very substantial reforms for two reasons.

First, because the line between a revision and an amendment is far from bright, amendments that are very substantial reforms often are deemed by the courts not be to revisions. For example, California's 1990 term limits measure (Proposition 140)

¹⁶ Benjamin, *op. cit.*, pp. 183-191.

imposed extremely short terms for the state legislature and a lifetime ban on termed out members, substantially weakening the legislature's leadership, institutional knowledge, oversight capability, and committee system.¹⁷ In so doing, the amendment shifted power from the legislature to the executive, and increased the influence of lobbyists on the legislative process. Yet the California Supreme Court did not deem this change to be substantial enough to qualify as a revision.¹⁸

Second, even when a measure by itself is clearly an amendment and not a revision, the accumulation of separate amendments on a given subject passed at different times can equal a substantial revision. A good illustration is the long list of separately passed measures in California that limit taxes, cap total expenditures, and impose minimum expenditure requirements in many program areas. The cumulative effect of these measures is severely to constrain the fiscal discretion of California's elected officials.¹⁹ Each measure is narrow enough to fit under the single subject rule, but taken together these measures effectively remove the constitutional authority of the legislature to construct the state's annual budget. California's fiscal process is an example of how to revise a constitution quite dramatically through the amendment process without raising objections on revision versus amendment grounds.

Taking Advantage of Constitutional Malleability

The changing conditions of modern American politics have shaped recent state

¹⁷ For a discussion of the measure and its effects on the California legislature see Bruce E Cain and Thad Kousser, *Adapting to Term Limits: Recent Experiences and New Directions*, San Francisco: PPIC Report, 2004.

¹⁸ *Legislature v. Eu* (1991) 54 Cal.3d 492

¹⁹ See Mathew D. McCubbins, "Putting the State Back in State Government: The Constitution and the Budget," in Bruce E. Cain and Roger G. Noll, eds. *Constitutional Reform in California*, Berkeley, IGS Press, 1995, pp. 353-76.

constitutional trends. In particular, the growing number and sophistication of interest groups plus rising partisanship in American political parties have complicated the task of constitutional revision while stoking the fires of amendment. Constitutional reform, like law-making, has become a battleground in which political parties and competing interest groups seek to gain advantage by constitutional means. Labor unions, teachers, industry trade associations, tax limitation groups, animal rights activists, environmentalists, prison guards, and many other groups compete for favorable treatment and/or a bigger share of the state budget. State constitutional amendments are an attractive means for achieving these ends. State constitutions do not limit their own content and contain many provisions that are virtually indistinguishable from normal legislation. Unlike simple legislation, constitutional amendments can not be repealed by subsequent elected officials, so that a successful amendment makes a policy change more durable. In essence, the malleability and specificity of state constitutions invites political attention from political actors who otherwise would fight things out in the legislature.

Consider, for example, California's Proposition 98, which guarantees a fixed share of the annual budget for K-12 education except in fiscal emergencies.²⁰ K-12 must compete for its share of the budget with other important traditional state functions such as higher education, health care, social services, transportation, and corrections. Having a constitutional guarantee of a minimum level of spending, even if not ironclad, gives K-12 a priority in the budget process and reduces the bargaining uncertainty of teachers' in negotiating salaries and work rules. A constitutional provision of this sort is hard to

²⁰ The complexities of Prop. 98 funding include a guaranteed 39 percent base of General Fund spending, with annual increases tied to a formula based on school attendance, per capita personal income and general fund revenues. The legislature can suspend the Prop 98 guarantee for one year by a 2/3's vote. For an explanation see *Proposition 98 Primer*, Sacramento: LAO Report, February 2005.

repeal because opponents must qualify a new initiative and convince voters to reverse themselves. A statutory measure, by comparison, runs the risk of being amended at any time by the legislative majority and the governor.

Constitutional victories also can be valuable for gaining partisan advantage. Political reforms often differentially impact political parties and their constituents. Recent examples in California are term limits, campaign finance, redistricting, and the open primary.

Prior to the passage of term limits, Democrats enjoyed secure majorities in the state legislature while Republican gubernatorial and presidential candidates normally received majority support.²¹ Many Republicans believe that Democratic incumbents were unfairly protected by unlimited incumbency, and even worse, that long term incumbency corrupted elected officials and disposed them to spend more public money and to create more government programs.²² Consequently, Republicans were substantially more supportive of term limits than were Democrats.

By comparison, Democrats have been more supportive than Republicans of campaign finance reform. Democrats are more likely to believe that moneyed interests favor conservative business-friendly policies.²³ California Democrats have also been more skeptical of redistricting reform because they control both houses of the legislature while Governor Schwarzenegger, a Republican, advocates redistricting reform in order to

²¹ The gap between Democratic and Republican support for term limits in recent years has been in the range of 8 points. See Sherry Bebitch Jeffe, "Whatever It Fate in Court, Prop 140 is Doing its Job," LA Times, October 12, 1997 and "The Majority of Californians Still Support Term Limits," by Mark DiCamillo and Mervin Field, *Field Report*, May 1997.

²² See "Introduction," in Karl T. Kurtz, Bruce E. Cain and Richard G. Niemi, *Institutional Change in American Politics: The Case of Term Limits*, Ann Arbor: University of Michigan Press, 2007.

²³ See the ballot arguments and groups supporting Proposition 208 in November 2006, available at www.calvoter.org/voter/elections/archive/96gen/props/208.html. The party divide is less clear on some subsequent propositions like Proposition 34 (Nov 2000) because the reformers thought they were getting half a loaf or in the case of Prop 89 (Nov 2006) that it was measure on behalf of a particular interest group.

increase competition in legislative races and enhance the chances for moderate candidates who would be more likely to support his policies.²⁴ Meanwhile, moderate California Republicans support open primaries, such as the blanket ballot and the Louisiana run-off system, because they want to reduce the stranglehold that the conservative base has on its party's nominees.²⁵ And so forth. The point of these examples is not to argue that political calculations are the sole or even primary motives for any of these reforms, but only that partisan calculations often play a prominent role in the patterns of support and opposition for re-engineering governance institutions.

Another important motivation for locking positions into the constitution is to overturn an unpopular court decision. This motive figured prominently in California's recent Proposition 8 regarding gay marriage. Previous definitions of marriage were found in statutes, which could be altered by normal legislature processes or overturned by the Supreme Court. Same sex marriage bills were passed in both 2005 and 2007, but vetoed by the governor. Subsequently, the California Supreme Court overturned Proposition 22, which explicitly prohibited gay marriage, on equal protection grounds. Opponents, seeking to overturn the Court's decision and to prevent any further legislative attempts to legalize gay marriage, qualified a constitutional amendment that defined marriage as only between a man and woman. In effect, gay marriage opponents used the constitution to over-ride both the legislature and the courts.

All of the examples given so far are about actors seeking advantage through amendment activity. But these same groups and individuals are also players in the

²⁴ See Brian Joseph, "Governor Tries to Remake Sacramento with Prop 11," *Orange County Register*, October 10, 2008.

²⁵ See Bruce E. Cain and Elizabeth Gerber, *Voting at the Political Fault Line*, Berkeley: UC Press, 2002, especially chapters 1 and 3.

revision process, but more often in a negative way. The success rate of California ICAs is typically less than fifty percent,²⁶ but the success rate of constitutional revision processes in California and elsewhere has been zero in the last quarter century, and for good reason. The logic of a revision is more inherently vulnerable to death by coalescing opposition than single amendments are. Because revisions in California are meant to be fundamental, the stakes are higher and more players are affected by proposed changes. By seeking to make sweeping changes in the constitution, revisions make many enemies all at once. Eventually, the sum of all the groups that do not favor a particular provision can become an overwhelming coalition of veto minorities.

The analytic logic that constitutional commissions and conventions often employ (sometimes at the urging of well-meaning academics) ignores or downplays the task of winning public or legislative approval. A good illustration is the tortured history of the California Constitutional Revision Commission in the early nineties.²⁷ The goals of the commission were to rationalize California's governmental institutions, eliminate duplication, and increase accountability. Like many states, California's 1879 Constitution provided for a plural executive system that now includes a separately elected Lt. Governor, Controller, Treasurer, Attorney General, Secretary of State, Insurance Commissioner, and Superintendent of Public Instruction.²⁸ Because these offices have low visibility and cloud the lines of accountability, the Constitutional Revision Commission recommended that three of these offices be appointed. While this reform

²⁶ "Constitutional Change: Is It Too Easy To Amend Our State Constitution?," (Bruce E. Cain, Sara Ferejohn, Margarita Najjar, and Mary Walther) in Cain and Noll, *op. cit.*, pp. 265-90.

²⁷ For a more complete discussion of the California case, see Bruce E. Cain "Constitutional Revision in California: The Triumph of Amendment over Revision," in Tarr and Williams, *op. cit.*, vol 1, pp. 59-71.

²⁸ Roger G. Noll, "Executive Organization: Responsiveness v. Expertise and Flexibility," in Cain and Noll, *op. cit.*, pp. 57-86.

made sense from a rational analytical perspective, it had the unfortunate political byproduct of leaving three fewer opportunities for term-limited state legislators to stay in political office.

Legislators were not the only veto players who worried about consolidation and simplification in the cause of efficiency. K-12 teachers liked some of the budget reforms but would not sign off on eliminating the elected Superintendent of Public Instruction and giving the duties of that office to the appointed Secretary of Education. Special districts liked some proposed tax reforms, but opposed consolidating local governments. Taxpayer groups liked the Commission's endorsement of a balanced state budget with a rainy day fund for recessions, but would not accept local control over local revenue or a return to majority-rule referenda for increasing property taxes. And so forth.

The critical strategic choice for a revision effort is whether to consider the full spectrum of potentially attractive changes or to restrict deliberations to what is politically feasible. A politically savvy agenda may be likely to succeed, but it risks being revisionist and incremental. A bold, politically blind revision is likely to make more enemies than friends. Aided by their lobbyists, most organized interests are able to follow politics and legislation with a high level of knowledge and sophistication. Once revision discussions are underway in earnest and everyone's preferred changes are revealed, the various interests can calculate whether any particular proposal is good or bad for them. They then decide whether they are, on balance, better off or worse off with the package as a whole. If they care more about what they might lose on one particular issue rather than what they might gain on the others, they will join the opposition, and when the sum of the disgruntled reaches a critical mass, the revision process grinds to a

halt. The problem is an example of the classic case of concentrated costs and diffuse benefits. If each of the governance problems of a state also happens to create institutionalized protections and benefits for a particular interest group, an attempt at global reform through revision is likely to create a coalition of strange bedfellows that collectively can block the entire package of reforms. It is not much of an exaggeration to claim that the only revisions that are likely to succeed are Pareto improvements (i.e. changes that make no powerful group worse off). Only a drastic deterioration in the conditions of the status quo brings anything more politically complex into play.

By comparison, amendment politics is more politically manageable. No need to deal with the uncertainties and open agenda of a commission or convention.

Constitutional change can be affected either through the legislature or the initiative process in the 18 (including two by indirect initiative) states that allow it. There is less danger of linkage with an unrelated issue, or that the agenda will get out of control. Gaining public support is still a substantial hurdle, but popular, respected organized interests like the teachers, law enforcement and firemen have a good shot at getting what they want without any major concessions, compromises and expenditure of effort on issues that other groups want and have might successfully demanded in a convention or commission setting.

But what are the consequences of more constitutional change being channeled through the amendment processes rather than conventions and revision commissions? Is it merely an interesting story about evolving contemporary political strategies, or is this trend shaping the kinds of constitutional changes states have been adopting in recent years? Should the courts care about the distinction between revision and amendment, and

try to enforce a tougher, clearer line between the two?

The sections that follow argue that amendment and revision shape outcomes differently, and that a new conception of the revision doctrine should incorporate different demarcations for altering rights than for changing institutions or policies: stricter for changes in fundamental rights and lower for institutions. States that do not allow for revisions except through the legislature should consider creating alternative revision paths.

Revision, Amendment and Rights

Many states have rights provisions in their constitutions that seemingly duplicate guarantees in the US constitution. This has resulted in a form of judicial federalism in which the Federal courts define the floor for particular rights while the state courts are allowed to build up from the floor (i.e. enhance the protections) if they so choose.²⁹ The trends of hyper-amendability and revision blockage have increased the tension in hybrid democracies between the principles of popular sovereignty and deference to the majority will as expressed in initiative outcomes on the one hand and the state supplemented federal rights and court review on the other. The failure to enforce the revision versus amendment distinction could over time significantly erode some of these above the floor protections and challenge the courts' role in interpreting them. While US constitutional rights guarantees are substantial, there is much to be said for preserving rights federalism.

A good illustration of this tension is the case of California's Proposition 8, an ICA placed on the November 2008 ballot. It defined marriage as being between a man and

²⁹ For a full discussion of the relation between state courts and fundamental rights see Robert F. Williams, "Rights," in Tarr and Williams, *op. cit.*, vol 3, pp. 7-35

woman, thereby invalidating same sex marriages. The story behind this measure fits the theme that amendment activity is an extension of political competition from the legislative to the constitutional realm. The struggle over defining marriage was primarily centered within the legislature until Proposition 22 in 2000. Language clarifying that marriage was between a man and a woman was added to the state's civil code in 1977, but by 2000, opponents of gay marriage feared that the law did not explicitly prohibit the recognition of out-of-state same sex marriages. Failing to persuade the Democrats who controlled the California legislature, opponents of same sex marriage placed clarifying language in a statutory initiative in 2000, Proposition 22, which won by the margin of 61.4-38.6. Subsequently, the legislature passed gay marriage bills in 2005 and 2007 that were vetoed by Governor Schwarzenegger.³⁰ By that time, opponents of gay marriage realized that they were one gubernatorial election away from losing the legislative battle over same sex marriage in an increasingly blue state. Adding fuel to the fire, the California Supreme Court overturned the statutory limitation in its *In Re: Marriages* (2008) decision. The explicit purpose of Proposition 8 was to bypass the legislature and overturn the California Supreme Court in order to lock in a heterosexual definition of marriage. Just as importantly, the implication of the measure was that the initiative majority, not the courts, should ultimately decide whether rights can be extended above the federal guarantee.

The gay marriage issue is not the first time that California has confronted whether an ICA can eliminate rights accorded to citizens in the state constitution. Proposition 115, the Victim's Bill of Rights, attempted to limit defendants' rights in California by

³⁰ The accounts of Prop 22 and the legislative attempts to legalize gay marriage are summarized in "Same Sex Marriage in California: Overview and Issues," <http://igs.berkeley.edu/library/htGayMarriage.html>

stipulating the California constitution could not be construed to give greater protections than those afforded by the US constitution. In its decision, *Raven v Deukmejian*,³¹ the California Supreme Court determined that the implementation of Proposition 115 would have amounted to a fundamental revision of the state constitution because it would have subordinated the judiciary's role in the governmental process.

Stepping back from the specifics of these two cases, the issue of who determines whether rights can be expanded seems to fall pretty clearly into the kind of fundamental constitutional reform that was intended for the revision process. Proponents of both Props 115 and 8 chose the constitutional amendment route because it was easier and more likely to succeed than the revision alternatives. Convincing the legislature to convene a commission or convention for these purposes would have been impossible, and the outcomes of commission or convention deliberations would be uncertain in any event. Quite likely, legal experts testifying before either body would have called attention to broader questions about the court's role in interpreting rights, perhaps weakening support for proponents of limiting rights. Choosing the revision by amendment path was the obvious strategy, even given the risk that the court might overturn the measure after the election. The California Supreme Court's failure to articulate a clear line between revision and amendment and its track record of mostly deciding against revision objections encourages proponents of changes in fundamental rights to take this risk.

California would be no less a democracy if it limited state constitutional rights to those delineated in the U.S. Constitution and curbed the review powers of the state judiciary, but with such a limitation the state would be a different type of democracy. The relevant question is how best to decide to make such a transition. Leaving aside the

³¹ *Raven v. Deukmejian* (1990) 52 Cal.3d 336

specific details, the underlying logic of revision in California and most other states is that fundamental changes should receive more scrutiny and be subjected to more serious deliberation than they would receive in normal legislative processes. In addition, this logic implies that the basis for a final judgment about whether to accept or reject fundamental changes should be stronger and more considered than normal legislative judgment. For these reasons many states, like California, have supermajority or successive vote requirements at some point in the revision process. By comparison, approval for an initiative measure requires only a majority of those voting for a measure and the merits are debated solely within the framework of normal electioneering (heavy dependence on paid media, poll and focus group tested appeals geared to eliciting emotional responses, etc.). The initiative process does not include a prior deliberative stage, as in the convention or commission process. As a consequence, there is no basis for believing that voters give serious consideration to the long-term consequences of changing the state's equal protection doctrine, especially since the issue of gay marriage taps into strongly held religious and ideological beliefs.³²

So the key question is this: if a state constitutes itself on the assumption that constituents will adhere to certain core principles and rules of the game unless they are changed by a specified deliberative process, should it allow changes in fundamental rights by the easier route of amendment because the revision process has become more difficult politically in recent years? No doubt, some believe that the answer is yes because democracy is about majority rule and, besides, the federal Constitution provides a floor to fundamental rights; however, for several reasons the better answer is no.

³² Patrick G. Egan and Kenneth Sherill, "California's Proposition 8 What Happened and What Does the Future Hold?" Report for the National Gay and Lesbian Task Force Policy Institute, January 2009.

First is the social contract response that a promise is a promise, and the failure to live up to commitments has costs. If a particular fundamental right or rule can be altered by mere amendment, then all can, and commitments to constitutional rights become less stable than they were before. People who move to a state under certain assumptions about fairness or equal protection for historically discriminated groups will be less certain of the durability of those rights in the future. The majority at least owes it to minorities that they will consider the larger implications of such a change in a more deliberative fashion before they act.

Second is the value of rights federalism to the nation. Regardless of its legal or normative merits, *Roe v. Wade* demonstrated how an attempt to define baseline rights for all states can exacerbate political divisions and distort national politics. Considerable scholarly evidence shows that Americans sort themselves geographically by lifestyle, income, religion and ideology.³³ Deciding which rights should be nationalized is a complex and nuanced exercise, and one that is not undertaken here. But allowing some rights variations among the states gives more time to build a national consensus and avoids the tensions that can arise with an attempt to forge a national agreement prematurely. Moreover, other states can learn from the pioneering experiences of the innovator states. The latter argument, of course, is a variant of the traditional “laboratory of the states” argument for the American system of federalism.³⁴ But an increasingly mobile population also implies a Tiebout³⁵ “voting with your feet” argument for allowing states to have different conceptions of rights above the floor. Rights federalism allows

³³ For evidence and discussion of this in California see Frederick Douzet, Thad Kousser and Kenneth P. Miller, *The New Political Geography of California*, Berkeley: Berkeley Public Policy Press, 2008

³⁴ The concept is credited to Justice Brandeis in his dissent in *New State Ice Co. v. Liebmann* (1932)

³⁵ See Charles Tiebout, “A Pure Theory of Local Expenditures,” *Journal of Political Economy*, 64(5): (Oct. 1956), pp. 416-24.

people to choose where they live based on between different packages of public goods, including rights, in different states. California's stronger package of fundamental rights very much suits its diverse population and provides an option for those who prefer to live under stronger protections. If California no longer wants to be at the forefront of stronger protections, that choice, critical as it is, should be made deliberatively and with a full appreciation of what it means for the state and its citizens.

For a hybrid democracy like California, the commitment to popular sovereignty needs to be reconciled with its representative and republican institutions. There are two competing conceptions of governance by initiative: the populist ideal that subordinates representative institutions to the voice of the people as expressed through direct democracy and the progressive vision that sees the initiative process as a safety valve for and supplement to the normal legislative process.³⁶ The balance of direct and representative democracy in a state's institutions can be consequential in terms of policy and representation. Because of differential voting rates among groups of citizens who are geographically separated, such is often the case with racial, religious and even ideological groups, states often have two distinct controlling constituencies (i.e., different groups control the statewide voting majority and the elected representatives). In California, dual constituencies arise from the distribution of the population by age and citizenship rights. White voters are the majority in the statewide electorate, but because districts are based on population (not the number of voters or citizens), nonwhites are better represented in the legislature.³⁷

³⁶ Bruce E. Cain and Kenneth Miller, "The Populist Legacy: Initiatives and the Undermining of Representative Government," in Larry Sabato, Howard Ernst, and Bruce Larson, eds, *Dangerous Democracy*, Lanham Maryland: Roman and Littlefield, 2001.

³⁷ See Bruce E. Cain, "Epilogue: Seeking Consensus Among Conflicting Electorates," in Gerald C.

The statewide voting majority already has a strong voice in determining rights. The voting majority elects the governor, and the governor has the power to appoint judges. Moreover, the voting majority has the right to remove judges in retention elections. When California's State Supreme Court refused to implement a reinstated death penalty in the 1970s, pro-death penalty groups targeted Supreme Court Justice Rose Bird and two other justices, and the voters turned them out of office.³⁸ The voters could have responded in the same way after Proposition 115 was over-turned, but chose not to do so. They had that option with respect to the decision that gave rise to Proposition 8 as well, and will have it again in response to the Court's decision in the legal challenge to Prop 8 that is now before them.

In sum, there are good reasons for more stringently enforcing the line between amendment and revision with respect to state enhanced rights. Allowing groups to take their causes to the ballot box in the form of constitutional amendments can undermine a state's commitment to rights and to judicial review. Given federal guarantees, a state has room to reconsider the degree that it supplements national protections, but reversals of this sort should be regarded as fundamental and taken only after an appropriate level of deliberation and consensus.

Revision and Institutions

The question of malleability also applies to the institutional structures described in state constitutions. All state constitutions lay out the basic rules and structure of government. The motive for a change in governance institutions may be to make

Lubenow and Bruce E. Cain, eds., *Governing California*, Berkeley: IGS Press, 1997.

³⁸ A summary of the Bird Court and death penalty issues can be found in her obituary, Todd S. Purdum, "Rose Bird, Once California's Chief Justice is Dead at 63," *New York Times*, December 6, 1999.

government more transparent, efficient and honest, but this is not necessarily the case. Because governance institutions transparently can advantage interests and elected officials, political competition can lead to attempts to change the basic rules of government in order to gain political advantage. As with changes in rights, the critical issue is whether there can be too much malleability to institutional structure. In the extreme, excessive openness to constitutional change would lead to constant revision of the rules, particularly by groups or parties that happen to have the upper hand at a particular moment in time. This instability could weaken respect for government (i.e. reduce its legitimacy) and could encourage or enable those in power to try to lock-in their positions or lock-out opposition. But a constitution that sets the bar for constitutional change too high might not adapt itself to changing circumstances or new problems.

The example of the US constitution suggests that many governance reforms can be effective when they are enacted in statutes rather than by constitutional amendments. Consider the lobbying reforms recently adopted by Congress, which are at least as stringent as those in many states.³⁹ But national reforms have important constitutional limits, as the ongoing concerns over the Electoral College or the anomaly of the U. S. Senate in the post-*Reynolds v. Sims* era amply demonstrate.⁴⁰ Some institutional changes are so fundamental that they need to be embedded in the constitution even if only to fix an existing flawed provision. So it stands to reason that if revisions are increasingly hard and amendments are not, fundamental institutional reforms will increasingly be crammed into the amendment process.

³⁹ A review of the new federal laws and the way they advance lobbying to a higher level of regulation can be found in Dorie Apollonio, Bruce E. Cain and Lee Drutman, "Access and Lobbying: Looking Beyond the Corruption Paradigm," *Hastings Law Review* 36:1 (2008), pp. 13-50.

⁴⁰ See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* Oxford: Oxford University Press, 2006.

The leakage of institutional reform from revision into amendment has been accelerated by two related structural features. First, the path to revision in many states leads through the legislature. Second, the legislature has historically had a privileged position in state constitutions, and hence many modern state reforms have attempted to limit legislative power. The first point, as discussed earlier, is that only two states allow citizens to call for a convention by the initiative process and only 14 periodically ask their citizens whether they wish to hold a convention without the prior approval of the legislature. This means that most state legislatures can block attempts at fundamental reform by refusing to authorize a convention or commission. Although a few states like Alaska and Montana explicitly prevent the legislature from restricting the convention agenda, most do not and some (e.g. Kansas, Tennessee and North Carolina) explicitly provide for conventions with a limited agenda.⁴¹ Some states provide for constitutional commissions in lieu of conventions, but the commissioners are typically appointed by elected officials and the commissions' proposals usually have to come back through the legislature. Both provisions undercut the commission's independence.⁴²

The legislature's centrality to the revision process coincides with a second feature of state government. Many state constitutions still bear a legacy of mistrust of executive power that was derived from America's experience with colonial governors. A common example of this mistrust is the widespread adoption of the plural executive, which divides executive power among multiple elected offices. As of 2000, there were 305 separately elected state executive officials in 12 different offices, including 43 Attorney Generals, 20 Auditors, 37 Treasurers, 35 Secretaries of State, 13 Secretaries of Agriculture, 14

⁴¹ Benjamin, *op. cit.*, p. 194

⁴² Benjamin, *op. cit.*, pp. 191-192

education officials, 5 labor officials, and 7 public utility officials.⁴³ In many states, the Lt. Governor runs independently from the Governor, resulting in awkward situations and occasional disputes when they belong to different political parties. As discussed earlier, attempts to consolidate these positions and focus accountability in a given policy area on one executive office have been consistently opposed by legislators who are loathe to get rid of offices they might run for in the future.

Local governments also have tried to limit the legislature's power. On balance, the trend has been to strengthen the executive branch of state government over the last one hundred years, beginning with Progressive Era reforms that introduced civil service, an expansion of the governor's office, and independent regulatory commissions.

According to an index developed by Professor Thad Beyle, governors have continued to consolidate power in recent years in every area except the budget (but that of course is a huge exception).⁴⁴ A major source of contention between governors and legislatures is whether a governor should have the unilateral power to make cuts in enacted budgets, whether by spending less than is appropriated or through emergency powers in a fiscal crisis, and if so whether those cuts should be across the board or can differ by program areas, such as through a line-item veto. Legislators have strong and vested views about reforms in this realm.

Legislatures also face pressures from below. Local governments persistently press for more autonomy from the state legislature.⁴⁵ Defining the local and state spheres of government is an ongoing contentious problem. In California, the boundaries between these spheres continue to blur, especially as local sources of revenues, especially property

⁴³ Thad Beyle, "The Executive Branch," in Tarr and Williams, Vol. 3, *op. cit.*, pp. 74-82.

⁴⁴ Beyle, *op. cit.*, pp. 67-8.

⁴⁵ See Michael E. Libonati, "Local Government," in Tarr and Williams, Vol. 3, *op. cit.*, pp. 110-132.

taxes, have been restricted by ICAs. State versus local tensions are also manifest in defining home rule for chartered cities and counties, establishing rules to govern the creation of special governments, determining the extent of local fiscal autonomy, clarifying the limits to the legal presumption that local interests should be subordinated to state interests, and enabling local government units to enter into agreements with one another. Once again, legislatures generally want to preserve their powers in these matters rather than cede them.

Perhaps even more problematic in are reforms that regulate the legislature and its members, such as term limits, campaign finance, the choice between a bicameral and a unicameral legislature, and above all, redistricting. Term limits have mostly been imposed on legislatures by initiatives and generally have not been adopted in states that preclude ICAs.⁴⁶ No reform has more drastically altered legislative function in the last century than term limits (rivaled only by the professionalization of some large state legislatures in the sixties and seventies). Term limits have weakened legislative leadership and undermined the expertise and oversight capacities of legislative committees. But term limits have also increased turnover, and for that reason alone, remain popular with voters. Legislatures have done a little better with respect to reforming campaign finance⁴⁷ and the initiative process. For instance, when the California legislature realized that outside reformers might use the initiative process to regulate campaign finance, they created their own reform with much more lenient contribution limits.

Redistricting reform is another area where legislative opposition has been intense.

⁴⁶ See Jennie Drage Bowser and Gary Montcrief, "Term Limits in State Legislatures," in Kurtz *et al.*, *op. cit.*, pp. 10-15.

⁴⁷ Nathaniel Persily, ??

The right to draw district lines is close to sacred for many legislators. The way districts are constructed affects not only their reelection prospects but also how much money they need to be spend in a campaign, the projects and bills on which they must work in order to be responsive to their constituents, their ability to raise campaign contributions, the number of challengers they might face in a primary, and even where they have to live. Prior to the passage of Proposition 11 in 2008, all previous attempts to take the primary redistricting function away from the California legislature and give it to the courts or a nonpartisan/bipartisan commission ended in defeat, in large measure because legislators and members of Congress united strongly against them. Term limits in the end made redistricting reform possible in California because incumbency became less important and undermined the legislature's resolve to resist to the bitter end giving up their line-drawing powers.

Resistance is as high or higher to even more innovative reforms such as creating a unicameral legislature or introducing proportional representation. When the California Constitutional Revision Commission met in the early 1990s, two former legislators advocated a unicameral legislature, believing that the reconciliation negotiations at the end of bill passage were non-transparent and too often used as a means to bypass normal legislature procedures for political advantage. Special interests, they claimed, often won victories under the cover of legislative darkness that they could not win in earlier, more transparent stages of bill development. But which house would be collapsed and whether legislators in a larger, combined body would have smaller budgets and staff became critical considerations, and the idea died a quick death.

In all these ways, legislative interests conflict with reform efforts, which makes

the legislatures' ability to block revision through the convention or commission route all the more critical. The predictable effect has been that reform groups have pressed for their changes through the amendment process, especially in the hybrid democracies. Arguably, some of these amendments could be classified as revisions. Proposition 140, the term limits initiative, is a good example, for its effects on weakening the legislature were predictable.⁴⁸ Nevertheless, the court was unwilling to strike the measure down on what seemed to them unproven speculations.⁴⁹ Their concern was not unreasonable, but it was also not unreasonable to think that term limits, if they presented a significant risk of substantially weakening the legislature, were a revision, not a mere amendment.

Still, allowing revision by amendment with respect to legislative and executive branch reforms in light of the legislature's ability to veto revision seems justifiable. As compensation for the current legislative veto over the California constitutional convention and commission processes, the threshold for revision by amendment can be lower for institutional change (including judicial organization) in comparison to the threshold for matters involving rights and judicial review. Better yet, the revision process could be altered to allow, as some states do, for a convention or commission to be called by the people directly by initiative or through automatic periodic referenda, and for the commission or convention recommendations to go directly to the ballot without legislative or gubernatorial approval.

Cumulative Revision

Although rarely if ever discussed, the cumulative effect of separate policy

⁴⁸ Reference?

⁴⁹ *Legislature v. Eu* (1991) 54 Cal.3d 492

amendments can amount to important revisions of the constitution. State constitutions are grab-bags of all sorts of items, including policies that would normally be found in statutes. The motive is usually to lock in a policy, prohibit an action, or assure a particular level of appropriations. Lawmakers then must follow a constitutional mandate irrespective of the political circumstances and needs of the moment. Constitutional specificity breeds inflexibility and hinders adaptation, and tempts more amendment activity to fix, adjust or over-turn what has already been added to the constitution.

In state fiscal areas especially the cumulative effects of separately adopted policy initiatives can substantially alter a state government's powers and capacities in ways that might not be foreseen by voters when each particular measure is passed. So, to come back to California, voters have at different times approved a string of measures that substantially limit the legislature's ability to raise and spend money. These include earmarked taxes, limits on property taxes, supermajority vote requirements for tax increases, and government spending limits.⁵⁰ But while limiting taxes and total spending, voters also have adopted measures that directly or indirectly set minimum expenditure requirements in many areas of policy, such as criminal justice, education, environmental protection, and transportation. In addition, interest and amortization of general obligation bonds for specific types of public investments also must fit under the caps on taxation and expenditure. In normal times these collectively incompatible measures eliminate nearly all of the discretion of the legislature in constructing a budget. In difficult financial periods, these measures mandate expenditures that exceed revenues, despite

⁵⁰ Discussions of fiscal bind in California in *Governing Ca.*, Cain and Noll and for a broader discussion encompassing other states see Richard Briffault, "State and Local Finance," in Tarr and Williams vol. 3, *op. cit.*, pp. 211-228.

another constitutional provision that requires a balanced budget.\

To expect the courts to police the cumulative effects of a long string of separately passed policy amendments is unrealistic. The key underlying problem is that a revision process to attempt to unravel the cumulative effects of numerous amendments is so difficult to initiate. A constitutional revision was not required to create California's fiscal mess, but a revision will be required to fix it. This again argues for loosening current revision and amendment procedures to permit routes that bypass the legislature.

Conclusions

The trend in state constitutional change is for more amendment and less revision. This trend has potentially serious consequences, particularly with respect to state constitutional rights and judicial review. Revision is hard in contemporary politics because interest groups and parties keep a close eye on rule changes and seek to lock-in advantages into the constitution. The uncontrolled agenda and cumbersome process of revision are not good options for them so they naturally turn to the easier route of legislative amendment or, in direct democracy states, ICA. The courts tend to allow considerable slippage in the line between revision and amendment, and sometimes this has led to changes that threaten state-enhanced rights, undercut the review power of the courts, and introduce inconsistent and incoherent structural reforms. The revision versus amendment distinction should be taken more seriously by the courts, and states should consider methods of revision that bypass the legislature. Even so, revision will remain a difficult task because the gap between what is analytically desirable and politically feasible can be quite wide.