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LAW REVIEW

Change that Matters: An Essay on State Constitutional Development

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A sharp focus on state constitutional change brings into relief many related matters of state constitutionalism—how should we think about state constitutional development in a world in which state constitutions are frequently amended or revised? What political struggles take place on a battleground in which formal change may be the ultimate prize? How effectively do courts enforce procedural rules which purport to regulate processes of change? What light do positive theories of state politics, judicial behavior, and constitutional design shed on our normative perspectives on state constitutionalism in either a first or a second-best world? These are, of course, interrelated issues. And the emerging (and converging) fields of state constitutional law and American constitutional development promise to help us better negotiate these issues.[2]

What we learn from modern scholarly perspectives on American constitutional development is essentially this: the relationship between law and politics is unavoidable and essential to understanding the dynamics of constitutionalism and constitutional change.[3] Therefore, whatever focal point we have in mind in our consideration of state constitutional matters, we must attend to the ubiquitous considerations of

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2. On the renaissance of interest in, and scholarly analysis of, state constitutions and constitutionalism, *see, e.g.*, NEW FRONTIERS OF STATE CONSTITUTIONAL LAW (James A. Gardner & Jim Rossi, eds., 2011); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009).

3. This has been a key theme in the contemporary work of leading state constitutional law scholars including, among others, JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION (2009) and CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (G. Alan Tarr, ed., 1996).

both law and politics. In this symposium essay, I consider how this advised focus on law and politics—or what I call *constitutional law/politics in high fidelity*—illuminates the complex matter of state constitutional change.

While the relevance of this inquiry is not unique to state constitutions and constitutionalism, some special characteristics of state law and politics in the American constitutional system make this a topic of compelling importance. First, state constitutions are famously more malleable than is the U.S. Constitution;[4] hence the circumstances in which change takes place—through formal means, to say nothing about informal means—are much more common in the state constitutional context.[5] Second, and relatedly, the dynamics of social movements and direct political action are magnified given the real possibilities of implementing constitutional change.[6] Third, elected state judges ignore powerful political pressures at their peril. They need to be—and likely are in reality—more closely attuned to the connection between legal judgments and political ramifications.[7] Fourth, the availability of direct constitutional change through the initiative system in many states obviously amplifies the persistent political considerations in the law.[8] Fifth, and finally, politics at the sub-national level implicate more conspicuously democratic values and circumstances.[9]

4. On comparisons between state and federal constitutional change, see WILLIAMS, *supra* note 2, at 359-97; Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS, Winter 1982, at 57, 57 (1982).

5. *See generally* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1641-43 (2010); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1163 (1999) (describing state constitutions as "more plastic and porous").

6. *See*, *e.g.*, G. Alan Tarr, *Introduction* to CONSTITUTIONAL POLITICS IN THE STATES, at xiii, xv (G. Alan Tarr ed., 1996) ("Far from viewing their constitutions as sacrosanct and above politics, the states have treated them as political documents to be changed in accordance with the shifting needs and opinions of their citizens").

7 *See generally*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2090 (2010) ("judicial rulings are more easily and frequently overridden at the state level").

8. *See id*. at 2089-90. See also JOHN MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); ELISABETH GERBER, POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999); Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 OKLA. L. REV. 2 (2006).

9. From one perspective, this is tied to the Jeffersonian idea of small-level democracy and the superiority of localism on this standard to more centralized (and centralizing) tendencies. *See, e.g.*, David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PENN. L. REV. 787 (1999). From another, the fulfillment of this idea is grounded in the complex dynamic between national, state, and local governance. What is or is not "democratic," in this view, depends upon how state constitutionalism interacts with national constitutional objectives. *See*, *e.g.*, ROBERT

Framed around the argument that state constitutional change is simultaneously about both law and politics, my essay has two distinct objectives. The first, and more ambitious of the two objectives, is to explain how and why theories of state constitutional development flounder unless they are conspicuously attentive to considerations of politics and political strategy and the positive political theory of legal decision-making. My second objective is to reinforce this abstract argument with a specific doctrinal example, the distinction in state constitutional law between *revisions* and *amendments*.[10] While this distinction implicates key constitutional values, judicial interpretations have been incoherent and vexing. That courts have lurched toward and away from particular lodestars in implementing this distinction suggests the difficulties of undertaking state constitutional interpretation without due account of the peculiar dynamics of state constitutional politics.

I. CONSTITUTIONAL LAW AND POLITICS IN HIGH FIDELITY

State constitutionalism is best understood as an admixture of political and legal choice.[11] Law takes place in the shadow of politics, and political activities are implemented within legal frameworks, in light of legal rules and interpretations. Accordingly, any meaningful account of state constitutional development must be scrupulously attentive to the dynamic relationship between law and politics and, more ambitiously, have a theory in mind that makes sense of this relationship and provides traction for prescriptive analysis and normative assessment.

A. Law Meets Politics

To say that legal rules and interpretations take place in the shadow of politics is to say something that is at the same time banal and vital. That political choice has an impact on judicial outcomes is a rather conventional insight that is dug deep into the ground of American public law.[12] More provocative is the claim, sketched in some of the leading

SCHAPIRO, POLYPHONIC FEDERALISM (2009); Lawrence Sager, *Cool Federalism and the Life Cycle of Moral Progress*, *in* NEW FRONTIERS, *supra* note 2, at 15-24.

10. For a valuable historical perspective on the revision/amendment distinction, see DINAN, *supra* note 3, at 29-63. *See infra* text accompanying notes 46-50.

11. An observation we could make, as well, about American constitutionalism more generally. *See, e.g.*, DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN (2006); Walter F. Murphy, *Designing a Constitution: Of Architects and Builders*, 87 TEX. L. REV. 1303 (2009). Indeed, we need not necessarily limit this observation to the U.S. *See, e.g.*, ZACHARY ELKINS, TOM GINSBURG, & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); Ran Hirschl, *The 'Design Sciences' and Constitutional Success*, 87 TEX. L. REV. 1339 (2009).

12. *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE (2010); ROBERT MCCLOSKEY, THE AMERICAN SUPREME COURT (5th ed. 2010); KEITH E. WHITTINGTON,

political science work of this and previous generations, that judges are influenced in their decision-making by political choice and strategy.[13] Taking this claim as roughly accurate, we still need an explanation, one rooted in both theory and empirics, of just how legal rules, and the application of these rules in cases, cut at the relevant joints of American political practice.

The developing work in law and positive political theory ("L/PPT") approaches this question by positing an informed, dynamic relationship among political and legal institutions in the framework of policymaking.[14] Court-legislature relations are modeled as a game, a game in which legal rules and interpretations are configured in light of expected legislative and executive reactions.[15] By reasoning inductively and purposively,[16] lawmakers and judges can calibrate their decisions to the expected reactions of other institutions and officials who matter. From the judiciary's perspective, "the ubiquitous possibility of congressional override of judicial . . . interpretation shapes judicial behavior."[17] L/PPT explains how decision-making is conducted within the structure of the incentives, opportunities, and obstacles present and prevalent in all institutions in government.[18] In short, L/PPT presents a picture of dynamic policymaking which helps us better to understand just how law meets politics.[19] In fact, "[T]he emerging PPT literature on the judiciary and the role of law stresses the political nature of legal decision-making and the dynamic relationship among the legislative,

CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

13. *See, e.g.*, FRANK CROSS & STEFANIE LINDQUIST, MEASURING JUDICIAL ACTIVISM (2009); RICHARD POSNER, HOW JUDGES THINK (2008); HAROLD SPAETH & JEFFREY SEGAL, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

14. For an excellent expository essay on this work, see Rui J.P. deFigueiredo, Jr., Tonja Jacobi, & Barry R. Weingast, *The New Separation-of-Powers Approach to American Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 200 (Barry R. Weingast & Donald Wittman, eds., 2006).

15. *See, e.g.*, William N. Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

16. For an accessible analysis of how backward induction is critical to the game theoretic analysis ungirding the PPT approach, see KENNETH A. SHEPSLE, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 163-67 (2d. 2010). *See generally* DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELLING (1990).

17. De Figueiredo, *supra* note 14, at 209.

18. *See generally* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994).

19. Much of the analysis in the L/PPT paradigm builds upon the model introduced in an unpublished paper by Brian Marks. *See* Brian Marks, A Model of Judicial Influence on Congressional Policy-Making: Grove City College v. Bell (1988) (unpublished manuscript, on file with author).

executive, and judicial branches."[20] From this vantage point, we can consider myriad normative questions, not the least of which is how best to construct schemes of legal rules in the face of this iterative game.

To fuel this consideration, we need to have in mind an idea of what sort of legal rules are practical and optimal. The fundamental question, of course, is what we are trying to achieve with our rules. When we think of political-legal dynamics in the way sketched by L/PPT we may gravitate toward two opposed prescriptive approaches. We can look to law as a way of *reflecting* politics or we can look at law as *combating* politics. To help unpack this a bit more, let us distinguish between two kinds of constitutional decision rules: one that seeks to promote political incentives and the other that is concerned with controlling political strategy. The first kind of rule accommodates how government officials behave; it is a rule that is "incentive compatible."[21] In an optimal world, these constitutional decisions will not impact political choices in the sense that officials will find it either easier or harder to make their choices because of the decisions; rather, they will make choices within the policy discretion space decried by political officials and with the purpose of implementing legislative and/or executive goals. The legal-political game, to put it in specific L/PPT terms, is a self-enforcing equilibrium.[22]

A second kind of rule has a different effect. Here, the legal rule has the effect of disrupting political strategy; it changes the equilibrium by imposing a new barrier or requirement on legislators, new in the sense that the rational legislator will act differently than she would if no such rule were forthcoming.[23] Legal rules in this way are incentive incompatible.

As an example of an incentive compatible rule, consider the rules governing property rights. As Douglas North and various colleagues have written, secure property rights enable political officials, firms, and other interested stakeholders to plan effectively and to construct optimal

20. Mathew D. McCubbins & Daniel B. Rodriguez, *The Judiciary and the Role of Law*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY, *supra* note 14, at 284.

21. On incentive compatibility more generally, *see* Kim-Sau Chung & Jeffrey C. Ely, *Ex-Post Incentive Compatible Mechanism Design*, 74 REV. ECON. STUD. 447 (2007); David Schizer, *Executives and Hedging: The Fragile Legal Foundations of Incentive Compatibility*, 100 COLUM. L. REV. 440 (2000).

22. *See, e.g.*, Norman Schofield, *Evolution of the Constitution*, 32 BRITISH J. POL. SCI. 1, 1 (2002) ("[T]he beliefs that underpin the constitution must themselves generally be in equilibrium").

23. *See, e.g.*, William Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988); Jonathan Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

bargaining relationships.[24] Although, in any particular instance one's ox may become gored, there is a generally acceptable interest in maintaining the schemes of property rights in order to protect investment and to reduce inefficient conflict. Writing in this same political economy tradition, Barry Weingast has made a similar argument for the creation and persistence of federalism as a mechanism for preserving markets.[25] A further example, albeit a bit farther afield from the specific focus on formal constitutional structure, is the techniques of legal interpretation which purport to honor the will of the constitution's framers (or, in connection with statutory interpretation, the framers of the statute). This is, to be sure, a controversial and problematic endeavor; critics of certain forms of originalism emphasize both the positive and normative difficulties of this approach. However, a commitment to the framers' intent in interpreting constitutions is compatible with the incentives of legislators to forge agreement and to communicate their intentions through not only the words of the document, but through probative legislative history.[26]

There are also distinct legal rules which can best be viewed as incentive incompatible. The so-called "single subject" rule, for example, counters legislator incentives but limits the ability of legislators to strike political agreements and make tradeoffs in the four corners of a proposed bill.[27] Logrolling can, to be sure, be carried out across the terrain of legislative proposals, but the requirement of simultaneity of exchange,[28] a key assumption underlying intra-legislative strategy, is better fulfilled when the tradeoffs are made within an omnibus proposal that will ultimately be considered in an up or down vote. The history of the single subject rule suggests that it was precisely this concern with legislative logrolling (as well as lawmaking transparency) that generated this constitutional rule.[29] Similarly, the requirement that legislators adopt a

24. *See, e.g.*, DOUGLAS C. NORTH, JOHN JOSEPH WALLIS, & BARRY R. WEINGAST, VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY 148-89 (2009).

25. *See* Barry R. Weingast, *The Economic Role of Political Institutions: Market-preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995).

26. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PENN. L. REV. 1417 (2003) (discussing how revised approach to reading legislative history would be incentive compatible).

27. On the "single-subject" rule more generally, see WILLIAMS, *supra* note 2, at 261-63. For an interesting, recent analysis of the political economy of the single-subject rule, see Robert Cooter & Michael Gilbert, *A Theory of Direct Democracy and the Single-Subject Rule*, 110 COLUM. L. REV. 843 (2010).

28. *See* Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, are not Organized as Markets*, 86 J. POL. ECON. 132 (1988).

29. *See generally* Cooter & Gilbert, *supra* note 27, at 706-07.

balanced budget, which is hard-wired in nearly every state constitution, is incentive incompatible in that it reduces the capacity of legislators to engage in various fiscal illusions and machinations. Balanced budget rules, at least in theory, function as a sort of constitutional PAYGO system - that is, a system that obligates legislators to provide sufficient funding for their legislative initiatives and, in essence, requires them to make their tradeoffs more explicit in their budgetary annum.

Finally, certain rules are incentive compatible in some circumstances but not others. For example, the separation of powers may conflict with purposive goals by raising the costs of engaging in forms of political strategy. This effect was very much on the minds of Madison and Montesquieu;[30] political action is rendered more difficult by checks and balances and schemes that parcel out political power among formal institutions.[31] On this account, the myriad of separation of powers rules are incompatible with political incentives. But from another perspective, separation of powers enables officials to invest capital in their own institutions and to realize gains from specialization and monopoly.[32] Legislators can know that under the formal rendering of separation of powers, their lawmaking power is exclusive and thus the benefits accruing from lawmaking power will redound to members of this and only this institution. Moreover, the extent to which separation of powers is incentive compatible depends fundamentally upon what we *mean* by the separation of powers. Doctrinal line-drawing has been notoriously difficult, and so the connection between what amounts to a jurisprudence, rather than a formal structure ("separation of power" being nowhere delineated exactly in the text of the U.S. Constitution), can be opaque. Other concepts integral to the so-called "rule of law" have this quality as well.[33]

This stylized theory is meant to encompass key truths about the nature of political and legal decision-making in the American system. We should be careful, however, about making the uncritical move from a depiction of politics as usual to a normative picture of how politics engages with core constitutional values. The incentive compatibility analysis explains how constitutional rules reflect politics, but such rules are designed, in small or large part, to regulate politics and political

30. *See* MONTESQUIEU, THE SPIRIT OF THE LAWS, vol. 1 (1748) (Thomas Nugent trans., 1777); THE FEDERALIST NO. 51 (James Madison).

31. *See generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

32. *See* Rui J.P. DeFigueiredo, Jr., Tonja Jacobi, & Barry R. Weingast, *The New Separation-of-PowersApproach to American Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 199, 199 (Barry R. Weingast & Donald A. Wittman eds., 2006).

33. *See generally* Daniel B. Rodriguez, Mathew D. McCubbins & Barry R. Weingast, *The Rule of Law Unplugged*, 59 EMORY L.J. 1455 (2010).

behavior. Herein lies the puzzle at the heart of L/PPT: certain formal rules and structures are needed in order to implement the objectives of constitutional commitment. This is no less true of state than of national constitutionalism. Yet, we need and want rules to constrain political choice in order to implement other key values. It is pursuit of this second objective where we consider squarely the question of how politics meets law.

B. Politics Meets Law

In light of this account of legal rules and political strategy, how should we think about state constitutional rules? The metaphor I proffer here as a way of thinking coherently about these multifaceted and multidimensional ideas is *constitutional law and politics in high fidelity*. High fidelity is a concept that comes from stereophonics[34] and, indeed, is a rather quaint concept that, in an earlier generation, was swiftly abbreviated simply as "hi-fi," generally in reference to a stereo system. Hi-fi reproduction denotes the high-quality reproduction of sound or images. The quality of this reproduction is measured by the true sound coming through with minimal amounts of noise and distortion, as well as an accurate frequency response. This captures, I would suggest, the critical features of our system of constitutional law and politics. After all, we have as an ideal a constitution as reflecting our polity's primacy governance objectives. Not only does the formal architecture of the document embody these objectives by, for instance, creating workable governmental institutions, but the processes set in motion by our constitutional system facilitates good lawmaking and, in a variety of ways, enables the government to perform its tasks—*our* tasks—successfully.[35] Many obstacles exist; political pressures and tactics create distortions in the workability of the original constitutional system. These are, to be sure, not abnormal events but are ordinary given the circumstances of retail and wholesale American politics. Still and all, the distortions and noise created make it difficult to reproduce the quality of the original constitutional structure.

Constitutional adjudication and formal constitutional change are the two primary ways in which the system confronts these distortions. To

34. The term "high fidelity" was coined by H.A. Hartley in 1927. *See* H.A. HARTLEY, AUDIO DESIGN HANDBOOK 200 (1958). "I invented the phrase," he writes, "to denote a type of sound reproduction that might be taken rather seriously by a music lover. In those days the average radio or phonograph equipment sounded pretty horrible but, as I was really interested in music, it occurred to me that something might be done about it." *Id.*

35. On the objects of state constitutions, see Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. (forthcoming 2011).

come back to our stereophonic metaphor, we want a constitutional law and politics in high fidelity; that is, we want to reproduce our objectives into functioning policy with a minimum of political noise and distortion. This will never be achieved perfectly, of course, but then again, neither will a perfect hi-fi system be manufactured.[36]

C. Perspectives on Constitutional Change

Constitutions are created in order to manage social and political conflict. They construct rules that, whether or not in the short-term political interest of government officials, secure a long-range interest in promoting valuable social investment,[37] reducing the stakes of politics and thereby what de Figueredo and Weingast called the "rationality of fear,"[38] and in overcoming various coordination problems.[39] The dilemma is how to accommodate constitutional change in a schema that prizes, for the reasons just stated, constitutional stability. "Dynamic or long-term stability," write Mittal and Weingast, "requires the ability to adapt existing institutions so that they continue to lower stakes in politics and enable widespread coordination as circumstances change."[40] In other words, constitutional change is necessary for the same reasons as is constitutional stability: to protect the system and its citizens against the volatility, violence, and expropriation at risk by political officials unmoored to workable legal rules.

The normative element remains missing in this account, however. What values does the law serve in implementing broad governance goals

36. My focus is on legal mechanisms within the state system. This is myopic, to be sure. Insofar as law should aim to reduce noise and distortion in the system, this can be accomplished by mechanisms external to the state constitutional system. In fact, the American constitutional tradition, and its commitment to federal supremacy, supposes that federal government will exercise just this role. All that the idea of constitutionalism in high fidelity adds to this classic view of American federalism is the idea that the function of federal law and trans-state legal rules is, *inter alia*, to reduce distortions in the system that would otherwise leave imperative social goals to the disruptive effects of local political struggle and strategy. The Supreme Court's lodestar decisions in the reapportionment cases are cogent illustrations of this function. *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

37. *See generally* NORTH, WALLIS & WEINGAST, *supra* note 24.

38. *See* Rui J. P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103 (2005); Rui J. P. de Figueiredo, Jr. & Barry R. Weingast, *The Rationality of Fear: Political Opportunism and Ethnic Conflict*, *in* CIVIL WARS, INSECURITY, AND INTERVENTION 261, 261 (Barbara F. Walter & Jack Snyder eds., 1999).

39. *See* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 59 (1996); Russell Hardin, *Constitutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY, *supra* note 14, at 297-99.

40. Sonia Mittal & Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century 4 (July 2010) (unpublished manuscript, on file with author).

through constitutional rules and interpretation? Change is about adaptation to instabilities, but it is also about safeguarding principles of justice, economic efficiency, and moral and political rights in new circumstances.[41]

Modalities of state constitutional change require an appreciation for two key considerations: first, the political dynamics of constitutionalism made palpable and compelling by political economy accounts that stress the connection between institutions, rules, and what Daryl Levinson insightfully labels the "puzzle of constitutional commitment."[42] Second, we have the normative elements of our constitutional ambitions and expectations. Sensible strategies of change require us to navigate both of these complex considerations.

The good news about state constitutional change is also the bad news. The flexibility of state constitutional change processes,[43] particularly in those states with direct initiative lawmaking,[44] made change easier to secure through formal modifications our normative commitments. State constitutions can, in short, better keep up with the tenor of the times. This is also the bad news, however, since the malleability of the documents creates opportunities for precipitous action and filling up the document with clutter, with policies that hardly warrant the label "constitutional." Moreover, the susceptibility of state constitutions to frequent change can undermine the kind of stability that the L/PPT analyses prize. By shifting the focus to constitutional adjustment when the spirit moves them, entrepreneurial political interest groups can increase the stakes of politics and heighten, rather than assuage, fear.

Workable constitutional change at the state level requires striking this difficult balance. At a broad level, this means that reformers should ideally choose one's spots carefully. Moreover, at a legal level, it means that procedures should be in place to ensure that constitutional change is carefully considered and modulated to take into account some of the risks of frequent change and the threats such change poses to constitutional stability and acceptability. In the next Part, I consider one key doctrinal puzzle that purports to strike this balance.

II. DYNAMIC IN ACTION: THE REVISION/AMENDMENT PUZZLE

One of the persistent puzzles of state constitutional law is how best to distinguish between a constitutional change through amendment and a

41. *See, e.g.*, Hershkoff, *supra* note 5.

42. See, *e.g.*, Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 657-58 (2011).

43. *See supra* text accompanying notes 4-6.

44. *See supra* note 8 and accompanying text.

change through revision.[45] The basic distinction drawn in the case law is between incremental changes, which are construed as *amendments*, and changes of a large scope, which are deemed *revisions*.[46] The latter sorts of changes can be implemented through revision mechanisms provided for in the state constitution; alternatively, they can be implemented through the process of a constitutional convention.[47] The reason this is a matter of state constitutional *law*, rather than merely tactical choice, is that it falls ultimately to courts to decide whether a particular change is best interpreted as a revision, thereby triggering one route of change, or an amendment, permitting another, typically less cumbersome, method. Moreover, the rubber truly hits the road in instances in which the state constitution provides for constitutional change through direct actions of the people and thus without a legislative role.[48] Changes through this mechanism are limited to amendments; revisions require participation at some point in the process by the legislature.[49] The distinction between an amendment and a revision has palpable legal effects, and, in exploring the distinction from the vantage point of this idea of constitutional law and politics in high fidelity, we can illuminate the nature of state constitutional development and, accordingly, state constitutionalism more generally.

A. The Stakes, Legal and Otherwise

Constitutional revisions entail changes so fundamental and so comprehensive that more elaborate processes are required. Requiring revision proposals to run through a more formidable gauntlet serves two overlapping functions: first, bringing into the process a representative institution—the legislature—helps mediate between emerging popular sentiment and more measured approaches to policymaking; and, second, promoting deliberation in the constitutional change process extends the scope of consideration to a wider, and presumably more deliberative, group of stakeholders. Both of these functions can be broadly described as "Madisonian," in that they introduce particular "auxiliary precautions"

45. *See generally* WILLIAMS, *supra* note 2, at 359-97; Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177 (G. Alan Tarr & Robert F. Williams eds., 2006); Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27 (1996).

46. *See generally* WILLIAMS, *supra* note 2 (describing doctrine).

47. *See id*.

48. *See generally* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 29-63 (2009) (detailing amendment and revision issue).

49. Typically, in states that have the constitutional initiative system, a revision must be considered and approved by the legislature before it is sent to the People to vote on for final approval.

in order to put brakes on extreme forms of democracy.[50] The objective of doing so is more controversial when invoked in the context of initiative lawmaking. Such a scheme of lawmaking, of course, was designed to work around the legislature.[51] Requiring legislative intervention is at least a caveat to this Progressive innovation; at most, it is a direct antidote. Given the tension between Madisonian checks and direct democracy, the procedural gauntlet proscribed by state constitutions is confined to a particular strategy of change; that is, a change that effects an overarching, global change to the basic constitutional structure. Such revisions, and the procedural rules that attach to revisions, are quite rare, as we would expect.

We the People, by contrast, are free to amend our constitutions without legislative review, as this is the case in those states which have initiative lawmaking as a means of constitutional change. Madisonian checks are inapt in such a system; indeed, what Madison and other framers feared is just what initiative lawmaking celebrates—the capacity of ordinary citizens to rise up and amend their fundamental charter of governance without legislative intervention or oversight. The fundamental choice, then, is between constitutional change through direct act of the people (amendment) and change through the crucible of representative democracy (revision).

The stakes of this distinction are high.[52] Casting a change into the bin of amendment means that this change is more likely to be enacted given strong public support; adding the legislature to the revision process, *ceteris paribus*, has the opposite effect. Where legislators would fear initiatives, especially in the circumstance in which the initiative is directed at curtailing legislative power or reconfiguring the structure of the institution, the impact of the court's interpretation of revision and amendment will have important political repercussions. While I will only speculate here about the relationship between these consequences and judicial behavior, the role of the court in constitutional interpretation is by any measure critical–indeed, frequently *outcome determinative*—with regard to the success or failure of the proposed initiative.[53] The focus in judicial doctrine, as I will explore in greater

50. THE FEDERALIST NO. 51 (James Madison).

51. *See, e.g.*, JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 81 (2002) ("Only the combined power of the people through a system of direct democracy seemed sufficient to free the states from greedy clutches").

52. *See* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1478-79 (1987).

53. As Cain and Bruce Noll describe the situation:

> 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

depth below, is on the *scope* of the initiative. The politics of constitutional change suggest that the principal preoccupation of legislators and motivated interest groups is the *character* and *impact* of the initiative. In practical terms, combining the law and politics of the revision/amendment distinction yields a multidimensional picture, one that invites scrutiny from different angles and attitudes.

B. Judicial Doctrine

The traditional criteria for distinguishing between revisions and amendments are porous, formalistic, and singularly unhelpful. Courts typically look to the quantitative magnitude of the change, or else to the question of how global the impact is on constitutional governance. These are, to put it mildly, highly subjective criteria. They seldom do the job of limiting judicial discretion; likewise, they seldom guide effectively citizen and legislative reform efforts.

The difficulties are well illustrated by the California Supreme Court's decisions in the same-sex marriage and Proposition 13 cases. In *Strauss v. Horton*,[54] the supreme court considered whether a quantitatively small change to the state Constitution one that adds to the document the statement "[o]nly marriage between a man and a woman is valid or recognized in California"—is an amendment or instead a revision.[55] The court held that this change was an amendment, rather than a revision, on the idea that only those "far reaching changes in the nature *of our basic governmental plan*" should be deemed revisions.[56] "Proposition 8," the court declared, "simply changes the substantive content of a state constitutional rule in one specific subject area," and thus makes no fundamental change to the organization of governance within the state.[57] The court's argument is highly plausible as a formalistic depiction of what the initiative does or does not do to the structure of the California Constitution. But the reasoning of the court eludes the question of what the proponents of the change were truly

> 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. . . . The problem is an example of the classic case of concentrated costs and diffuse benefits.

Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1529 (2009). *See also* Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, *in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 45, at 59.

54. Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

55. *Id.* at 59. California's Constitution provides that an "amendment" can be enacted through the initiative directly, *see* CAL. CONST. art. II, § 8, subdiv. (b), but a revision requires assent by the legislation, *see* CAL. CONST. art. XVIII, §§ 1-2.

56. *Strauss*, 207 P.3d at 98.

57. *Id.* at 99.

looking to accomplish. Were they addressing a deep governance failure? Clearly not. Were they reconsidering in a fundamental way the underlying structure, objectives, or methodology of their state constitutional system? Hardly. While in no way minimizing the impact of this change on gay and lesbian Californians who seek marital options available to straight co-citizens (that is, the ability to marry their partners), the constitutional change could not be reasonably viewed as addressing a constitutional failure, but, at most, a perceived mistake on the part of the supreme court in its earlier decision invalidating same-sex marriage bans on state constitutional grounds. And considered from a practical dimension, the only added value of the legislature in considering this change is the decreased likelihood, given the politics of the matter, that the legislature would have acceded to this change–in other words, the principal effect of defining the change as a revision is the tactical one of blocking change.

Also problematic is the California court's decision in *Amador Valley Joint Union High School District v. State Board of Equalization*,[58] the case in which the court considered the revision/amendment question in the context of Proposition 13. In *Amador*, the court rejected the claim that Proposition 13 was a revision, describing the change as only about taxing powers.[59] Viewed not only in hindsight, but also contemporaneously with the change, the effect of Proposition 13 was a radical transformation in the fiscal prerogatives of governmental entities and a significant transformation in the fiscal relationship between state and local governments.[60] It is fair to view the initiative more generally as an effort, albeit misguided in the eyes of many, to respond to a deep constitutional failure—that is, the decentralization of fiscal authority and the corresponding incentive of local governments to tax and spend at too high a level. Insofar as the change addressed a perceived constitutional failure, the supreme court should have deemed it a revision and thus subject to legislative review. Likewise, the court's consideration of the legislative term limit initiative (Proposition 140) in *Legislature of California v. Eu*,[61] elides the question of the underlying purpose and effect of the change.[62] In holding that this change was an amendment, not a revision, the court implausibly asserted that the initiative "on its face does not affect either the structure or the foundational powers of the Legislature. . . . No legislative power is diminished or delegated to other

58. Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208 (Cal. 1978).
59. *See id.* at 228-29.
60. *See id.* at 220.
61. Legislature of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991).
62. *See id.* at 1320.

persons or agencies."[63] It is only the qualification "on its face" that gives the positive claim any plausibility; in any event, the structural impact on legislative governance could well have been anticipated—indeed, it is what proponents of term limits truly sought—and, insofar as this initiative reflected an effort at tackling perceived legislative failures, it should have been treated as a revision. Finally, to consider an example from a different state, the structural change made to the Alaska constitution in 1998 which removed the reapportionment authority from the executive branch to an body comprised of appointees by all three governmental branches was deemed an amendment rather a revision by the Alaska Supreme Court in *Bess v. Ulmer*,[64] despite the clear import of the change being to address a structural problem that proponents believed impaired governance in the state. This decision, too, avoids tackling the central problem of what defects the proposed change aims to correct and, indeed, what it causes. Drawing the legislature into this reform conversation would improve the situation.

Does it matter whether the proposal focuses on a governance change rather than something else? In a recent article, Bruce Cain and Roger Noll argue that courts should distinguish between changes to individual rights and changes to governmental institutions and processes.[65] In their view, "rights" changes should be deemed revisions and therefore should go through a process that is required for revisions under the relevant state constitution. "[T]he issue of who determines whether rights can be expanded," they write, "seems to fall pretty clearly into the kind of fundamental constitutional reform that was intended for the revision process."[66] Structural changes, by contrast, could be implemented through the amendment process and, where the constitution so provides, directly through the people.[67] The reason for this distinction is two-fold: individual rights are intrinsically counter-majoritarian; to subject them to reevaluation at the ballot box would threaten the values underlying the creation and maintenance of these rights. Rather, reversals should be regarded as "fundamental and taken only after an appropriate level of deliberation and consensus."[68] By contrast, institutional changes should be fair game for direct change. Institutions become entrenched, they plausibly argue, by political considerations; thus, these same institutions cannot be expected to undertake reforms which disempower embedded

63. *Id*.
64. Bess v. Ulmer, 985 P.2d 979 (Alaska 1999).
65. *See* Cain & Noll, *supra* note 53, at 1530-36.
66. *See id*. at 1532.
67. *See id*. at 1536-42.
68. *Id*. at 1536.

interest groups.[69] The amendment process, in essence, should provide an end run around these difficult obstacles.

This is a plausible argument, but viewed from a different vantage point, Cain and Noll may have the matter backwards. Many of the reasons for constitutional failure stem from defects in the ways in which institutions function and govern. These defects are contextualized through attention to the four sets of performance problems described above. To be sure, the fact of entrenchment is certainly a real one; yet, the mechanisms for constitutional change should properly track the nature of the problems entailed. Where politics entrenches constitutional pathologies, the solution lies in omnibus revision. The most sensible mechanism for this revision is a constitutional convention or, failing that, a comprehensive initiative that addresses the large issues at work and incorporates tradeoffs (and perhaps, given the reality of politics, compromise).[70] It will not do, however, to characterize these institutional changes as mere amendments because the impetus for making these changes is that the constitutional architecture is rotten and failure suggests revision.[71] What Cain and Noll label an obstacle can be more plausibly viewed as an opportunity, that is, an opportunity for dialogue between representatives and citizens, and between different branches of government. The efficacy of these reforms, after all, requires acquiescence by those impacted and charged with the responsibilities to govern.

By way of an alternate presumption, therefore, we might think about reforms to governmental structure as usually revisions, and therefore subject to a more elaborate process of change. Rights changes, by contrast, are within the prerogatives of the state citizenry. They may reflect sinister motives and may be ill-advised, but that judgment rests on normative considerations of the merits or demerits of the policy change, not a judgment about the underlying logic of the state constitution and its functions.

The harder cases in this regard will be ones in which the change pertains to rights, but the substance of the change addresses a particular process failure. Consider *Raven v. Deukmejian*,[72] in which the California

69. *Id*. at 1537-38.

70. On the constitutional change process, *see generally* Tarr, "Introduction," supra note 6.

71. Indeed, Cain and Noll acknowledge the strategic considerations animating these change tactics when they note that "[s]ome institutional changes are so fundamental that they need to be embedded in a constitution even if only to fix an existing flawed provision. So it stands to reason that if revisions are increasingly difficult and amendments are not, fundamental institutional reforms will increasingly be crammed into the amendment process." Cain & Noll, *supra* note 53, at 1537.

72. Raven v. Deukmejian, 52 Cal. 3d 336 (Cal. 1990).

Supreme Court examined a constitutional initiative which required that state courts interpret certain constitutional provisions in lockstep with the federal courts. In striking down this initiative on the grounds that it was a revision rather than an amendment, the court insisted that the change dealt with the large matter of independent constitutional interpretation and was therefore a fundamental shift in the role of the state judiciary under the constitution.[73] This is the right result, although the rationale could have been refined by emphasizing the stated reasons for the initiative—to respond to a perceived constitutional failure, that is, the expanding scope of judicial interpretations of certain rights and the apparent incorrigibility between this approach and the philosophies behind the rights at issue. Whether the perceived problems to which the initiative was directed should be deemed a failure or, instead, embraced as a wise take on California's criminal justice rights is subject to debate. However, the rationale for the initiative was to address a constitutional failure and, for that reason, the Court could credibly hold that the change reflected a revision rather than an amendment.

The interpretive puzzle of the revision/amendment distinction touches upon the larger question about how best to view the requisites of constitutional change. After all, the key consequence of a holding that the proposed change is an amendment, rather than a revision, is that a particular process may be followed and, therefore, a different complement of political interests, strategies, and struggles will be implicated.

C. The Problem Writ Large

The preceding analysis reveals that judicial interpretations of the revision/amendment distinction have been largely incoherent. Yet, the incoherence of judicial approaches can hardly be chalked up to unimaginative or careless judges. Rather, the essential difficulty stems from an equivocation in the documents about the suitability and efficacy of initiative lawmaking given its pitfalls and other important constitutional objectives. The constitutional doctrine supposes there is a cohesive line dividing revisions from amendments. Such a line is illusory.

The problem is essentially a *political* one. While our ambition might be (and I suggest ought to be) a constitutional law in high fidelity,[74] noise and distortion create predicaments that are hard to resolve. Any line drawn by the courts between a proposal that can be implemented directly as an amendment and one that requires legislative

73. *Id*. at 513-18.
74. *See supra* text accompanying notes 34-36.

participation will empower different clusters of interest groups. Whether attentive to this dynamic or not, courts are basically helpless at confronting this political dynamic through their interpretations of the constitutional text.

One way out of this box is to take account in interpreting the constitution of the structure of political incentives and patterns of legislative behavior in the face of this initiative proposal. Courts might ask this: What sorts of policy choices would result from one interpretation versus another? We can think of revision versus amendment analysis as basically a device by which courts can configure the costs and benefits of political decision-making in order to promote certain salutary results. However appealing or unappealing these particular doctrinal recommendations, the key take-away point is that judicial decision-making should be incentive compatible with political choices. Constitutional decision rules should be in high fidelity, that is, they should reduce noise and distortion within the broad political process and, more specifically, between among courts, legislators, interest groups, and the general public.

The difficulties with this suggested approach are two-fold: First, we should always be skeptical of the courts' capacity to reset the agenda of politics by their dispute-resolution interventions. What the legislature would do if the court construed a proposal to be a revision rather than an amendment is a counter-factual; and, like all forms of counter-factual reasoning, we are asking more than one question at the same time. For example, would this proposal be fashioned and packaged in this form if supporters knew that it was facing a legislative gauntlet? Would supporters turn away from formal constitutional change toward informal processes such as judicial interpretations of the document or even federal intervention? If, say, the supporters of Proposition 8 were doubtful that the California legislature would approve a bill amending the state constitution to overturn the decision in the *In re Marriage* cases, they may well have pursued the strategy of judicial removal—a strategy that worked in Iowa in the November 2010 election[75]—or of a DOMA-like strategy at the national level that would have supplanted California's judicial ruling. Because we do not know the equilibrium outcome of a political strategy, we should be wary of a judicial rule that sets out to manage political conflict ex post. Recalling the L/PPT account of legislative-judicial relations as a game in which both "parties" reason inductively to conclusions about how they should act in anticipation of

75. *See* Maura Dolan, *Rejection of Iowa Judges over Gay Marriage Raises Fears of Political Influence*, L.A. TIMES, November 5, 2010, *available at* http://articles.latimes.com/2010/nov/05/local/la-me-gay-justice-20101105; A.G. Sulzberger, *Voters Moving to Oust Judges Over Decisions*, N.Y. TIMES, September 24, 2010, at A1.

the actions of others,[76] it is not clear that courts would be able to solve these difficulties by a thumb on the revision/amendment scale, one way or the other.[77] Second, calibrating judicial doctrine to the type of proposal at issue is a very slippery slope. Constitutional reform efforts are multifaceted; some changes reshuffle the deck of political power in the way noted by Cain and Noll, while others reconfigure the pattern of rights, duties, and commitments. We might doubt the ability of courts to truly track the kind of issues at the heart of certain reform proposals. The measure in California invalided in *Raven*, for example, was about the structure of legal decision-making in the state, (in other words, it was about governance) but it was at root a law-and-order initiative designed to reign in "activist" judges who, it was charged, coddled criminals. Decoupling the rights orientation of constitutional proposals from their structural nature and impact will be difficult in a range of potential cases.

Given these difficulties, I can find some solace in an approach that is by and large a distant second-best; that is, second best to a hypothetical approach that (a) is tractable by courts interpreting their respective constitutions, and (b) gets the political incentives exactly right. Given the difficulty in realizing these objectives simultaneously, the most sensible approach would be one that looks squarely at the connection between the objectives of the reform efforts and the process that supporters turn to implement these objectives. The effort to end-run the legislature, while plausible when viewed in light of the extreme Progressive reforms that brought the constitutional initiative system into being,[78] should be modulated, where possible, through careful attention to the values and benefits, from the system's perspective, of having additional Madisonian-type checks.[79] The term limits decision in California,[80] for example, may have come out the other way under this approach; so, too might have the Alaska reapportionment decision described above.[81] By contrast, change proposals that speak to a broad public commitment to a new way of solving social problems, even if this commitment changes some key structural features of the document in the course of these efforts, should presumptively be determined to be amendments and thus capable of being enacted without the intervention

76. *See supra* text accompanying notes 15-20.

77. This observation tracks the larger insight of influential political science work which despairs about the prospect of serious judicial "fixing" of political pathologies. *See, e.g.*, GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES AND KILLS POLITICS (2009); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

78. *See* TEAFORD, *supra* note 51, at 81; *see generally* MATSUSAKA, *supra* note 8.

79. *See* Garrett, *Hybrid Democracy*, *supra* note 8.

80. *See generally* Legislature of Cal. v. Eu, 816 P.2d 1309 (Cal. 1991).

81. *See generally* Bess v. Ulmer, 985 P.2d 979 (Alaska 1999).

of the legislature. Under this standard, Raven might have come out the other way—after all, it is a major change, but one that speaks to the public's preference, for better or worse, to have a lockstep approach to constitutional interpretation in the area of criminal defendants' rights.

To be sure, this suggested decision rule—more of a presumption, actually—is inferior to an interpretive approach which would reduce noise and distortion and leave us with a constitutional rule in high fidelity. Such an ambition, for the reasons just described, may be elusive. Yet, it can make better sense of the distinction by pushing toward other modes of constitutional reform, in particular, a constitutional convention, in which a range of interests can be accommodated and in which strategy, while persistent and inevitable, can be counteracted by more transparent checks and balances.[82]

III. ON THE SUBJECT OF STATE CONSTITUTIONAL CHANGE MORE GENERALLY

Reasoning from positive political theories of constitutionalism to prescriptive analysis requires us, as an initial matter, to be conspicuous and clear about our assumptions underlying the normative project. For my part, my assumptions are framed around a strategic account of legislative-judicial relations, one that sees government officials as essentially in competition with one another and, within the structure of their institutions, in competition with other institutions which might, unchecked, threaten the ability of these officials to pursue their own agendas. Furthermore, constitutionalism at the state level (not unlike the

82. Courts would do well, I have suggested, by attending to the political dynamics of change strategies in order to reduce, as best as possible, distortions in the system. However, the criterion of reducing noise and distortion cannot be dislodged from the larger objectives of the constitutional system. Some of the political dynamics at work and, moreover, the struggles between courts and legislators and between legislators and "We the People" are the result of choices embedded in the documents. They are, in other words, *deliberate* choices, not anomalies. Indeed, the opacity of the revision/amendment distinction may well track not only the ambivalence of the Progressive era constitutional framers but, more intriguingly, their interest in having politics play out in the process of constitutional reform. The conventional take on the connection between constitutional implementation and constitutional design is that constitutions are designed by their framers to *work*; and the ideas of incentive compatibility and constitutional law and politics in high fidelity build on the normative assumption that workability is the principal objective, the *sine qua non* of constitutionalism.

However, what if we look at the matter from a very different angle? What if we consider state constitutionalism as the product of merely self-serving political choices, made by shrewd officials, over the long expanse of American history, and not grounded in a general, public-regarding logic of constitutional workability? This remains a vexing question, one which calls upon, my instinct tells me, a different kind of normative analysis. Whether and to what extent we would end up at basically the same place is a question I am in no position to answer.

national level, in this respect) is organized around the incentives of political officials to resolve overlapping dilemmas through constitutional strictures and, as well, on our interest as citizens (in this case, citizens of the *state*) to implement our objectives through constitutional architecture.[83] From these foundational assumptions, I described how law can meet the demands of politics by being attentive to the incentives of political officials; specifically, the relative compatibility of legal rules to these incentives. The extended illustration provided in Part II of the revision/amendment distinction was intended to sharpen this analysis.

But what of state constitutional change more generally? We do well to consider state constitutions as a major venue in which we construct and implement the goals of the pertinent polity. Given the complex dynamics of law and politics and the difficulties of achieving the appealing goal of constitutionalism in high fidelity, we should concentrate in our pursuit of good governance on developing rules which improve the likelihood of "good" change and reduce the likelihood of either "bad" change or unintended consequences of otherwise appealing reforms. Bracketing the normatively laden questions of what distinguishes the good from the bad in this account, we can readily imagine procedures that moves us fruitfully in the right direction. Let me close this essay by suggesting a few promising guidelines.

First, a formal process of change that includes more, rather than fewer, stakeholders will maximize, *ceteris paribus*, the chances of consensus. This may seem counter-intuitive, given the presumably greater capacity of smaller groups over larger groups to deliberate over policy disagreements. However, it is important to have a reform process in which all the relevant parties are included. We know, after all, that where some parties are excluded, they will, under the logic of L/PPT, just take their complaints to other fora.[84] So far as venues for considering the interests of multiple stakeholders, constitutional conventions will serve this purpose better than either legislator or plebiscitary processes. This may or may not rest on the belief that large groups in collective choice settings will engage in constructive dialogue and deliberation, but on the less controversial belief that forging compromise will be more likely in an environment in which preferences are more transparent and thus decision-makers are more accountable. Such conventions, as we learned from our 18th century founding story,

83. Elsewhere, I have said more about the purposes of state constitutions, but this truncated account will do for my purposes. For more information, *see generally* Rodriguez, *State Constitutional Failure*, *supra* note 35.

84. *See, e.g.*, Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291 (1995).

create serious risks of constitutional radicalism, which is the price we pay for engaging directly first principles of governance. But it is a price worth paying in pursuit of a constitutional system that is modern, effective, and broadly acceptable. And if it is any comfort to folks worried about radical experimentation, the historical experience with state constitutional conventions, as John Dinan has described,[85] suggests that moderate, even technocratic, initiatives will likely win out over wackier, far-flung proposals.

Second, major constitutional change through plebiscitary forms runs risks that cannot be easily curtailed or controlled. To be sure, the Progressive reforms that brought to many states in the West and Midwest direct constitutional lawmaking was designed to work against legislative intransigence and to implement the will of the People in ways that would often be dramatic.[86] But as many critics of direct democracy excesses have noted over the past several decades, initiative lawmaking introduces its own noise and distortions in public governance. The choice may ultimately not be between the wise populace and obstructionist, private-interest legislators, as Hiram Johnson, Howard Jarvis, and dyed-in-the-wool advocates of direct democracy suggest. Rather, the result may be democratic goals achievable through streamlined lawmaking and goals formulated and implemented through a complex machinery of representative democracy, with checks and balances, transparency, and electoral accountability—in short, the Madisonian, rather than the Jeffersonian, ideal. Yes, I have surely stacked the deck in making the point. However, the point is not to reposition the order between plebiscitary and representative lawmaking, but to fill out the picture so we can make comparative evaluations of competing modalities of change. Setting up a fruitful series of change procedures first requires a candid engagement with the lawmaking and policy implementations that are embedded in state constitutions. Next, closely considering whether these procedures do and whether there ought to be a thumb push the scale in favor of one lawmaking process over another.

Third, we should draw a distinction when we think about structural reform between what I will call ***hard*** and ***soft*** wiring. When we think of our hard-wired constitutions, we see constitutional structure as imbedding certain rules and institutions into the document.[87] This is not epiphenomenal, but is purposive and deliberate. And we see the function of judicial review is to police political officials to ensure that this

85. *See* DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 3, at 7-28.

86. *See* TEAFORD, *supra* note 51, at 81.

87. *See*, *e.g.*, LUTZ, *supra* note 11, at 25 (describing the function of these imbedded institutions).

structure will govern.[88] This hard-wiring raises its own unique problems. First, and most obviously, hard-wired rules allow for limited variability and adaptation. This is particularly problematic, as we see from the national context, where these hard-wired rules are exceptionally difficult to remove. Moreover, the impact of hard-wired rules may be intended or unintended, depending upon the circumstances. One example mentioned profitably by my colleague, Sanford Levinson, in his terrific book**,** "Our Undemocratic Constitution,"[89] is the two plus months period behind the popular election for President and the Inauguration (a period that was originally even longer!).[90] While the purpose of this hard-wired rule was to accommodate a presidential transition in a world in which communication and transportation was slow, it has the unfortunate consequence in modern times of limiting the ability of the newly elected president to confront important social problems immediately and ambitiously.[91] The lame-duck incumbent has none of the incentives, but the entire burden, to address these pressing matters in the dwindling, but not insignificant, time remaining to him.

The dilemma faced by constitutional designers, of course, is how to construct rules and institutions that serve the larger objectives of constitutionalism over time while guarding against serious problems of obsolescence and self-dealing.[92] Elsewhere, I have considered state constitutional failure by focusing on certain governance problems that result from a panoply of rules, structures, and institutions.[93] Some of these—for instance, the plural executive and tax and expenditure limitations (TELs)—are hard-wired into the document. Others are soft-wired, in the sense that the constitutional structure drives political officials to develop rules and institutions that they would otherwise not do but for this structure. Direct democracy, for example, encourages legislators to make distinct political choices.[94] For instance, choices like the short-changing of post-secondary education in a policy environment

88. *See generally* Daniel B. Rodriguez, *State Constitutionalism and the Scope of Judicial Review*, *in* NEW FRONTIERS OF STATE CONSTITUTIONAL LAW 61, 61; *cf.* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (noting that the courts' role is to correct clear mistakes by legislators).

89. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (Oxford University Press 2006).

90. March, rather than January. *See id* at 75.

91. *See id* at 98-99.

92. However, as Adrian Vermeule reminds us, we might be content with what he calls a "second-best" constitutionalism. *See* Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003). After all, constitutional structure can produce "compensating adjustments that ensure constitutional equilibrium." *Id.*

93. *See generally* Rodriguez, *State Constitutional Failure*, *supra* note 35.

94. *See generally* Garrett, *supra* note 8.

in which legislators are constrained in raising revenues (because of TELs) and required to spend a certain amount of the budget on a particular policy illustrated the ways in which a hard-wired element of the constitution incentivizes legislators to make soft-wired rules.

Finally, structures of constitutional structure must distinguish between formal and informal processes. There indeed may be a constitution "outside" the Constitution, as Ernest Young puts it,[95] or a "small-c" constitutionalism, as William Eskridge and John Ferejohn describe it, that is more appropriate to our modern republic than the clunky 18th-19th century version which represents our "Large-C" constitution.[96] But this only points us in the useful direction of more eclectic strategies of change. Serious questions remain (as, to be fair, these leading theorists of non-formal constitutionalism well understand) about how to choose between formal and informal change mechanisms. That state constitutions are more susceptible to formal changes given their comparatively liberal amendment procedures provides a temptation for proceeding more often than not through these formal mechanisms, just as, likewise, the rigidity of the U.S. Constitution pushes in the direction of extra-constitutional devices. But drawing workable lines between the circumstances in which formal modification is called for and when it is not raises key questions at the heart of any practical theory of state constitutional development. My own contribution to this serious debate is a modest one: Politics matters in this choice; that is, considering how constitutional reform impacts upon, and is impacted by, political strategy and tactics is the best place to start in fashioning an agenda of change.

IV. CONCLUSION

State constitutional development must resonate with a full-bodied account of state constitutionalism more generally. Our constitutional objectives, where we should start our analysis in every respect, are myriad, contestable, and deeply political in every salient sense of that term. To understand state constitutional law, we must understand state constitutional politics. While an imperative for any dimension of public law, it is an especially potent edict in the state constitutional context, given factors and circumstances that are pronounced and enduring in the

95. *See generally* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

96. *See* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 1-24 (Yale University Press 2010) (describing contrast between "small-c" constitutionalism, reflected principally in statutes and administrative regulations, and "Large-C" constitutionalism, which is reflected in the literal text of the constitutional document).

American states and their respective constitutional traditions. Any effort to participate in the process of state constitutional development, whether through formal or informal means, must attend to the concrete goals and predicaments of the state constitutional order.

The metaphor of constitutional law/politics in high fidelity helps sharpen, at the very least, the goal of constitutional theory. Less clear is whether it can help us with the goal of optimal constitutional interpretation. One conclusion we can draw from a close look at the amendment/revision distinction in state constitutional law is that courts face difficult challenges in turning the insight that politics matters greatly into interpretive approaches. Still and all, framing the interpretive issue around a realistic view of law's potential to meet political realities and, correlatively, around political impacts on legal rules and decision-making at least turns us in the right direction.

Moreover, when we focus in earnest on constitutional reform, we should look to those procedures and processes that navigate between the competing demands of law and of politics. Constitutional change is, at bottom, a collective choice process involving multiple stakeholders and myriad challenges. A clearer sense of the noise and distortion intrinsic to political struggle and, in particular, to the strategic relationship among purposive judges, legislators, and ordinary citizens will help us to make best use of the extant mechanisms of constitutional reform. This sense will also enrich the project of developing new mechanisms of reform to accommodate the modern needs and demands. Given the crushing demands on state governance in this early part of the 21st century, this project is certainly a pressing one.