

## ARTICLES

### AMERICAN DEMOCRACY AND THE STATE CONSTITUTIONAL CONVENTION

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*Fears about the health of American democracy are high. And with the U.S. Supreme Court loosening federal constraints and returning critical substantive issues to the states, there is new and particular interest in the democratic quality of state institutions. Although some see opportunity in this decentralization, there is also good reason to believe that many states are failing to deliver on America's democratic ideals. There are growing concerns, for example, that many state legislatures are enacting laws wildly misaligned with majority preferences on important issues like guns, abortion, LGBTQ+ rights, and healthcare. There are also deeper structural concerns regarding partisan gerrymandering, voting rights, and regressive power-stripping within state governments. To the extent that American democracy increasingly depends on existing state institutions, there is good reason to believe that this structure is precarious.*

*This Article is the first to explore how the state constitutional convention might help address contemporary concerns about American democracy. My core claim is that the independent state convention is well designed to address certain aspects of contemporary democratic decay—specifically, systemic misalignment between statewide popular majorities and government. At its core, the state constitutional convention is designed to empower majorities over political elites and privileged private interests. Its defining features are the special election of a unicameral body of representative delegates with the sole mandate to debate and draft constitutional reform subject to a statewide referendum. Drawing on important theoretical and empirical work from political scientists, I show that the convention's unique design tends to diminish the influence of special interests, facilitate moderation, and empower popular majorities. As a*

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result, the state convention deserves more serious consideration in conversations about democratic reform in America. It could, for example, be a more constructive venue for conversations about redistricting, ranked-choice voting, open primaries, campaign finance, allocation of Electoral College votes, and a host of other popular reforms that could improve American democracy but now run headlong into opposition from entrenched party leaders and special interests.

There are, of course, real limitations and dangers in holding a state constitutional convention. The most notable are foreclosure or sabotage by state legislatures, voter manipulation by interest groups, and the possibility of a majoritarian but illiberal constitutional convention. I propose several novel solutions in response to these concerns that reimagine how state courts and Congress might revive state conventions as constructive democratic institutions. I conclude by suggesting that American democracy would be improved if the state constitutional convention was a more accessible and credible institution because it would change the political calculus of misaligned state officials and special interests.

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## INTRODUCTION

The health of American democracy increasingly depends on state governments.<sup>1</sup> But the states seem to be in disarray.<sup>2</sup> Partisan gerrymandering is reaching new extremes on both sides of the aisle.<sup>3</sup> Battles

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1. See Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 275 (2022); Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 178–224 (2020) (explaining how the U.S. Supreme Court has decentralized the law of democracy over the last twenty years).

2. See Francesca L. Procaccini, *Reconstructing State Republics*, 89 FORDHAM L. REV. 2157, 2158 (2021) (“Something is rotten in the American states.”).

3. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2014) (“[T]he plans in effect today are the most extreme gerrymanders in modern history.”). Partisan gerrymandering in Republican states is well-known, but Democratic legislatures engage in it too. See *In re Harkenrider v. Hochul*, 197 N.E.3d 437, 501, 518–20 (N.Y. 2022) (invalidating “nontransparent” and partisan gerrymandering by a Democratic majority in the New York legislature). See generally ERIK J.

over state high courts are turning raucous.<sup>4</sup> Sitting legislators are being expelled.<sup>5</sup> And officials casually deny election results.<sup>6</sup> Aside from this anecdotal headline drama, academic studies show systemic incongruence between state policy and statewide majorities.<sup>7</sup> According to one study, on important issues like abortion, guns, and healthcare, state governments are no more likely to translate majority opinions into policies than “flipping coins.”<sup>8</sup> Another study found that although state legislatures are mythicized as “closest to the people,”<sup>9</sup> they are often controlled by the minority party.<sup>10</sup> Still other research shows that wealthy donors “clearly and cleanly” influence state policy and undermine constituent interests.<sup>11</sup> To the extent that American democracy depends on existing state institutions, this situation seems precarious.<sup>12</sup>

But there is reason for hope. Americans tend to agree that democracy is worth saving,<sup>13</sup> and they also seem to agree on some basic structural

ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY (2013).

4. See Caroline Vakil, *Wisconsin State Senate Candidate Says He ‘Certainly Would Consider’ Impeaching Judge Running for State Supreme Court*, HILL (Mar. 29, 2023, 4:39 PM), <https://thehill.com/homenews/campaign/3924387-wisconsin-state-senate-candidate-says-he-certainly-would-consider-impeaching-judge-running-for-state-supreme-court/> [https://perma.cc/9QLZ-25NF]; Rebecca C. Lewis, *‘There’s Total Paralysis.’ With NY’s Chief Judge Vacancy, Courts Are Stagnant*, CITY & STATE N.Y. (Mar. 20, 2023), <https://www.cityandstateny.com/politics/2023/03/theres-total-paralysis-nys-chief-judge-vacancy-courts-are-stagnant/384159/> [https://perma.cc/YHJ7-UKAT].

5. See Anne Applebaum, *Is Tennessee a Democracy?*, ATLANTIC (July 18, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/tennessee-republican-partisanship-one-party-state/674732/> [https://perma.cc/VX8D-BCT6].

6. See Jonathan J. Cooper, *Republican-Controlled Arizona County Refuses to Certify 2022 Election*, NPR (Nov. 28, 2022, 1:37 PM), <https://www.pbs.org/newshour/politics/republican-controlled-arizona-county-refuses-to-certify-2022-election> [https://perma.cc/MD8Y-MNK6].

7. See, e.g., Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 150–57 (2012) (finding significant incongruence in thirty-nine policies across fifty states); JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 55 (2020) (finding incongruence on forty-four issues across fifty states using 2,150 separate policy decisions).

8. MATSUSAKA, *supra* note 7, at 55.

9. Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1744 (2021) (quoting *Ninetieth Minn. State Senate v. Dayton*, 903 N.W.2d 609, 627 (Minn. 2017) (Anderson, J., dissenting)).

10. *Id.* at 1764 (finding, between 1968 and 2016, “146 minoritarian outcomes in state senates (77 won by Democrats, 69 by Republicans) and 121 in state houses (79 won by Democrats, 42 by Republicans)”).

11. LYNDA W. POWELL, THE INFLUENCE OF CAMPAIGN CONTRIBUTIONS IN STATE LEGISLATURES: THE EFFECTS OF INSTITUTIONS AND POLITICS 188 (2012).

12. See Michael Wines, *If Tennessee’s Legislature Looks Broken, It’s Not Alone*, N.Y. TIMES (Apr. 13, 2023), <https://www.nytimes.com/2023/04/13/us/tennessee-house-republicans.html> [https://perma.cc/VC9P-GRHK]. Voters sense (and resent) the incongruence and misalignment in state government. See Nicholas Riccardi & Linley Sanders, *Americans Are Widely Pessimistic About Democracy in the United States, an AP-NORC Poll Finds*, AP (July 14, 2023, 12:12 AM), <https://apnews.com/article/poll-democracy-partisanship-trump-biden-trust-221f2b4f6cf9805f766c9a8395b9539d> [https://perma.cc/QCB3-9J42].

13. See ROBERT BOSCH STIFTUNG, IT’S COMPLICATED. PEOPLE AND THEIR DEMOCRACY IN GERMANY, FRANCE, BRITAIN, POLAND, AND THE UNITED STATES 104 (2012),

reforms.<sup>14</sup> There is voter support (often bipartisan) for better campaign finance regulation,<sup>15</sup> redistricting reform,<sup>16</sup> enforceable ethics rules for officials,<sup>17</sup> and even open primaries.<sup>18</sup> In other words, Americans remain committed to democracy, but they want a better version of it. So where can they go to make change?

From a historical perspective, state constitutional conventions seem like a natural place for Americans to pursue structural reform. Americans have held more constitutional conventions than any other country in the world—hundreds more.<sup>19</sup> Moreover, Americans invented and refined the convention as an instrument of majoritarian control over government.<sup>20</sup> Through special

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[https://www.bosch-stiftung.de/sites/default/files/publications/pdf/2021-07/Study\\_It%CA%BCs\\_Complicated\\_People\\_and\\_Their\\_Democracy.pdf](https://www.bosch-stiftung.de/sites/default/files/publications/pdf/2021-07/Study_It%CA%BCs_Complicated_People_and_Their_Democracy.pdf) [https://perma.cc/7BYD-VMF6]. Of course, there's an opinion poll for everything. See Nick Corasaniti, Michael C. Bender, Ruth Igielnik & Kristen Bayrakdarian, *Voters See Democracy in Peril, but Saving It Isn't a Priority*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/us/politics/midterm-election-voters-democracy-poll.html> [https://perma.cc/XGY6-LUKB] (discussing opinion polls that asked whether American democracy was under threat). Moreover, Americans are deeply polarized and hold different opinions about what is wrong with American democracy. See STIFTUNG, *supra*, at 104.

14. See *There Is a Growing Pro-democracy Movement*, BRENNAN CTR. FOR JUST. (Jan. 15, 2020), <https://www.brennancenter.org/our-work/research-reports/momentum-democracy-reform-across-country> [https://perma.cc/XR82-P3GF] (noting broad support for federal electoral reform and similar initiatives enacted across the country at the state level).

15. See, e.g., Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018), <https://www.pewresearch.org/short-reads/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/> [https://perma.cc/FQQ7-FR7V].

16. See, e.g., *Americans Are United Against Partisan Gerrymandering*, BRENNAN CTR. FOR JUST. (Mar. 15, 2019), <https://www.brennancenter.org/our-work/research-reports/americans-are-united-against-partisan-gerrymandering> [https://perma.cc/AC54-QXVX]. But see Bradley Jones, *With Legislative Redistricting at a Crucial Stage, Most Americans Don't Feel Strongly About It*, PEW RSCH. CTR. (Mar. 4, 2022), <https://www.pewresearch.org/short-reads/2022/03/04/with-legislative-redistricting-at-a-crucial-stage-most-americans-dont-feel-strongly-about-it/> [https://perma.cc/V4XZ-KSDV].

17. See, e.g., *There Is a Growing Pro-democracy Movement*, *supra* note 14.

18. See Richard H. Pildes, *Why the Center Does Not Hold*, 99 CALIF. L. REV. 273, 299 (2011) (discussing popular support for open primaries).

19. In addition to the federal convention of 1787, the states have held 233 different constitutional conventions since 1776. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 1, 7 (2009). Native Americans and federal territories have also held conventions. See Amos Maxwell, *The Sequoyah Convention*, 28 CHRON. OKLA. 161, 161 (1950) (Native American territories); David M. Helfeld, *The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JURIDICA U. P.R. 135, 149 (1952) (noting the existence of a procedure for a constitutional convention in Puerto Rico); Joel Colón-Rios & Yaniz Roznai, *A Constitutional Theory of Territoriality: The Case of Puerto Rico*, 70 CLEV. STATE L. REV. 279, 286–91 (2022). The rest of the world combined has held only 130 conventions since 1900. See Gabriel Negretto, *Constitution-Making in Comparative Perspective*, in OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (William R. Thompson, Jóhanna K. Birnir, Erik Martínez Kuhonta, Verlan Lewis & Regina Smyth eds., 2017).

20. See *infra* Part II; William Parlett, *The American Tradition of Constituent Power*, 15 INT'L J. CONST. L. 955, 957, 964 (2018); Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 49, 49 (Martin Loughlin & Neil Walker eds., 2007) (describing the state convention as an “extraordinary

elections for delegates, a unicameral structure, and statewide referenda before and after, the convention is built to empower statewide majorities over incumbent officials, entrenched private interests, and forces that favor the status quo.<sup>21</sup> Moreover, it has been successful for these purposes on many occasions.<sup>22</sup>

Despite the state convention's long history in American politics, it is wholly absent from today's conversations about democratic reform.<sup>23</sup> Thousands of pages have been dedicated to analyzing the fanciful idea of a federal constitutional convention,<sup>24</sup> but hardly anyone has explored how state conventions, which are far more accessible, predictable, and bounded, might provide constructive venues for today's needed reforms. To the extent that state conventions are acknowledged, they are dismissed offhand as dangerous and silly.<sup>25</sup> This Article fills that gap. My core claim is that state

invention, the most distinctive institutional contribution . . . the American Revolutionaries made to Western politics").

21. See *infra* Part II; ALBERT STURM, *METHODS OF STATE CONSTITUTIONAL REFORM* 80 (1954).

22. Common examples of this include nineteenth-century conventions used to free state legislatures from railroad capture; Progressive Era conventions used to reform courts, legislatures, and rights; and twentieth-century conventions used to address malapportioned state legislatures. See G. Alan Tarr, *Explaining State Constitutional Changes*, 3 REV. INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. RSCH.] 9, 15–16, 18–19 (2016) (Braz.). But there are myriad other, more specific examples. See generally Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853 (2022) (finding that conventions addressed misalignment on issues as diverse as takings, imprisonment for debt, environmental protection, labor, abortion, and welfare).

23. Professor Francesca L. Procaccini has mentioned state conventions in work exploring affirmative actions that Congress might adopt to address democratic problems in the states. See Procaccini, *supra* note 2, at 2208. Procaccini argues that Congress has the power to dissolve undemocratic state governments and convene conventions to reconstitute states, but she does not engage with the convention as an independent democracy-enhancing institution. *Id.* Professor Miriam Seifter has written extensively about how state actors (mostly governors and courts) can push back against countermajoritarian developments in state government. See generally, e.g., Seifter, *supra* note 1. Seifter has also emphasized the role of citizens, reformers, and civic organizations, but she has not suggested state conventions as a solution. *Id.* at 351. There are isolated flowerings of interest around state conventions that tend to coincide with the periodic convention referenda included in fourteen different state constitutions. See, e.g., Gerald Benjamin, *The Mandator Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017 (2001). But these tend to focus on arguments for and against a convention in a particular state at a particular time.

24. See, e.g., SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006); JOHN F. KOWAL & WILFRED U. CODRINGTON III, *THE PEOPLE'S CONSTITUTION: 200 YEARS, 27 AMENDMENTS, AND THE PROMISE OF A MORE PERFECT UNION* (2021); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677 (1993); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL'Y 837 (2011); Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 WM. & MARY L. REV. 1037 (2000).

25. See Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 54–55 (1996); Robert J. Martin, *Calling in Heavy Artillery to Assault*

constitutional conventions deserve more serious consideration in discussions about democratic reform in American politics. State conventions are not a panacea. But, as I argue below, if taken seriously by scholars, reformers, courts, and perhaps even Congress, conventions might open constructive pathways toward change.

To motivate more serious engagement with state constitutional conventions, this Article makes two main contributions. First, drawing on a largely ignored body of interdisciplinary and political science literature, I argue that there is compelling evidence that state conventions are effective at empowering statewide majorities over misaligned and recalcitrant state governments.<sup>26</sup> Contrary to prevailing views that conventions will be dominated by private interests and corrupted delegates, this literature consistently finds that the convention's unique institutional qualities (special elections, unicameralism, and referenda) tend to dislodge advantages that wealthy private interests enjoy during ordinary legislative sessions and empower groups with broader interests, fewer resources, and more public-regarding agendas.<sup>27</sup> This literature also suggests that convention design can weaken party cohesion and invigorate grassroots reforms that

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*Politics as Usual: Past and Prospective Deployment of Constitutional Conventions in New Jersey*, 29 RUTGERS L.J. 963, 1016–19 (1998).

26. *Infra* Part III.A. For key qualitative and theoretical works, see EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013); AMY BRIDGES, *DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES* (2015); DINAN, *supra* note 19; ROBINSON WOODWARD-BURNS, *HIDDEN LAWS: HOW STATES CONSTITUTIONS STABILIZE AMERICAN POLITICS* (2021) (including quantitative analysis); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998); PAUL E. HERRON, *FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION* (2017); ELMER E. CORNWELL, JR., JAY S. GOODMAN & WAYNE R. SWANSON, *STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES* (1975) [hereinafter CORNWELL ET AL., *THE POLITICS OF THE REVISION PROCESS*] (including quantitative analysis); ALBERT STURM, *THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938–1968* (1970); Robert S. Friedman & Sybil Stokes, *The Role of Constitution-Maker as Representative*, 9 MIDWEST. J. POL. SCI. 148 (1965); John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211 (2005). For key quantitative studies, see James M. Strickland, *Lobbying at Constitutional Conventions: Venues for the People*, 11 INT. GRPS. & ADVOC. 517 (2022); Daniel C. Lewis, Jack D. Collens & Leonard Cutler, *Conventional Wisdom?: Analyzing Public Support for a State Constitutional Convention Referendum*, 51 STATE & LOC. GOV'T REV. 19 (2019); Jay S. Goodman, Robert Arsenau, Elmer E. Cornwell Jr. & Wayne R. Swanson, *Public Responses to State Constitutional Revision*, 17 AM. J. POL. SCI. 571 (1973); Elmer E. Cornwell, Jr., Jay S. Goodman & Wayne R. Swanson, *State Constitutional Conventions: Delegates, Roll Calls, and Issues*, 14 MIDWEST J. POL. SCI. 105 (1970) [hereinafter Cornwell et al., *State Constitutional Conventions*]; Wayne R. Swanson, Sean A. Kelleher & Arthur English, *Socialization of Constitution-Makers: Political Experience, Role Conflict, and Attitude Change*, 34 J. POL. 183 (1972); Cal Clark & Janet Clark, *The Impact of Party Electoral Systems on Political Conflict in State Constitutional Conventions*, 28 W. POL. Q. 700 (1975).

27. See, e.g., Strickland, *supra* note 26, at 537 (“[C]onventions are not subject to rampant lobbying by narrow interests. Instead, while monetary interests may still be numerous, conventions are (based on mobilization rates) seemingly better venues for broad interests than legislatures. The evidence implies that modern conventions may be structured in ways that help to ensure that the resulting constitutions are more representative of broad interests.”).

otherwise struggle to get footholds during regular legislative sessions.<sup>28</sup> Finally, this literature indicates that conventions often pull toward the median voter more effectively than state legislatures.<sup>29</sup> All of this suggests that state conventions have potential for addressing many of today's democratic ills.

There are, of course, meaningful limitations and dangers in calling state constitutional conventions, and this Article begins the process of identifying and assessing those too.<sup>30</sup> The evidence suggests that effective conventions require broad popular engagement and support, thoughtful funding and delegate-selection methods, and robust independence from incumbent state governments.<sup>31</sup> Our history also shows that in the hands of abusive majorities, state constitutional conventions can produce abhorrent results precisely because they are tethered tightly to popular majorities.<sup>32</sup> Moreover, new levels of polarization, population growth, and unlimited money in politics are also likely to impact convention performance today.<sup>33</sup> Any serious contemporary discussion of state constitutional conventions requires an account of these and other factors.

This Article's second contribution is to explore how the law might help revitalize the state constitutional convention as an independent force in today's reform efforts.<sup>34</sup> I argue that the state convention has largely been relegated to constitutional desuetude because of its dependence on state legislatures and its presumed capture by incumbent state government and wealthy special interests. I offer two preliminary suggestions designed to open dialogue about how to overcome those barriers if state conventions appear useful for contemporary reform. First, I argue that several long-forgotten doctrines of state constitutional law support an implied private right to petition for a convention-call referendum.<sup>35</sup> I explore how citizens might exercise this right under existing state statutes, as well as the grounds on which state courts might recognize and vindicate this right. I also explore

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28. See, e.g., Tarr, *supra* note 22, at 9, 20–21 (explaining how conventions' institutional features—especially the ratification referendum—can mitigate party cohesion and open space for civic groups to contribute to the convention's agenda); STURM, *supra* note 21, at 118 (“Normally, constitutional conventions are less subject to the pulling and hauling of partisan politics than are legislative assemblies.”).

29. See, e.g., STURM, *supra* note 21, at 119 (explaining how ratification referenda mitigate extremism in conventions and empower the median voter, and noting that “[o]n the whole, recent [early twentieth century] conventions have been moderate in their proposals”).

30. See *infra* Part III.B.

31. See J.H. Snider, *Does the World Really Belong to the Living?: The Decline of the Constitutional Convention in New York and Other States, 1776–2015*, 6 AM. POL. THOUGHT 256, 274–75 (2017).

32. See HERRON, *supra* note 26, at 189–228 (tracing how conventions were instruments of Jim Crow policies).

33. See generally Strickland, *supra* note 26, at 538–39.

34. See *infra* Part IV.

35. See *infra* Part IV.A. Only four states—Florida, Montana, and the Dakotas—have positive law that allows citizens to use the initiative to qualify a convention-call question for referendum. See 53 THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 11 tbl.1.6 (2021).



how state courts might guard convention independence if citizens call a convention.

Second, I make the radical suggestion that Congress adopt legislation under the Spending Clause (buoyed by the Guarantee Clause) that offers grants to state conventions conditioned only on minimum up-front structural criteria (referenda and special elections based on fair districts). This legislation could have several beneficial effects. It could incentivize grassroots convention campaigns that are currently stunted by the convention's financial dependence on incumbent state governments. Relatedly, it could limit state government interference in the convention while allowing citizens (not the federal government) to retain control over convention outcomes.<sup>36</sup>

Of course, this plan has its own problems. It may be a political nonstarter in Congress simply because it threatens to upset the status quo in unpredictable ways. It would likely be challenged under the Spending Clause and perhaps the Tenth Amendment.<sup>37</sup> It is also sure to invoke comparisons to congressional Reconstruction, which would give certain groups salient arguments against accepting federal funds and could create new coalitions against calling conventions. Nevertheless, it provides Congress with a constructive way to indirectly facilitate democratic reform in the states through an institution that has a proven track record of overcoming misalignment. Moreover, simply making the convention a credible threat to misaligned state governments could have positive secondary effects.

Much more work must be done to fully understand how state constitutional conventions could improve or undermine democracy in America. But the evidence is sufficient to warrant those inquiries. State conventions should not be dismissed offhand. Moreover, state constitutional law stands ready to revive, refine, and protect citizens if they mobilize to reclaim conventions as the majoritarian institutions that these conventions are designed to be. And, if Congress wants to support grassroots popular reform, I have sketched the beginnings of a novel program for it to explore too.

This Article proceeds in four Parts. Part I briefly explores the democratic ills that plague many state governments today and that beg for an appropriate venue for reform. Part II describes the basic features of the state constitutional convention and argues that the states invented and refined it to empower popular majorities over misaligned state governments. Part II also outlines the main reasons why reformers reject the state constitutional convention as a constructive solution to today's democratic ills. Part III presents evidence that state conventions are effective at majoritarian realignment and considers limitations and qualifications. Part IV explores how state constitutional law and Congress might revive and protect state conventions as majoritarian institutions.

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36. Because conditions for the funding would be set up-front and before any particular convention is underway, this would also limit concerns about federal interference with specific conventions.

37. For a preliminary analysis of the plan's constitutionality, see *infra* Part IV.B.2.

## I. MISALIGNMENT IN THE STATES

It is something of a truism that state governments are designed to be more democratic than federal institutions. Malapportionment in the Senate, the Electoral College, and life tenure for U.S. Supreme Court justices all converge (with other factors) to produce a federal government that is unrepresentative of most Americans.<sup>38</sup> State institutions, we are told, are different. Apportioned legislatures, popularly elected governors and judges, and various forms of direct democracy all work to produce more representative state outcomes.<sup>39</sup> This is surely correct as a relative matter, but there are growing concerns about the democratic structure of state institutions and compelling evidence of broad incongruence between statewide popular majorities and state policy.<sup>40</sup>

In this section, I present evidence of concerning state policy incongruence.<sup>41</sup> I then explore some of the deeper structural misalignments that are likely driving policy incongruence and feeding popular discontent with state government.<sup>42</sup>

## A. Policy Incongruence

Many states are experiencing troubling levels of policy incongruence between majoritarian preferences and government policy. Consider how states have handled several high-profile policy debates, such as abortion policy after *Dobbs v. Jackson Women's Health Organization*,<sup>43</sup> marijuana legalization, Medicaid expansion, and gun control. In each area, states have actively pursued policies at variance with statewide popular majorities.

After *Dobbs*, many Republican state legislatures quickly adopted stringent abortion bans in spite of visible popular majorities in favor of legalized abortion.<sup>44</sup> Indeed, a robust state-level investigation of abortion legislation

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38. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics*, 12 PERSPS. ON POL. 564 (2014) (finding incongruence between federal policies and nationwide majorities).

39. See Seifter, *supra* note 1, at 293–98.

40. See Procaccini, *supra* note 2, at 2187.

41. See *infra* Part 1.A.

42. See *infra* Part 1.B. Political scientists use “alignment” in different ways. First, they use the term to refer to the relationship between the median voter’s partisan preferences and a winning candidate’s partisan association. See Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 304–06 (2014). Second, they use it to refer to the relationship between the median voter’s policy preferences and a winning candidate’s policy positions. *Id.* at 307. These concepts can be used to aggregate “legislative misalignment” between jurisdictions and assemblies. *Id.* at 311. “Congruence” refers to whether a specific government policy conforms to popular preferences. See MATSUSAKA, *supra* note 7, at 247 n.2. A related concept is policy-responsiveness, which refers to the degree that government policy reacts to popular preferences regardless of whether it reaches congruence. See *id.* In my discussion, all of these concepts are at play in different ways, and I adopt this terminology.

43. 597 U.S. 215 (2022).

44. See Arielle A.J. Scoglio & Sameera S. Nayak, *Alignment of State-Level Policies and Public Attitudes Towards Abortion Legality and Government Restrictions on Abortion in the United States*, SOC. SCI. & MED., March 2023, at 1; see also Mikaela H. Smith, Abigail Norris Turner, Payal Chakraborty, Robert B. Hood, Danielle Bessett, Maria F. Gallo & Alison H.

and public opinion post-*Dobbs* found strong evidence of incongruence in several states.<sup>45</sup> This investigation demonstrated that popular preferences regarding abortion are not reflected in “the polarized state legislative climate, where lawmakers are attempting to effectively outlaw abortion” against voter preferences.<sup>46</sup>

Similarly, public opinion for marijuana legalization has steadily grown, but policy in many states has not aligned. Several state governments have even taken hostile steps toward suppressing wildly popular support for marijuana legalization.<sup>47</sup> In South Dakota in 2020, for example, 70 percent of voters approved a medical marijuana initiative<sup>48</sup> and 54 percent approved a recreational marijuana initiative.<sup>49</sup> However, in a rather remarkable move, the governor publicly announced her opposition to the initiatives and launched litigation challenging the recreational marijuana initiative.<sup>50</sup> Ultimately, the South Dakota Supreme Court invalidated it.<sup>51</sup>

Similar stories have unfolded regarding gun control and Medicaid expansion. In Michigan, for example, statewide popular opinion polls have shown strong and longstanding support for certain gun control measures, especially legislation authorizing Extreme Risk Protection Orders (ERPO) as a strategy for reducing gun-related suicides.<sup>52</sup> This support was somewhat bipartisan, with one poll finding that 64 percent of Republicans supported ERPO proposals.<sup>53</sup> Yet lawmakers have repeatedly refused to pass ERPO legislation.<sup>54</sup> Similar scenarios have unfolded in North Carolina, Pennsylvania, Virginia, and Wisconsin.<sup>55</sup> Medicaid expansion illustrates more of the same. In North Carolina, a strong majority of voters long favored

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Norris, *Opinions About Abortion Among Reproductive-Age Women in Ohio*, 19 SEXUALITY RSCH. & SOC. POL'Y 909, 909 (2021).

45. Scoglio & Nayak, *supra* note 44, at 1. Support for legal abortion (in at least some circumstances such as rape or incest) ranged from 77 percent (South Dakota) to 98 percent (Washington). *Id.* at 5.

46. *Id.* at 6.

47. See Jonathan L. Marshfield, *The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States*, 101 NEB. L. REV. 71, 89–90 (2022).

48. See *Statewide Ballot Questions*, S.D. SEC'Y STATE (Nov. 30, 2020), <https://electionresults.sd.gov/resultsSW.aspx?type=BQ&map=CTY&eid=422> [<https://perma.cc/L6QL-UG84>].

49. See *id.* at 104.

50. See *id.*

51. See *Thom v. Barnett*, 967 N.W.2d 261 (S.D. 2021).

52. Alex Tausanovitch, Chelsea Parsons & Rukmani Bhatia, *How Partisan Gerrymandering Prevents Legislative Action on Gun Violence*, CTR. FOR AM. PROGRESS (Dec. 17, 2019), <https://www.americanprogress.org/article/partisan-gerrymandering-prevents-legislative-action-gun-violence/> [<https://perma.cc/PDB4-K39K>].

53. See *id.*

54. See Abigail Censky, *Red Flag Laws Are Stalled in Michigan as Lawmakers Return to Lansing*, WKAR PUB. MEDIA (Aug. 23, 2019), <https://www.wkar.org/politics-government/2019-08-23/red-flag-laws-are-stalled-in-michigan-as-lawmakers-return-to-lansing> [<https://perma.cc/CA3T-B2UL>].

55. Tausanovitch et al., *supra* note 52; Grace Segers, *What Are “Red Flag” Laws, and Which States Have Implemented Them?*, CBS NEWS (Aug. 9, 2019), <https://www.cbsnews.com/news/what-are-red-flag-laws-and-which-states-have-implemented-them/> [<https://perma.cc/4SY7-7K3A>].

Medicaid expansion under the Affordable Care Act,<sup>56</sup> but the legislature refused and even prohibited the governor from expanding Medicaid.<sup>57</sup> Gubernatorial resistance to Medicaid expansion following the Affordable Care Act was so pervasive and countermajoritarian that it attracted focused study by political scientists, who concluded that “for high profile, highly politicized issues such as the Affordable Care Act,” a governor’s own party loyalties “outweigh the needs of citizens and state economic conditions.”<sup>58</sup>

Aside from these anecdotes, robust studies show systemic policy incongruence on a long list of high-profile issues.<sup>59</sup> Professors Jeffrey Lax and Justin Phillips, for example, studied thirty-nine different policy issues across all fifty states.<sup>60</sup> Their study included affirmative action, assisted suicide, campaign finance, charter schools, gambling, guns, hate crimes, health insurance, immigration, marijuana, and school vouchers, among others.<sup>61</sup> After accounting for various factors, they found that “states effectively translate[d] majority opinion into policy only about half the time, a clear ‘failing grade.’”<sup>62</sup> Indeed, Professor John Matsusaka expanded the analysis to include even more issues and reached the same conclusion.<sup>63</sup>

Of course, some theories of democracy view disconnect between policy and popular opinion as a virtue.<sup>64</sup> On this view, elected officials are “trustees” who should use their own judgment to pick the best policy rather than simply parrot constituent preferences.<sup>65</sup> In other words, incongruence can reflect the purifying process of representative democracy. There are important benefits to representative government. But a democracy in which representatives consistently overrule or ignore constituent preferences on important issues will experience “democratic deficits” that impact its

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56. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S.C.).

57. Billy Corriher & Liz Kennedy, *Distorted Districts*, *Distorted Laws*, CTR. FOR AM. PROGRESS (Sept. 19, 2017), <https://www.americanprogress.org/article/distorted-districts-distorted-laws/> [<https://perma.cc/VV3X-S8TW>] (noting a similar scenario in Wisconsin).

58. Charles Barrilleaux & Carlisle Rainey, *The Politics of Need: Examining Governors’ Decisions to Oppose the “Obamacare” Medicaid Expansion*, 14 ST. POL. & POL’Y Q. 437, 437 (2014). For similar findings regarding state healthcare exchanges, see Elizabeth Rigby, *State Resistance to “Obamacare,”* FORUM, July 2012, at 1, 10. Professor Jennifer M. Jensen has since shown that state governors are increasingly beholden to partisan interests at the expense of their state’s interests and constituents. See Jennifer M. Jensen, *Governors and Partisan Polarization in the Federal Arena*, 47 PUBLIUS 314, 314 (2017).

59. See, e.g., Lax & Phillips, *supra* note 7, at 148; MATSUSAKA, *supra* note 7, at 55; see also Gabor Simonovits, Andrew M. Guess & Jonathan Nagler, *Responsiveness Without Representation: Evidence from Minimum Wage Laws in the U.S. States*, 63 AM. J. POL. SCI. 401, 401 (2019); ROBERT S. ERIKSON, *STATEHOUSE DEMOCRACY: PUBLIC OPINION AND POLICY IN THE AMERICAN STATES* (1993); Robert Y. Shapiro, *Public Opinion and American Democracy*, 75 PUB. OP. Q. 982 (2011).

60. See Lax & Phillips, *supra* note 7, at 148.

61. See *id.* at 154.

62. *Id.* at 164.

63. MATSUSAKA, *supra* note 7, at 55.

64. See HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 129–30 (1967).

65. *Id.*

legitimacy and stability.<sup>66</sup> Indeed, polling shows that majorities increasingly feel alienated from government and frustrated with their representatives.<sup>67</sup>

### B. Structural Misalignment

But policy incongruence reflects only part of the situation. There is a deeper structural trajectory in many state governments that has countermajoritarian effects. The Supreme Court has enabled this trajectory with several rulings over the last twenty years that loosened federal constraints on the law of democracy.<sup>68</sup> By allowing partisan gerrymandering,<sup>69</sup> eliminating preclearance under the Voting Rights Act of 1965,<sup>70</sup> invalidating large chunks of campaign finance regulation,<sup>71</sup> and allowing more restrictive voting regulation,<sup>72</sup> the Supreme Court has created significant space for states to influence American democracy. Of course, these rulings do not require states to fill that space in any particular way, and some states have looked to reinforce the majority rule.<sup>73</sup> But other states have worked to manufacture or inflate legislative majorities, undermine opposition voting blocs, and further weaken campaign finance regulation—often contributing to the minority rule.<sup>74</sup>

Misalignment is inevitable to some degree in state legislatures that use single-member districts with first-past-the-post rules,<sup>75</sup> but aggressive partisan gerrymandering is making it worse.<sup>76</sup> Between 1968 and 2016, there were 146 elections in which the minority party won control of state senates and 121 similar outcomes in state lower houses.<sup>77</sup> In many states this is now a recurring phenomenon and is accompanied by the opposition party winning

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66. William A. Galston, *The 2016 U.S. Election: The Populist Moment*, 28 J. DEMOCRACY 21, 21–33 (2017).

67. A survey by the American National Election Studies shows that as of 2016, 35 percent of college-educated and only 25 percent of high-school educated Americans believed that they have a say in government. ANES *Question Search*, AM. NAT'L ELECTION STUD., <https://electionstudies.org/data-tools/anes-question-search/> [https://perma.cc/4F77-QZKZ] (search “say in government”; then choose “2016”).

68. See Klarman, *supra* note 1, at 178–224.

69. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019).

70. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.); see *Shelby County v. Holder*, 570 U.S. 529, 556–57 (2013).

71. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–43 (2010).

72. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Souter, J., concurring) (upholding voter identification laws); see also *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (allowing the purge of voter rolls).

73. Washington has been a leader in rigorous campaign finance regulation following *Citizens United*. See COAL. FOR INTEGRITY, THE STATE CAMPAIGN FINANCE INDEX 13 (2022). Oregon's legislature recently placed statewide rank-choice voting (which is commonly perceived to mitigate partisan polarization) on the 2023 ballot. See Adam Edelman, *Oregon Becomes the Latest State to Put Ranked Choice Voting on the Ballot*, NBC NEWS (June 17, 2023, 2:43 PM), <https://www.nbcnews.com/politics/2024-election/oregon-becomes-latest-state-put-ranked-choice-voting-ballot-rcna91289> [https://perma.cc/L3TU-STYJ].

74. See Procaccini, *supra* note 2, at 2184–95.

75. See Seifter, *supra* note 9, at 1762.

76. See Stephanopoulos & McGhee, *supra* note 3, at 831.

77. See Seifter, *supra* note 9, at 1764.

concurrent statewide elections (such as elections for governor), which highlights concerns about unrepresentative legislatures.<sup>78</sup> The result is that after any given election, “million[s] of Americans live under minority rule in their U.S. state legislatures.”<sup>79</sup> Professor Miriam Seifter now suggests that state legislatures are the “least majoritarian branch.”<sup>80</sup>

State governments have also launched aggressive campaigns to curb processes of direct democracy that might help restore majority rule in some states.<sup>81</sup> These reforms include strengthening onerous geographic distribution requirements for petition signatures, adding technical requirements for authenticating signatures, prohibiting sponsors from paying canvassers based on the number of signatures obtained, and simply raising thresholds required for voters to approve an initiative, among other things.<sup>82</sup> Tellingly, many of these reforms were adopted in response to successful initiatives that fixed incongruent state policies.<sup>83</sup> In Florida, for example, voters approved an initiative in 2018 that re-enfranchised felons who had completed their “terms of sentence.”<sup>84</sup> In June 2019, Florida’s legislature adopted two responsive laws. The first gutted the substance of the felon enfranchisement initiative by defining “terms of sentence” to include repayment of court costs, fees, and restitution.<sup>85</sup> The second significantly limited the initiative process for future use.<sup>86</sup>

State governments can also undermine majority rule by shifting authority away from majoritarian institutions. Many states have a divided executive

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78. *Id.* at 1765–66. Michigan is an example. Republicans retained control of the Michigan House of Representatives between 2018 and 2023 despite Democrats winning total legislative votes in multiple elections and several statewide contests, including for governor. *See id.*

79. CHRISTIAN R. GROSE, JONATHAN CARR PETERSON, MATTHEW NELSON & SARA SADHWANI, U.S.C. SCHWARZENEGGER INST. FOR STATE & GLOB. POL’Y, THE WORST PARTISAN GERRYMANDERS IN U.S. STATE LEGISLATURES 6 (2019), <https://files.elfsightcdn.com/c98035dd-59ef-4b06-8e5b-c8d4dd555d9d/7f88292d-d6df-4f1c-9f0c-5f52e9d61a9e.pdf> [<https://perma.cc/4RCL-RWK5>].

80. Seifter, *supra* note 9, at 1755.

81. *See* John Dinan, *Changing the Rules for Direct Democracy in the Twenty-First Century*, 101 NEB. L. REV. 40, 41 (2022).

82. *See* Marshfield, *supra* note 47, at 106–08, 107 n.236; *see also* Seifter, *supra* note 1, at 311–18. State courts have occasionally intervened and invalidated these changes as unconstitutional limits on direct democracy. *See, e.g.*, League of Woman Voters v. Sec’y of State, 975 N.W.2d 840 (Mich. 2022).

83. *See* Marshfield, *supra* note 47, at 106–08.

84. FLA. CONST. art. VI, § 4(a).

85. S.B. 7066, 2019 Leg., Reg. Sess. (Fla. 2019); *accord Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Aug. 7, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> [<https://perma.cc/63A5-V6M5>].

86. Advisory Op. to the Governor re: Implementation of Amend. 4, the Voting Restoration Amend., 288 So. 3d 1070, 1072, 1084 (Fla. 2020) (per curiam); *see also* Comment, *Eleventh Circuit Upholds Statute Limiting Constitutional Amendment on Felon Reenfranchisement*, 134 HARV. L. REV. 2291, 2292 (2021); Marshfield, *supra* note 47, at 106–07.

with various separately elected officials, boards, and commissions.<sup>87</sup> One of the main objectives for this is to promote majority control over discrete areas of high public concern.<sup>88</sup> Because of districting issues in state legislatures and, perhaps, because of voters splitting their tickets, these specialized offices can be won by candidates from a different political party than that which controls the legislature.<sup>89</sup> A recurring trend is for state legislatures to respond to these losses by stripping separately elected officers of substantive power.<sup>90</sup> This form of “power-stripping” works to undermine state constitutional structures that are built to enable more direct majority rule.<sup>91</sup>

Attacks on state majority rule are fueled by the growing influence of wealthy private interests on state legislative policy. The principal study in this regard is by Professor Lynda Powell, who examined “the degree to which campaign contributions influence the content and passage of legislation” in all state legislatures.<sup>92</sup> Powell found remarkably “clean[] and clear[]” evidence that legislative outcomes are influenced by political contributions.<sup>93</sup> Importantly, Powell’s empirical findings suggest that donors capitalize on the cost of reelection for incumbent officials and the immediate value to donors of obtaining influence with sitting legislators.<sup>94</sup> She found evidence that heavily funded incumbent legislators pursue donor interests over constituent interests—most likely because they are dependent on donor

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87. Jonathan L. Marshfield, *America’s Other Separation of Powers Tradition*, 72 DUKE L.J. 545, 619 (2023).

88. *Id.*

89. Seifter, *supra* note 1, at 318–26.

90. For example, this recently played out in Ohio amid controversy over how to teach racism in public schools. See Laura Hancock, *Anti-culture War Candidates Win Three Seats on Ohio State Board of Education, with Big Boost from Teachers’ Unions*, CLEVELAND.COM (Nov. 9, 2022, 2:18 PM) [hereinafter Hancock, *Anti-culture War Candidates*], <https://www.cleveland.com/news/2022/11/anti-culture-war-candidates-win-three-seats-on-ohio-state-board-of-education-with-big-boost-from-teachers-unions.html> [https://perma.cc/5JNE-KZN4]. Leading up to the 2022 election, the conservative-controlled Ohio State Board of Education overturned an antiracism resolution and aligned itself with anti-Critical Race Theory campaigns. Laura Hancock, *Ohio State Board of Education Abolishes Anti-racism and Equity Resolution Passed in Wake of George Floyd’s Murder*, CLEVELAND.COM (Oct. 14, 2021, 2:24 PM), <https://www.cleveland.com/open/2021/10/ohio-state-board-of-education-abolishes-anti-racism-and-equity-resolution-passed-in-wake-of-george-floyds-murder.html> [https://perma.cc/C3U2-8KLA]. These positions on race were at the center of the 2022 campaigns. See Hancock, *Anti-culture War Candidates*, *supra*. Three progressive candidates won, giving them a majority, even though Republicans won the legislature and governorship. See *id.* The results seemed to indicate a clear popular rebuke of the board’s race positions. See *id.* (“My estimation is that people rejected extremists and the extreme issues that they’re bringing to the table.”). The legislature, however, quickly introduced a law that would move much of the board’s authority under the governor. See S.B. 1, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

91. See generally Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 ARIZ. L. REV. 183, 215–22 (2020).

92. POWELL, *supra* note 11, at 5; see also *id.* at 1–20 (summarizing literature).

93. *Id.* at 177, 206.

94. See *id.* at 210 (“Financial contributions have the least influence in chambers with small constituencies and small chamber sizes, low levels of legislator and leader compensation, low levels of ambition for higher office, and term limits.”). She also considered the idea that legislators seek higher office or private lobbying careers. *Id.* at 177.

contributions for reelection.<sup>95</sup> She also found that the greater the incentives, costs, and opportunities for reelection, the greater influence donors enjoyed.<sup>96</sup> In states with term limits, for example, donor influence was reduced.<sup>97</sup>

Powell's findings are consistent with a broader literature showing that "legislators raise money to fund their reelection campaigns and, in return, provide legislative services to their donors."<sup>98</sup> This work suggests that, at the very least, popular majorities are on unequal terms with wealthy private donors during ordinary legislative sessions. In that sense, these findings match popular sentiment regarding the unequal influence of wealthy private interests on state policy. Most Americans believe that they have no say in government.<sup>99</sup>

But there is hope. Despite all this misalignment and discontent, polls consistently show that Americans still believe in democracy.<sup>100</sup> Moreover, there is often agreement on structural reforms.<sup>101</sup> Polls show majority support for campaign finance reform, the broader use of independent redistricting commissions, moderating voting methods, open primaries, and meaningful legislator ethics rules.<sup>102</sup> In other words, although Americans are committed to democracy, they want a better version of it. But where can they go to get it? Why not in state constitutional conventions?

## II. THE STATE CONSTITUTIONAL CONVENTION AND ITS DISUSE TODAY

State conventions seem like a natural place for Americans to pursue deep structural reform. After all, Americans have used conventions for this purpose hundreds of times before, and all fifty states allow for reform by

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95. *Id.* at 39 ("Donors with politically 'material' motives give much more to current officeholders, because of their access to the legislative agenda, than they give to those seeking office.").

96. *Id.* at 210.

97. *Id.* at 208. The impact of this variable, however, was complex because of opportunities for higher office (and tangential private careers). *Id.*

98. *Id.* at 205; see also Joshua L. Kalla & David E. Broockman, *Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 547 (2016).

99. POWELL, *supra* note 11, at 213–14. There are also serious concerns about voter suppression as a means of undermining majority rule. There is evidence, for example, that restrictive voter ID laws reduce voter turnout for key Democratic voting blocs and contribute to Republican control in states that should be more competitive otherwise. See ACLU, OPPOSE VOTE ID LEGISLATION—FACT SHEET (2021), <https://www.aclu.org/documents/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/GXR6-GHAS>]; *What's So Bad About Voter ID Laws?*, LEAGUE WOMEN VOTERS (May 23, 2023), <https://www.lwv.org/blog/whats-so-bad-about-voter-id-laws> [<https://perma.cc/PJE8-8REN>]. But there are also studies suggesting that the impact is nominal or overstated. See, e.g., Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 150 (2017). This claim is apparently difficult to isolate and confirm.

100. See *supra* notes 13–18 and accompanying text.

101. See *id.*

102. See *id.*



convention.<sup>103</sup> In this section, I provide an overview of the state constitutional convention's origin, purpose, and defining features. I argue that the state constitutional convention is a unique American institution designed to empower popular majorities over misaligned state governments. Its defining features are the special election of delegates to a temporary unicameral body with the sole mandate to debate and draft constitutional reform subject to statewide referenda. I conclude this section by outlining the prevailing arguments against using the convention to address today's democratic ills.

### A. *Origins and Core Concept*

The best way to describe the convention's purpose is to tell its origin story.<sup>104</sup> In 1776, as the Revolution began to unfold, the colonies looked for ways to create new governments based on popular sovereignty.<sup>105</sup> This was no small task.<sup>106</sup> The Declaration of Independence announced America's commitment to popular sovereignty, but there were no useful precedents for how to operationalize a government in which all authority came from and remained in the people.<sup>107</sup> Indeed, Professor Willi Paul Adams noted that the colonies were "faced with a task that had never before been accomplished."<sup>108</sup>

One convenient solution was for sitting legislative assemblies to configure governments on behalf of the people, and three of the four states to first adopt constitutions took this approach.<sup>109</sup> Almost immediately, however, there were concerns about the competency of regularly elected legislatures to adopt constitutions for the people.<sup>110</sup> Because written constitutions were emerging

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103. DINAN, *supra* note 19, at 5–12. The dominant method for convening a state constitutional convention is for the legislature to pass a law that puts the question of whether to hold a convention to voters. *See* 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11–12. Additionally, fourteen states have constitutional provisions that require this question to be sent to voters at regular intervals (mostly ten or twenty years), and four states allow citizens to place a convention call on the ballot through the initiative process. *Id.* Forty-one state constitutions specifically provide for calling conventions, but long-standing state constitutional doctrine holds that it is available in the remaining nine states. G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1077–79 (2005).

104. *See generally* Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 89–94 (2019).

105. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 128 (1998).

106. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 61–64 (Rowman & Littlefield, expanded ed. 2001) (1980).

107. *See id.*; TARR, *supra* note 22, at 69.

108. ADAMS, *supra* note 106, at 61.

109. *See id.* at 68–72 (exemplifying the approaches taken by New Jersey, South Carolina, and Virginia). *But see* MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 22–24 (1997) (arguing that these legislatures were not "ordinary" and more like conventions).

110. *See* TARR, *supra* note 22, at 69. Jefferson famously raised this objection regarding the Virginia constitution of 1776. JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 25 (1992).

as a new body of higher law that deputized and bound government on behalf of the people,<sup>111</sup> allowing incumbent governments to draft the constitution would essentially give the creature the power to destroy the creator.<sup>112</sup> Moreover, early Americans were highly suspicious of officials in power because of their repeated experience that political power tends to corrupt.<sup>113</sup> Thus, early Americans quickly concluded that they should separate the constitution-making process from regular government if popular sovereignty was to be realized.<sup>114</sup> They needed a new institution that was distinct from ordinary government, more closely tied to the people, and sufficiently practical to create a constitution by and for the people.<sup>115</sup>

The towns of Massachusetts are credited with first imagining the constitutional convention in response to these demands.<sup>116</sup> In October 1776, the town of Concord debated and voted on “the question of [whether to] authoriz[e] the legislature to frame a constitution.”<sup>117</sup> The town concluded that “the supreme legislative, either in their proper capacity, or in Joint Committee, are by no means a body proper to form and establish a

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111. There is debate among historians about how soon Americans appreciated written constitutions as higher law. *See generally* DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL (1980) (arguing that it was a delayed development, contra Woods). All seem to agree that it was fully formed by the nineteenth century. *See, e.g.,* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 89 n.342 (2001).

112. *See* WOOD, *supra* note 105, at 337; ADAMS, *supra* note 106, at 61; KRUMAN, *supra* note 109, at 25 (quoting an early American writer as asserting that legislatures could not draft a constitution because a constitution “is an act which can only be *done to them* but cannot be done *by them*”); Marshfield, *supra* note 104, at 107–19 (collecting affirmations of this principle in state convention debates from 1819 to 1984).

113. WOOD, *supra* note 105, at 22 (“Men in high stations . . . increase their ambition, and study rather to be more powerful than wise or better . . . Voracious like the grave, they can never have enough . . . power and wealth.” (quoting a Whig)); *id.* at 332–38 (detailing corrupt colonial governments); *id.* at 21–33; KRUMAN, *supra* note 109, at 109 (“They believed that men in power invariably lusted after more power and would attempt in myriad ways to obtain it.”).

114. *See* WOOD, *supra* note 105, at 342 (“Only a ‘[c]onvention of [d]elegates chosen by the people for that express purpose and no other . . . could establish or alter a constitution.” (quoting a 1787 South Carolina legislature)); James W. Garner, *Amendment of State Constitutions*, 1 AM. POL. SCI. REV. 213, 214 (1907); Arthur Lord, *The Massachusetts Constitution and the Constitutional Conventions*, 2 MASS. L.Q. 1, 5 (1916) (indicating that there was a “widespread belief that the only [institution] which could stand for all the people and best define its rights and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of framing a constitution, and not a body of representatives entrusted at the same time with other duties”); Ernest R. Bartley, *Methods of Constitutional Change*, in MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 21, 32 (W. Graves ed., 1960).

115. *See* WOOD, *supra* note 105, at 307.

116. ADAMS, *supra* note 106, at 62; ROGER S. HOAR, CONSTITUTIONAL CONVENTIONS 7 (1919) (attributing the idea of a convention to the town of Concord, Massachusetts in October 1776). *But see* WALTER FAIRLEIGH DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 6 (1910) (tracing the idea of a convention to Hanover, New Hampshire); WOOD, *supra* note 105, at 310–19 (explaining the European understanding of “convention” as an extra-legal convening of the public).

117. HOAR, *supra* note 116, at 7.

Constitution, or form a Government.”<sup>118</sup> The town gave the following justification:

[F]irst, because we conceive that a Constitution in its proper idea intends a system of principles established to secure the subject . . . against any encroachments of the governing part, second, because the same body that forms a constitution have of consequence a power to alter it, third, because a constitution alterable by the Supreme Legislative is no security at all to the subject against any encroachment of the governing part on any, or on all of their rights and privileges.<sup>119</sup>

The town recommended instead a “convention of delegates elected for that purpose alone.”<sup>120</sup> Other towns also rejected the legislature’s authority to formulate a constitution for the people.<sup>121</sup>

The legislature attempted to alleviate these concerns by declaring that “in the next general election” the people would “give to the new members of the house of representatives full authority to draft a constitution, along with the ‘ordinary Power of Representation.’”<sup>122</sup> After the general election in the middle of 1777, the newly elected body met and adopted a constitution that it sent to the citizens for approval in March 1778.<sup>123</sup>

In a remarkable moment, the electorate of Massachusetts, which had been broadened to include all free males, resoundingly rejected the constitution by a ratio of more than five to one.<sup>124</sup> The “material factor” was “the widespread belief” that the only institution,

which could stand for *all the people* . . . and determine its form of government, was a convention consisting of delegates to whom the powers of the people were delegated for the sole purpose of framing a constitution, and not a body of representatives entrusted at the same time with other duties.<sup>125</sup>

The Massachusetts legislature subsequently took steps to call “a State Convention, for the sole Purpose of forming a new Constitution.”<sup>126</sup> The convention met in September 1779 and was the “first true constitutional convention in Western history” because it was the only body ever assembled

118. *Id.* (quoting Mass. Archives Felt Collection Vol. 156, no. 182); *see also* THE COMM’N TO COMPILE INFO. & DATA FOR THE USE OF THE CONST. CONVENTION, THE COMMONWEALTH OF MASSACHUSETTS: A MANUAL FOR THE CONSTITUTIONAL CONVENTION 1917 (2d ed. 1917).

119. HOAR, *supra* note 116, at 7.

120. *See* THE COMM’N TO COMPILE INFO. & DATA FOR THE USE OF THE CONST. CONVENTION, *supra* note 118, at 15.

121. *Id.*; *see* ADAMS, *supra* note 106, at 86–87.

122. ADAMS, *supra* note 106, at 87.

123. *Id.* at 87–88.

124. *Id.* at 88.

125. Lord, *supra* note 114, at 5 (emphasis added); *accord* HOAR, *supra* note 116, at 5 (noting the Massachusetts electorate’s rejection of a proposed constitution “because they resented the legislature’s assumption that it could call a convention without first obtaining an authorization from the people”).

126. ADAMS, *supra* note 106, at 89.

of delegates “elected for the exclusive purpose of framing a constitution.”<sup>127</sup> Following the 1779 Massachusetts convention, there was soon a widespread understanding across the states that a constitution could be created only by “a Convention of Delegates chosen by the people for that express purpose and no other.”<sup>128</sup> Indeed, Professor Gordon S. Wood observes that by the 1780s, a specially elected convention “had become such a firmly established way of creating . . . a constitution that governments formed by other means seemed to have no constitution at all.”<sup>129</sup>

Thus, the convention was, from its invention, a majoritarian institution and accountability device. As a delegate to Delaware’s 1831 convention explained, a constitutional convention “bring[s] into exercise [the people’s] sovereign power.”<sup>130</sup> It is the one institution in which the majority is “absolutely free.”<sup>131</sup> Indeed, the convention’s authority and legitimacy stems entirely from its uninhibited connection to the people.<sup>132</sup>

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127. *Id.* Ironically, despite the delay and extensive deliberation regarding the process for convening and populating the convention, the constitution was drafted by essentially one man, John Adams. *See id.* at 89.

128. WOOD, *supra* note 105, at 342; *accord* R.R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION* 214 (1959); KRUMAN, *supra* note 109, at 15–16; Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 353 (1997).

129. WOOD, *supra* note 105, at 342.

130. WILLIAM M. GOUGE, *DEBATES OF THE DELAWARE CONVENTION, FOR REVISING THE CONSTITUTION OF THE STATE, OR ADOPTING A NEW ONE; HELD AT DOVER, NOVEMBER, 1831* 227 (Wilmington, S. Harker 1831); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS 177–78* (1991) (noting that even Federalists treated “constitutional conventions as if they were perfect substitutes for the people themselves”). This understanding of the convention is visible in many subsequent conventions. 4 *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE* 2524 (Charles G. Geyer & Edmond C. Hardesty eds., Milford, Milford Chronicle Publ’g Co. 1897) (stating that convention delegates “are the people; they are derived from the people; they are the direct delegates from the people”); *DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA* 104 (Albert P. Bennett ed., New Orleans, W.R. Fish 1864) (“[I]t is for the purpose of sustaining the sovereign power in the hands of the people that this Convention is assembled . . .”); *ARKANSAS CONST. REVISION STUDY COMM’N, REVISING THE ARKANSAS CONSTITUTION* 28 (1968) (“It is almost inherent in the definition of a constitutional convention that most or all of its delegates be elected by the people. This relates to the basic nature of a constitution as a document which derives its strength and authority from the people themselves.”); *VA. CONST. of 1902 pmbl.* (“Whereof the members of this convention were elected by the good people of Virginia, to meet in convention for such purpose. We, therefore, the people of Virginia, so assembled in convention through our representatives . . . do ordain and establish the following revised and amended Constitution for the government of the Commonwealth.”).

131. WOOD, *supra* note 105, at 338 (quoting a Pennsylvanian from 1776).

132. *See id.* (“What was once considered to be a legally deficient body because of the absence of the magistrates or rulers was now for the same reason seen to be ‘the most important body that ever convened on the affairs of this State,’ an extraordinary representation of the people actually superior in authority to the ordinary legislature.” (quoting DUNLAP’S PA. PACKET, Sept. 17, 1776)).

### B. Core Features

In this section, I briefly outline the three essential features of the state constitutional convention: (1) special election of delegates to a unicameral body (2) with a generative mandate (3) subject to statewide referenda. Convention design has changed remarkably little over time.<sup>133</sup> The most significant development since 1776 was the addition of the statewide referenda for ratification.<sup>134</sup> The special election of delegates to a unicameral body with a generative mandate has remained a universal expectation.<sup>135</sup>

My descriptions here are paradigmatic and focus on the underlying design logic as a majoritarian institution.<sup>136</sup> They are intended to provide a useful starting point for assessing how a contemporary convention might perform, and they frame the political science literature (discussed later) that has probed the true effectiveness of the convention's logic in overcoming misalignment.

#### 1. Special Election of Representative Delegates to a Unicameral Body

The special election of delegates to a unicameral body was an essential element of the earliest conventions, and it remains a defining feature.<sup>137</sup> The core requirement is that voters select delegates solely as convention delegates and for no other government position or station.<sup>138</sup>

Practically, this requirement was expected to control agency costs in a high-risk environment by eliminating a conflict of interest that would arise if an incumbent government populated the convention. As Professor Marc W.

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133. See Marshfield, *supra* note 104, at 94–105 (tracing all developments in design from 1779).

134. See TARR, *supra* note 26, at 70 n.37 (noting that this practice was an established norm by 1829).

135. See *id.* At the margins, states have experimented with limited convention calls and separating convention proposals on ballot questions. These adjustments can affect referenda outcomes, but they do not change the convention's design logic as a majoritarian institution. In fact, when state courts have assessed whether a state convention can be limited, the dominant position is that the people can limit a convention through a referendum, but the legislature may not—upholding the idea that the convention is a manifestation of the people and not a coordinate department of regular government. See *infra* Part IV.A (discussing cases).

136. See JOHN DINAN, STATE CONSTITUTIONAL POLITICS 19 (2018) (describing trends in convention structure over time). My account here accurately represents how extant state constitutions portend to structure conventions. See 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11–12 tbl.1.6 (tabulating extant state constitutional provisions addressing conventions and showing that forty-one state constitutions explicitly provide procedures for future conventions, the vast majority of those require a popular referendum to call a convention, and no state presumably allows ratification without a popular referendum); Gerald Benjamin, *Constitutional Amendment and Revision*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 177, 192 (2006) (providing taxonomy of state approaches to regulating conventions through their constitutions that overlaps with my description here).

137. STURM, *supra* note 26, at 96; see also JOHN A. JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 268–69 (4th ed. 1887) (describing unicameral structure as the universal norm and “preferable to any other” because it concentrates power in “a single chamber”); Marshfield, *supra* note 104, at 100–05 (examining all instances in which constitutions were adopted by bodies without special elections and noting them as anomalies).

138. The requirement is not that the election must be the only item on the ballot, but that delegates are selected only for the convention and no other purpose.

Kruman explains, allowing incumbent officials to create constitutions was “unacceptable [because] it would empower the [government] to write . . . a document designed to restrict legislative and other government power.”<sup>139</sup> Existing officials “could hardly ‘divest themselves of the idea of their being *members*’ of the government, and this ‘may induce them to form the government, with particular reference to themselves.’”<sup>140</sup>

Special elections also gave voters an opportunity to enforce different criteria for selecting delegates than for electing regular officials. Constitution-making is an extraordinary task, and special elections allow voters to order their preferences and priorities differently considering those factors.<sup>141</sup> This was precisely Thomas Jefferson’s point in his famous critique of the 1776 Virginia constitution that was adopted by an ordinary legislature.<sup>142</sup> Special elections presume (and respect) that voters appreciate the difference between choosing ordinary officials and selecting delegates to craft fundamental law.<sup>143</sup>

Special elections for delegates remain the clearly established norm.<sup>144</sup> States have experimented with different methods for special elections.<sup>145</sup> Some have required elections to be nonpartisan using existing legislative districts.<sup>146</sup> Others have elected delegates at large. Still others have used multimember districts.<sup>147</sup> As I discuss below, these variations can matter in assessing a convention’s relative effectiveness at realignment.<sup>148</sup>

Unicameralism reflects the idea that ordinary checks and balances are inappropriate when the people are acting together in their sovereign capacity.<sup>149</sup> It also reflected the related notion that unequal representation should be mitigated as much as possible in a convention.<sup>150</sup> This was an extraordinary feature of early state conventions because state legislatures almost universally included robust upper houses that were malapportioned and controlled by wealthy elites.<sup>151</sup> In historical context, eliminating the

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139. KRUMAN, *supra* note 109, at 29.

140. WOOD, *supra* note 105, at 341.

141. *See* KRUMAN, *supra* note 109, at 29.

142. Jefferson complained that “no special authority had been delegated by the people to form a permanent constitution” because the sitting legislators “had been elected for the ordinary purposes of legislation only, and at a time when the establishment of a new government had not been proposed or contemplated.” Fritz, *supra* note 128, at 328–29.

143. *See* KRUMAN, *supra* note 109, at 28–29.

144. *See* Marshfield, *supra* note 104, at 94–105.

145. *See* Vladimir Kogan, *Lessons from Recent State Constitutional Conventions*, CAL. J. POL. & POL’Y, Feb. 3, 2010, at 1, 7–12 app. 1 (2010) (providing selection schemes for delegates to all conventions since 1965).

146. *See id.*

147. *See id.*

148. *See infra* Part III.A.3.

149. *See* JAMESON, *supra* note 137, at 269.

150. *See* KRUMAN, *supra* note 109, at 131–54.

151. *See id.* Pennsylvania’s 1776 constitution is the exception.

upper house reflected a deep commitment to popular constitutionalism and the principle of majority rule. All state conventions have been unicameral.<sup>152</sup>

## 2. Generative Mandate

One of the most overlooked but important attributes of the state constitutional convention is its generative mandate. For purposes of the foundational act of creating or revising a constitution, state constitutional theory prioritizes the people's inclusion, as directly as practical, in the generative process of compiling the constitutional text for ratification.<sup>153</sup> The convention is designed to enable the people to participate in the origination of the constitution and not simply react to a constitution in which the details, nuance, and tradeoffs have been negotiated and determined by an outside institution.<sup>154</sup>

A specially elected unicameral convention with a generative mandate gave the people the best and most practical opportunity to *create* (rather than just ratify) their own constitution.<sup>155</sup> Constitution-making is tricky. It involves ascertaining and ordering priorities, negotiating compromises, and imagining creative institutional solutions. Convention logic presumes that agency costs will be heightened if the people are distanced from this complex process. The convention is unique in that it portends to include the people collectively in the generative process rather than delegate it to experts for review by the people.<sup>156</sup>

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152. See STURM, *supra* note 26, at 92 (“Indigenous to the United States, these bodies [state constitutional conventions] are universally unicameral.”); accord DINAN, *supra* note 136, at 7–18 (summarizing the composition and structure of all state conventions in American history, implying their unicameral structure, and making no reference to any other type of structure in any convention); *id.* at 12 (noting that even when legislatures have occasionally declared themselves to function as a convention, they have resolved into a conventional unicameral structure). But see WILLIAM ANDERSON, A HISTORY OF THE CONSTITUTION OF MINNESOTA 69–114 (1921) (describing Minnesota’s 1857 simultaneous, dueling conventions). A delegate to New York’s 1846 convention proposed bicameralism for future conventions, but his idea was rejected without discussion. See DEBATES AND PROCEEDINGS IN THE NEW-YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION (S. Croswell & R. Sutton eds., Albany, Off. of the Alb. Argus 1846).

153. This was the premise of the initial Massachusetts convention: a convention was necessary as an instrument for including the people as directly as possible in the actual negotiation and drafting of the constitution. See *supra* notes 116–29 and accompanying text.

154. See STURM, *supra* note 26, at 94 (conventions are “assemblies of the people on a small scale”).

155. Of course, conventions themselves have a long history of relying on commissions and experts for information and guidance. See *id.* at 96.

156. The internal operations of conventions have varied remarkably little over the centuries. See *id.* at 98–100 (describing procedures). Conventions begin with delegates selecting “a president or chairman and several other administrative officers.” *Id.* The convention then adopts rules for its own operation and appoints committees to develop specific substantive proposals. See *id.* The convention’s internal rules are often modelled after the rules for the state’s lower legislative chamber, with modifications “to permit greater opportunity for deliberation and discussion.” *Id.* The next stage in most conventions is dedicated to factfinding and expert hearings, research, and the study of proposals. See *id.* Committees then distribute their reports to all delegates, who debate the proposals in a plenary session. See *id.* Delegates can accept, modify, or reject proposals by a set majority. See *id.* If

Indeed, the convention came into being so that delegates could do much more than vote on a proposal that originated elsewhere.<sup>157</sup> A convention of specially elected delegates was never necessary for popular approval of prepackaged proposal. Society as a whole could always cast ballots on a proposal from a commission, committee, or legislature.<sup>158</sup> The convention was developed because the principle of popular sovereignty required that the people be included (as directly as possible) in the actual deliberative *generation* of the constitution.<sup>159</sup> This, in turn, facilitates popular control over constitution-making because the people are directly involved in the process of identifying priorities and negotiating tradeoffs.

### 3. Extraordinary Direct Democratic Accountability: Referenda

In addition to the requirement of a special election, state convention theory has emphasized that a convention should be subject to greater and broader popular input and control than ordinary legislative assemblies.<sup>160</sup> States have used a great variety of devices to protect the democratic credentials of the convention.<sup>161</sup> In the eighteenth century, Pennsylvania and South Carolina imposed waiting periods to ensure public discussion and input.<sup>162</sup> New Jersey ordered that copies of its new constitution be printed and distributed to the people.<sup>163</sup> Maryland, North Carolina, and Pennsylvania had similar distribution initiatives.<sup>164</sup>

Ultimately, of course, the statewide referenda became the dominant device for ensuring democratic accountability. In most instances, referenda are used at both the beginning and the end of the constitution-making process.<sup>165</sup> Conventions are usually called by legislation submitting the question of a convention to a referendum.<sup>166</sup> Four states explicitly allow for initiative petitions to place a convention call on the ballot.<sup>167</sup> Only six states currently allow for legislatures to call a convention without a referendum.<sup>168</sup> After a special election for delegates and the conclusion of the convention's work, there is a universal expectation for a statewide ratification referendum.<sup>169</sup> Traditionally, the ratification referendum was a single ballot question seeking

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a proposal is accepted, most conventions refer it to a committee on "style and arrangement," which prepares the formal proposal for final consideration by the convention. *Id.*

157. *See supra* Part II.A.

158. The idea of a plebiscite was developing in revolutionary America and might not have immediately occurred to early constitutionalists. *See* Marshfield, *supra* note 104, at 103 n.209. Moreover, early ratification referenda were plagued by significant logistical failures that have been overcome with practice. *See* ADAMS, *supra* note 106, at 90.

159. *See* WOOD, *supra* note 105, at 331–32.

160. *See* TARR, *supra* note 26, at 69.

161. *See id.* at 69–70.

162. *See id.* at 69 (South Carolina); Fritz, *supra* note 128, at 330 (Pennsylvania).

163. *See* TARR, *supra* note 26, at 69.

164. *See id.*

165. *See* Marshfield, *supra* note 104, at 102.

166. *See* STURM, *supra* note 26, at 85–88.

167. *See* 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11–12 tbl.1.6.

168. *See id.*

169. *See* STURM, *supra* note 26, at 89; Fritz, *supra* note 128, at 329–32.



approval of reforms as a bundle.<sup>170</sup> However, more recent conventions have separated out controversial reforms into separate ballot questions,<sup>171</sup> which appears to help ratification overall because it can stop “poison pills” from souring the public on the whole package.<sup>172</sup> Ratification thresholds can also matter. The current norm is to require only a majority of those voting on the ballot question for ratification.<sup>173</sup>

Both the convention-call referendum and the ratification referendum are, of course, intended to provide majoritarian checks on the convention. They are intended to ensure that the convention is not invoked improperly by anyone other than the people themselves and that the convention does not change the constitution in ways that the people do not approve. As I discuss in the next section, the dynamics that animate the actual performance of referenda are complex, but their design logic is rather straightforward.

### C. Today’s “Conventionphobia”

Despite the growing misalignment in state government and the convention’s unique design as a popular accountability device, we are now in a prolonged convention drought.<sup>174</sup> No state has called an independent constitutional convention since the 1980s,<sup>175</sup> and nobody seems to take state constitutional conventions seriously as a solution for contemporary problems.<sup>176</sup> As Gerald Benjamin and Thomas Gais have observed, we are experiencing collective “conventionphobia.”<sup>177</sup>

Arguments against state conventions vary, but they generally take two forms.<sup>178</sup> First, opponents argue that conventions are unnecessary and

170. See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 160–87.

171. See *id.*

172. See Tarr, *supra* note 22, at 21.

173. See 53 THE COUNCIL OF STATE GOV’TS, *supra* note 35, at 11–12 tbl.1.6.

174. See Snider, *supra* note 31, at 257–65.

175. No legislature has voluntarily issued a convention call since Arkansas in 1979, and voters have not approved a convention call of any kind since Rhode Island in 1986 (although, as I discuss in *infra* Part III.B.2, there are several instances in which a majority of voters approved a call but the legislature rejected or contested the outcome). Here, I follow James H. Snider’s assessment that Louisiana’s 1992 “convention” does not count because it was a special session of the ordinary legislature. See Snider, *supra* note 31, at 259 n.1. Rhode Island’s 1986 convention call was limited. See *id.* at 266 & n.13. New Hampshire called an unlimited convention in 1984. See *id.* at 264.

176. There are a few exceptions. See Snider, *supra* note 31, at 288–89 (lamenting what has become of conventions but hoping for their revival); Martin, *supra* note 25; Josh Barro, *Here’s Why I’m Voting for a Constitutional Convention in New York*, INSIDER (Nov. 6, 2017, 2:10 PM EST), <https://www.businessinsider.com/new-york-constitutional-convention-vote-pros-cons-2017-11> [<https://perma.cc/7CVC-2GCR>].

177. See generally Benjamin & Gais, *supra* note 25, at 53.

178. See Snider, *supra* note 31, at 280–81 (summarizing arguments). See generally John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums*, 71 MONT. L. REV. 395 (2010) (discussing arguments offered by reformers and opponents). There is robust literature exploring why voters reject convention referenda and why legislatures and other powerful interest groups oppose conventions. See, e.g., Lewis et al., *supra* note 26. In general, that literature shows that voters are heavily influenced by status quo bias, and legislatures and other groups whose interests are protected under the existing

wasteful because more efficient alternatives exist.<sup>179</sup> Second, opponents argue that conventions are dangerous because they are vulnerable to capture by special interests, incumbent officials, and partisan extremists who would further distort government for their own ends.<sup>180</sup>

In this section, I expand on each anti-convention position through the lens of growing misalignment in state government. I argue that despite real concerns about calling conventions, America needs another pathway to state constitutional change that can constructively shepherd deep structural reform while maintaining meaningful independence from existing state officials and entrenched interests.

### 1. State Conventions are “Boondoggles”

A core argument against the convention is that it is unnecessary and wasteful because there are other, more efficient alternatives.<sup>181</sup> This claim is surely correct to a degree. During most of the eighteenth and early nineteenth centuries, the states relied on constitutional conventions for change.<sup>182</sup> The states eventually found conventions cumbersome, and they developed more efficient methods of ad hoc constitutional change.<sup>183</sup> Today, the two dominant methods are legislative referral and the citizens’ initiative.<sup>184</sup> States have also experimented with appointed constitutional commissions, but only Florida allows a commission to place amendments on the ballot without legislative approval.<sup>185</sup> All three methods have significant limitations that justify reconsideration of conventionphobia.

The primary limitation on legislative referral is straightforward: it is controlled by the legislature. The process begins with the legislature drafting, debating, and approving proposed amendments for popular ratification.<sup>186</sup> Because the legislature controls the agenda for reform, it rarely offers

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constitution form “natural enemies” of a convention. *Id.* I discuss this literature later when I argue for better citizen access to convention-call referenda. My focus here is on outlining the substantive arguments against conventions so that I can explore those arguments in the remainder of the Article.

179. See Dinan, *supra* note 178, at 410, 429 (tracing argument that conventions are costly and unnecessary); see also Jessé McKinley, *New York Voters Reject a Constitutional Convention*, N.Y. TIMES (Nov. 11, 2017), <https://www.nytimes.com/2017/11/07/nyregion/new-york-state-constitutional-convention.html> [https://perma.cc/Q5U7-U9E8] (discussing same argument in New York’s 2017 referendum).

180. See Henry M. Greenberg, *Hope vs. Fear: The Debate over a State Constitutional Convention*, 38 PACE L. REV. 1, 11–12 (2017) (describing fears that a convention will be “dominated by sitting legislators and special interests, and thus be a carbon copy of a typical legislative session” and that “a convention will open a Pandora’s Box of potential constitutional mischief”).

181. Sensible estimates for New York’s convention in 2017 were between \$47 million and \$105 million. See Gerald Benjamin, *What’s a Constitutional Convention Cost?*, GOTHAM GAZETTE (July 5, 2017), <https://www.gothamgazette.com/130-opinion/7038-what-s-a-constitutional-convention-cost-we-can-t-afford-to-not-hold-one> [https://perma.cc/66C2-TRES].

182. See TARR, *supra* note 26, at 73.

183. See Tarr & Williams, *supra* note 103.

184. DINAN, *supra* note 136, at 11–34.

185. Tarr & Williams, *supra* note 103, at 1094.

186. See *id.* at 1092.

amendments against its own interests (or the interests of its caucus or donors).<sup>187</sup> Indeed, scholars repeatedly observe that democratic reforms are near impossible through state legislatures because of the inherent conflict of interest.<sup>188</sup> Thus, popular reforms such as independent redistricting commissions, open primaries, term limits, and legislative ethics are almost always nonstarters in state legislatures. To the extent that popular pressure for change involves reform of deeper democratic structures, legislative referral is unlikely to be a useful process.<sup>189</sup>

The citizens' initiative is more promising because it bypasses the legislature (to a degree). Citizens in several states have used the initiative to adopt term limits, redistricting commissions, open primaries, and other popular democratic reforms.<sup>190</sup> However, the initiative has its own limitations. First, the direct initiative (which bypasses the legislature) is available for constitutional change in only sixteen states.<sup>191</sup> Second, some states impose subject-matter restrictions on the initiative that significantly limit its effectiveness for democratic reforms. In Illinois, for example, the initiative may be used only to change the constitution's legislative article, and the Supreme Court of Illinois has held that the initiative cannot be used to adopt an independent redistricting commission.<sup>192</sup> Third, legislatures exercise significant control in regulating the initiative, and, as shown above, they increasingly use that power to undermine the initiative.<sup>193</sup> Fourth, successful initiatives almost always depend on legislatures for implementation, and legislatures have developed sophisticated countermeasures to undermine initiatives.<sup>194</sup> These countermeasures include refusing to fund programs under an initiative, declining to adopt necessary regulations, adopting conflicting or mitigating measures, and challenging

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187. James A. Gardner, *Voting and Elections*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 145, 147 (G. Alan Tarr and Robert F. Williams eds., 2006) (noting that reform to voting and other changes to the electoral process are usually by initiative because incumbent legislatures are privileged by status quo).

188. *See id.*; Pildes, *supra* note 18, at 306.

189. There are other limitations on legislative amendment. For example, the politics of legislative amendment skew in favor of amendments that benefit private interests. *See* CHARLOTTE IRVINE & EDWARD M. KRESKY, HOW TO STUDY A STATE CONSTITUTION 4 (1962). Private interests with power in a legislature use the amendment process to "deposit laws favorable to their own health and welfare" into the constitution so that they are protected from future unfavorable legislatures. *Id.* Because it is easier to add entitlements than take them away, it is easier for state legislatures to add entitlements and protections to state constitutions than to propose reforms that would take away entrenched interests. *See id.* This process of special interest entrenchment can further misalign state government with popular majorities.

190. *See* Gardner, *supra* note 187, at 147.

191. *See* DINAN, *supra* note 136, at 17. I exclude Mississippi because the Mississippi Supreme Court recently invalidated the initiative. *See In re Initiative Measure No. 65: Mayor Butler v. Watson*, 338 So. 3d 599, 602, 615 (Miss. 2021).

192. *See* ILL. CONST. art. XIV, § 3; *Hooker v. Ill. State Bd. of Elections*, 63 N.E.3d 824, 839 (Ill. 2017).

193. *See infra* Part I.A.2.

194. *See* Marshfield, *supra* note 47, at 95–107.

initiatives in court.<sup>195</sup> Thus, even in states in which the initiative is available to citizens, its potency and power for democratic reform are limited.<sup>196</sup>

One final limitation of the initiative is worth special attention. Although the initiative allows citizens to bypass state government (to some degree), it is the quintessential special interest device. Initiatives are drafted and framed by narrow interests (theoretically a single citizen) or a tightly aligned coalition of interests.<sup>197</sup> Those drafters may be indirectly influenced by broader public concerns and competing private interests, but proposing initiatives is ultimately a unilateral decision by narrow interests. There is no opportunity for public debate or negotiation in the proposal's formation. Consequently, the initiative is not well suited to broader constitutional reform because it does not provide a front-end public forum for negotiation of broad priorities and systemic solutions.<sup>198</sup>

The constitutional commission presents something of a hybrid. In general, a commission is an appointed body that makes recommendations for constitutional reform to the legislature.<sup>199</sup> Only Florida authorizes an appointed commission to send proposals directly to voters. Commissions offer improvements on legislative referral because the commission presumably has some independence from the legislature in crafting an agenda and proposals.<sup>200</sup> However, they tend to suffer from the same limitations as legislative referral, except that they can raise the political costs for a legislature refusing to take up popular reforms.<sup>201</sup>

To be sure, conventions can be expensive. The estimated cost of a New York convention in 2017 was \$100 million.<sup>202</sup> But existing methods of change are overtly controlled by legislatures or private interests, which limits their effectiveness for a variety of reforms.

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195. *Id.*

196. There are other limits on the initiative. Government officials themselves have begun to take advantage of the initiative to spoil or counteract citizen-led initiatives. Also, legislative countermeasures have caused initiatives to grow in length in order to be effective against anticipated countermeasures, but that length makes them vulnerable to challenges in court under the single-subject rule. *See* Marshfield, *supra* note 47, at 108.

197. *See* MATSUSAKA, *supra* note 7, at 196 (“[I]ndividual activists—particularly wealthy individuals . . . drive the agenda.”).

198. Indeed, even those that favor the initiative recommend that it be used for discrete topics. *See* MATSUSAKA, *supra* note 7, at 228.

199. *See* Tarr & Williams, *supra* note 103, at 1094.

200. *Id.* at 1083–84, 1098.

201. Florida's commission is noteworthy because it provides an opportunity for the commission to bypass the legislature and send proposals directly to voters. *See id.* at 1097. For this reason, however, appointments to the commission have been heavily politicized and partisan. The 2018 commission produced eight proposals that were largely unremarkable and did not touch on key issues of democratic reform. *See* Mary E. Adkins, *What Florida's Constitution Revision Commission Can Teach and Learn from Those of Other States*, 71 RUTGERS L. REV. 1177, 1213–15 (2019).

202. THE COMM. ON THE N.Y. STATE CONST., N.Y. STATE BAR ASS'N, WHETHER NEW YORKERS SHOULD APPROVE THE 2017 BALLOT QUESTION CALLING FOR A CONSTITUTIONAL CONVENTION 7 (2017), <https://nysba.org/app/uploads/2020/02/June-2017-NYS-Constitution-Final-Report-1.pdf> [<https://perma.cc/67D9-79U9>].

## 2. State Conventions Are Dangerous

The second argument against conventions is that they are vulnerable to capture by special interests and partisan extremists. This argument was on full display during New York's 2017 convention-call referendum. New Yorkers Against Corruption (a coalition of more than 150 organizations) repeatedly argued that a convention would be "a field day for powerful lobbyists and the special interest groups they represent."<sup>203</sup> Similarly, opponents of Rhode Island's 2014 convention referendum argued that a convention might be hijacked by extremists to jeopardize hard-earned progressive gains.<sup>204</sup> Planned Parenthood, for example, opposed the convention because it "could send women back to the 1950s."<sup>205</sup>

These arguments have not received much direct scholarly treatment, but there is theoretical basis for their logic. Law and economics literature has long emphasized that entrenched and durable laws are more attractive to organized special interests.<sup>206</sup> This insight has been extended to show that legislators lack incentives to pass legislation with reasonable sunset provisions, even when it would be in the public interest, because temporary laws are less valuable to donors.<sup>207</sup> From this work, it is reasonable to conclude that convention delegates will receive extraordinary attention from special interests because state constitutions are more durable than legislation. And, because delegates will face extraordinary special interest pressure, they will be even less attentive to constituents and even more tightly aligned with special interests.

The bulk of this Article is dedicated to challenging these claims as applied to state conventions, but a few preliminary points are necessary for framing purposes. First, this argument rests on the assumption that the relationships between special interests, legislators, and the public during ordinary legislative sessions are essentially the same as the relationships between special interests, delegates, and the public at a convention. The only difference is that the stakes are higher at a convention, and higher stakes mean more lobbying and more capture. Second, the factual basis for this argument is that prior conventions have been messy political affairs that descended into politics as usual, which implies the same dynamics for fostering special interest capture. As I argue in the next section, these assumptions are deeply misplaced.

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203. Jordan Marks, Opinion, *NY Constitutional Convention a 'Field Day for Powerful Lobbyists'* (Commentary), SYRACUSE.COM (Oct. 20, 2017, 10:38 AM), <https://www.syracuse.com/opinion/2017/10/ny-constitutional-convention-a-field-day-for-powerful-lobbyists-commentary.html> [<https://perma.cc/QK3M-FHXE>].

204. See Snider, *supra* note 31, at 286–87.

205. *Id.* at 286.

206. See generally William Landes & Richard Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

207. W. Mark Crain & Robert D. Tollison, *Constitutional Change in an Interest-Group Perspective*, 8 J. LEGAL STUD. 165, 171 (1979).

### III. TAKING STATE CONSTITUTIONAL CONVENTIONS SERIOUSLY TODAY

In this part, I explore the extent to which state convention design is effective at empowering majorities and under what conditions it works well. I first discuss the political science literature concluding that state conventions are effective at realignment and why. I then explore the convention's limitations and notable qualifications. My synthetic claim is that there is strong evidence that state conventions are more effective than ordinary state legislatures at protecting against special interests, empowering majorities, and mitigating partisanship. Contrary to prevailing views that dismiss state conventions offhand, conventions deserve more serious consideration for today's democratic ills.

To be sure, the performance of any constitutional convention is highly contextual and influenced by myriad factors, but the best evidence suggests that, all else being equal, conventions are well designed to address misalignment between statewide popular majorities and state government—especially on deep structural issues. Some conventions have, of course, performed poorly, but the dominant theme in the political science literature is that convention design incentivizes better majoritarian alignment than ordinary political processes (subject to certain key conditions that I discuss below).

#### A. Evidence that State Constitutional Conventions Are Effective

Before engaging with the political science literature, an important theoretical note is warranted. For a long time, state constitutional studies were stunted by the idea that “real” constitution-making occurred only through detached and reasoned judgment about entrenched political frameworks.<sup>208</sup> In other words, to be worthy of study as an independent phenomenon, constitution-making was expected to look and sound like the Federalist Papers and the Philadelphia Convention of 1787.<sup>209</sup> Of course, state constitutions and the processes underlying them look much more

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208. Swanson et al., *supra* note 26, at 184 (describing dominance of the “statesman” model of constitution-making); ZACKIN, *supra* note 26, at 22–23; TARR, *supra* note 26, at 25, 57–58; see, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 821 (1992) (“According to the [theories] of constitutionalism, a constitution is not supposed to be the outcome of pluralistic political bargaining on matters of everyday concern; that is the role played in our system by statutory law . . . . To the extent that a constitution or a particular provision departs so far from this model that it cannot plausibly be viewed as anything other than the result of pluralistic logrolling, constitutional discourse is correspondingly impoverished.”).

209. See Swanson et al., *supra* note 26, at 184 (“The requirements of the model postulate that constitution-makers should act as impartial law-givers, above the normal political struggles, abstractly considering the issues of constitutional revision with the aim of creating an ‘ideal’ document attuned to the needs of the state for which it is being devised. Decisions within the convention should be made on the basis on rational disinterested choice.”); Gardner, *supra* note 208, at 821 (“[C]onstitutionalism assumes that a constitution is the consensual act of a united society; it is viewed as the outcome of a process of deliberation meant to identify matters of fundamental importance to the people and to place those matters in a constitution specifically to protect them from the quotidian predations of pluralistic power struggles.”).

pedestrian, chaotic, and messy.<sup>210</sup> Consequently, they were largely dismissed as uninteresting displays of “politics as usual.”<sup>211</sup>

The great breakthrough in recent political science has been to turn away from this distinction and focus instead on how state constitution-making can be embroiled in messy pluralistic competition yet generate outcomes that are very different from the results in ordinary political forums—especially state legislatures.<sup>212</sup> That is, scholars stopped obsessing over why state constitution-making looks so different from the abstract enlightenment of the federal founding and started asking: If state constitution-making looks like ordinary politics, why are there different winners and losers in the constitutional realm than in ordinary state legislatures? Why, for example, were antebellum railroads so successful in state legislatures and so unsuccessful when those states’ constitutions were rewritten?<sup>213</sup> Why were environmental groups in the twentieth century shut out of state legislatures but so successful when using constitutional amendment processes?<sup>214</sup>

This shift in focus has generated a fruitful line of work that explores how ordinary lawmaking tends to benefit very different kinds of groups than processes of state constitutional change. Importantly for present purposes, this new focus has contributed much to our understanding of the institutional features of state conventions because it pays careful attention to how

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210. TARR, *supra* note 26, at 25, 57–58; Gardner, *supra* note 208, at 821. One of Minnesota’s most important founding moments was a fist fight between leading convention delegates in the committee room. See WILLIAM ANDERSON, A HISTORY OF THE CONSTITUTION OF MINNESOTA 99–100 (1921) (describing the fight between Willis Gorman and Thomas Wilson as a “thunderstorm in clearing the air” that paved the way for an otherwise unthinkable constitutional compromise). As I discuss in more detail below, the “messy” side of state constitutional conventions should not take away from the deep theoretical discussions and tremendous institutional ingenuity that has occurred in state conventions. See DINAN, *supra* note 19, at 1–6. The literature strongly suggests that state conventions facilitate a complex hybrid environment for constitution-making that includes pluralistic competition, genuine consideration of the public good, and abstract institutional design. See ZACKIN, *supra* note 26, at 27.

211. See VERNON A. O’ROURKE & DOUGLASS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE v (1943) (describing state constitution-making by convention as a mere extension of the ordinary legislative process); Gardner, *supra* note 208, at 821 (describing state constitutional dialogue as “impoverished”).

212. Professor Emily Zackin deserves much credit for highlighting and leveraging this shift, but this work has deep roots in research by Professors Alan Tarr, John Dinan, John Kincaid, and others. ZACKIN, *supra* note 26, at 27; *accord supra* note 26 and accompanying text. There was also an explosion of empirical work (some quantitative) by political scientists studying state conventions in the 1960s and 1970s in response to the wave of state conventions held following the Supreme Court’s apportionment rulings. One of the earliest studies is Robert S. Friedman & Sybil L. Stokes, *The Role of the Constitution-Maker as Representative*, 9 MIDWEST J. POL. SCI. 148 (1965). Much of this work has been ignored in recent discussion, but it is invaluable for my purposes here. It assumes ordinary political forces act on conventions, but it takes seriously that the convention’s institutional qualities impact how those forces interact. See, e.g., CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26. Currently, there is a renewed wave of exciting qualitative and quantitative work building on this framing. See generally, e.g., Strickland, *supra* note 26; Lewis et al., *supra* note 26; ZACKIN, *supra* note 26; BRIDGES, *supra* note 26.

213. Wallis, *supra* note 26, at 222–25.

214. See ZACKIN, *supra* note 26, at 184–86.

convention design changes the incentives, behavior, and success of interest groups. My synthetic claim here is that this literature generally supports the idea that conventions are better suited to majoritarian outcomes and defending against undue influence by private interests than ordinary state legislative process.

### 1. Are Special Elections Effective?

As explained above, the basic design logic of special elections is that they control agency costs by separating delegates from ordinary officials. The original idea was framed through a conflict-of-interest lens—incumbent officials would be tempted to tailor the constitution for their own benefit, but specially elected delegates would not have the same incentives because they held a terminal office. So, how have special elections performed in practice?

The short answer is that special elections appear to reduce agency costs for popular majorities (relative to ordinary legislative elections) but in ways that are slightly different than originally anticipated.<sup>215</sup> The dominant theme is that special elections for delegates create more parity between interest groups than ordinary legislative elections (which tend to benefit wealthy groups with narrow, private interests).<sup>216</sup> The result is that delegates are more responsive to groups that better approximate the interests of the public than legislators would be.<sup>217</sup> Although there is limited sophisticated quantitative evidence

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215. There are studies exploring the conflict-of-interest frame. See CORNWELL ET AL., *THE POLITICS OF THE REVISION PROCESS*, *supra* note 26, at 111 (finding evidence that delegates with interest in structural status quo are more likely to oppose reform); Richard L. Engstrom & Patrick F. O'Connor, *Restructuring the Regime: Support for Change Within the Louisiana Constitutional Convention*, 11 *POLITY* 440, 449–50 (1979) (same); William C. Havard, *Notes on a Theory of State Constitutional Change*, 21 *J. POL.* 80 (1959); ELMER E. CORNWELL, JR. & JAY S. GOODMAN, *THE POLITICS OF THE RHODE ISLAND CONSTITUTIONAL CONVENTION* 82–95 (1969).

216. STURM, *supra* note 26, at 118 (“Delegates are elected for the accomplishment of a single mission, they do not stand for reelection; thus they gain independence from pressures of various groups which have successfully achieved control of some legislative bodies.”); ZACKIN, *supra* note 26, at 84 (noting that special elections were “particularly important” for efforts to reform public education through conventions because legislators were unlikely to incur the necessary tax obligations and because they had used education funds to subsidize special interest development projects; however, specially elected delegates had broader time horizons and more public-regarding interests); Strickland, *supra* note 26, at 522 (hypothesizing and finding evidence that the absence of reelection for delegates means that “monetary interests cannot achieve the same levels of access in conventions as in [legislative] sessions because members lack electoral incentives and are less receptive to lobbying by [monetary] interests”).

217. Adding significantly to this dynamic are the feedback impacts of the ratification referendum, which various studies find to have a significant impact on delegate decision-making and which are probably more important in dislodging advantages enjoyed by wealthy private interest groups on legislatures. See generally Engstrom & O'Connor, *supra* note 215 (modeling impacts of ratification referendum on delegate decision-making). Regarding the public-oriented mindset, studies have also found that although delegates are elected from districts, they almost universally view their role at the convention as representing the interests of the state without regard to district-specific concerns (there are exceptions, such as delegates from Chicago at the 1969 Illinois convention). See CORNWELL ET AL., *THE POLITICS OF THE REVISION PROCESS*, *supra* note 26, at 78–79.



on this point, the qualitative empirical research repeatedly confirms this dynamic.<sup>218</sup>

Three important themes emerge from the literature.<sup>219</sup> First, incentives for candidates are different at a special election in ways that benefit outside groups, broader public interests, and (more generally) the public.<sup>220</sup> When candidates are subject to reelection, they tend to prioritize groups that can help with their reelection campaigns<sup>221</sup> and/or with private employment opportunities after elective office.<sup>222</sup> This generally favors well-financed, narrow interests (mostly corporations or industry-specific associations) because those groups can offer candidates large campaign contributions and industry expertise in exchange for influence.<sup>223</sup> On the other hand, broader interest groups that boast extensive citizen membership but relatively limited funds are disadvantaged because they cannot contribute as much expertise or capital to a candidate's reelection.<sup>224</sup> The result is a disparity in legislative influence between groups, with broad citizen groups being disadvantaged.<sup>225</sup>

However, when a candidate is elected once to a terminal institution (like a convention), the incentives are different. Convention candidates are relatively less concerned about resources for reelection and more focused on ensuring that they have the information and support necessary to produce constitutional reforms that will survive a statewide referendum.<sup>226</sup> This

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218. An important and rigorous recent study implicitly confirms this, although the study did not parse the effects of other convention features (referenda, unicameral structure, etc.). See Strickland, *supra* note 26, at 537 (“The evidence . . . shows that conventions are typically not subjected to rampant lobbying by narrow interests.”).

219. In addition, the studies indicate that other notable dynamics resulting from special elections are: (1) destabilization of party leadership because more independent candidates run since the appointment is terminal and of high consequence and (2) a “socializing” effect whereby delegates (even those with prior government service) experience a conscious reappointment as “delegates” with an awareness that they must act on behalf of the state in an extraordinary capacity that demands their full attention and diligence. See Tarr, *supra* note 22, at 20–21; CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 73.

220. Here, I focus on the political science literature directly studying state constitutional conventions. There is, however, significant literature studying direct democracy and legislative behavior in America (and abroad) that strongly supports the idea that special interests enjoy an advantage when representatives are subject to reelection. See, e.g., POWELL, *supra* note 11, at 91–92; MATSUSAKA, *supra* note 7, at 187.

221. See Strickland, *supra* note 26, at 521.

222. See *id.* at 518.

223. See *id.* at 521.

224. See *id.* at 521–22.

225. See *id.*; MATSUSAKA, *supra* note 7, at 187. Attitudinal studies of delegates have found that the absence of reelection also “frees” them to act on their own judgment rather than search for constituent preferences. CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 79–80. However, those same studies find that delegates focus heavily on statewide goods rather than personal gain and are influenced by the ratification referendum. See *id.* See generally William N. Thompson, *An Analysis of the Legislative Ambitions of State Constitutional Convention Delegates*, 29 W. POL. Q. 425 (1976) (finding lack of systematic evidence that delegates used conventions to further personal political advantages).

226. Carol S. Greenwald, *New York State Lobbyists: A Perspective on Styles*, 61 NAT'L CIVIC REV. 447 (1972) (noting that the absence of “reelection sanctions” changed the convention's “sources of authority”); CORNWELL ET AL., THE POLITICS OF THE REVISION

dynamic tends to favor organized citizen groups that can credibly threaten to undermine referenda by withholding the support of their members and can provide reliable information about their members' preferences.<sup>227</sup> As a result, broad citizen groups tend to be more successful in lobbying convention delegates than legislators, and the converse is generally true for wealthy private interests.<sup>228</sup>

Second, and relatedly, special elections create unique incentives for excluded interest groups to mobilize and invest in upsetting the status quo.<sup>229</sup> During ordinary political operations, outside political groups have little incentive to mobilize (and citizens have reduced incentives to get behind outside groups) because power has consolidated and stabilized to their exclusion.<sup>230</sup> Convention elections upset this equilibrium because they provide an opportunity to compete outside of established structures and for a much higher potential payoff.<sup>231</sup> To be sure, controlling groups have strong incentives to contest convention elections, but special elections are disruptive events that disproportionately benefit outside groups.<sup>232</sup> As a result, outside

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PROCESS, *supra* note 26, at 197–98; Strickland, *supra* note 26, at 524; *infra* Part III.A.2 (discussing a referendum's impact on delegates).

227. Indeed, when conventions have produced reforms soundly rejected by voters (e.g., New York and Maryland in 1967), the literature suggests that this was caused by an absence of adequate interest group presence at the convention (Maryland) or extreme partisanship which resulted in deafness to information from critical citizen groups (New York). See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 83–85; Robert J. Martineau, *Maryland's 1967–68 Constitutional Convention: Some Lessons for Reformers*, 55 IOWA L. REV. 1196, 1226 (1970).

228. See BRIDGES, *supra* note 26, at 67 (explaining that special elections allowed popular labor interests to “fare much better” than in legislative elections); CAROL S. GREENWALD, LOBBYISTS' PERCEPTIONS OF THE 1967 NEW YORK STATE CONSTITUTIONAL CONVENTION 272 (1971) (finding that lobbyists at the New York convention for broad citizen groups reported the convention to be more hospitable than an ordinary legislative session because of “absence of legislative continuity or delegate[s]”); ROBERT LAMONTAGNE, PRESSURE GROUP INFLUENCE ON THE PENNSYLVANIA CONSTITUTIONAL CONVENTION 10 (1974) (“This study will show that, although there were numerous attempts by some pressure groups to influence the outcome of the Convention, the delegates themselves had difficulty in agreeing about the extent of this influence, its effectiveness, or even the groups which exerted the most influence. In fact, some delegates believed that much more pressure was exerted by some of the political officials of the Convention and by the legislators who were appointed delegates to the Convention than by any organized pressure group.”); Strickland, *supra* note 26, at 520 (“Groups with statewide constituencies were found to exercise the greatest influence. Organized interests also helped persuade voters to adopt or reject proposed constitutions.” (citing LAMONTAGNE, *supra*)); Dinan, *supra* note 178, at 422 (“They already control the General Assembly . . . Controlling a majority of 75 newly elected convention delegates would have been expensive or impossible. And those citizens might have stirred up trouble.”).

229. See ZACKIN, *supra* note 26, at 27.

230. See *id.* at 120 (“Constitutional conventions often created a sense of opportunity among [outside] labor groups, prompting them to pursue the creation of new constitutional provisions when they might not have otherwise.”); BRIDGES, *supra* note 26, at 42.

231. See Greenwald, *supra* note 226, at 449–50.

232. See ZACKIN, *supra* note 26, at 24, 120 (explaining that organized citizen groups work to extract public pledges from delegates to pursue certain policies). In other words, the point is not that dominant groups have less of an interest in avoiding or competing at convention. See Strickland, *supra* note 26, at 538. The point is that outside groups have nominal interest

groups can be better represented in convention elections than ordinary legislative elections because they have unusual motivation and support.<sup>233</sup>

Third, convention elections tend to be more effective at elevating broad public interest concerns over specific policy outcomes because they necessarily implicate reform of legal frameworks for generalized application.<sup>234</sup> The election of legislators tends to focus on disputed policy questions with more immediate impact because they presume the existence of certain settled frameworks for making law.<sup>235</sup> This favors special interest groups that primarily seek influence over specific policy outcomes and disadvantages broader citizen groups interested in broader, structural reform. Convention elections invert this dynamic because they operate against the backdrop of deep institutional reform.<sup>236</sup> As a result, electors and candidates tend to show greater interest in broad public goals than during an ordinary legislative election, which creates new space and support for broad public interest groups.<sup>237</sup>

These three dynamics are connected and work together. The calling of a convention provides outside political groups with new motivation and opportunities to mobilize. Those enhanced efforts are received by candidates looking to identify groups with meaningful citizen support (rather than large funds for reelection campaigns) and broad public interest goals (rather than specific policy outcomes and expertise). This environment tends to benefit citizen groups looking for broad structural reform, especially groups with meaningful popular support.

At this point, it is helpful to discuss a few key studies that illustrate these claims. Professor Emily Zackin has studied why positive rights to education, worker entitlements, and environmental protection appear in state constitutions but not the federal Constitution. Her work traces the activities of various groups advocating for free and equal public schools, the labor movement of the late nineteenth and early twentieth centuries, and the environmental protection movement of the mid-twentieth century. In each of these areas, Zackin finds that the special election of delegates to constitutional conventions empowered outside, populist groups to overcome nonresponsive legislatures.<sup>238</sup>

In the education context, for example, Zackin shows that state legislatures were often unable to resist pressure to reallocate education resources away from schools and into projects that benefited wealthy private interests (railroads and banks).<sup>239</sup> Legislatures were also unwilling to impose more

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in competing during ordinary political times, but they have a greater interest in competing during a special election for delegates.

233. See ZACKIN, *supra* note 26, at 120.

234. Strickland, *supra* note 26, at 522–23; ZACKIN, *supra* note 26, at 27–31.

235. See Strickland, *supra* note 26, at 522–23.

236. CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 12.

237. *Id.* at 73–80 (finding that 12 percent of convention delegates viewed their role as local, whereas most viewed their role as a statewide and framework-oriented).

238. ZACKIN, *supra* note 26, at 59, 84, 120, 152–53.

239. See *id.* 80–84.

centralized taxes to fund education because of their general aversion to raising taxes and because of the redistributive nature of centralized education taxes.<sup>240</sup> Zackin carefully documents how the special election of convention delegates worked to reconfigure the political dynamics in favor of public education.<sup>241</sup> Because delegates were not subject to reelection, they were more willing to consider redistributive taxes, especially if those taxes had popular support and widespread public benefit.<sup>242</sup> Indeed, delegates recognized that they were uniquely situated to consider education financing because—unlike legislators, who were more dependent on wealthy private interests for reelection—delegates could take a broader, public-oriented perspective.<sup>243</sup> Zackin also shows how advocates for common schools, who had been shut out by state legislatures, recognized these opportunities and were extraordinarily motivated to leverage special elections to correct the misalignment caused by recalcitrant legislatures.<sup>244</sup> Finally, Zackin found that the public was willing to view education rights differently through the lens of constitutional reform, which focused public attention on general concerns for the common good rather than immediate policy reactions.<sup>245</sup> The public's altered perspective, in turn, further motivated education activists and increased their influence during special elections.<sup>246</sup> Ultimately, Zackin concludes that the special election of delegates significantly contributed to provisions that were directed to realigning legislative actions with popular preferences.<sup>247</sup>

Professor Amy Bridges has conducted a more focused study that arrives at similar conclusions but adds important color regarding partisanship and special elections. Bridges focuses on the constitutional development of the western states between 1847 and 1910.<sup>248</sup> As such, she documents many of the same dynamics regarding the adoption of labor rights as Zackin.<sup>249</sup> Bridges, however, emphasizes that the western states were much more partisan than other regions of the country.<sup>250</sup> She describes periods of extreme partisanship during which even the press was clearly divided along partisan lines.<sup>251</sup> Bridges notes that this partisanship impacted delegate elections and the performance of conventions (especially lopsided conventions).<sup>252</sup> However, she observes that the special election of delegates weakened party cohesion within conventions as compared to ordinary

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240. *See id.* at 84.

241. *See id.*

242. *See id.*

243. *See id.*

244. *See id.* at 80, 119–22 (labor rights).

245. *See id.* at 84.

246. *See id.*

247. *See id.*

248. *See* BRIDGES, *supra* note 26, at 11.

249. *See id.* at 67.

250. *See id.* at 103–04.

251. *See id.* at 108.

252. *See id.* at 67–68.

legislative sessions.<sup>253</sup> Although special elections produced conventions that matched a state's ordinary partisan profile, Bridges finds that labor advocates were more successful at influencing convention delegates than legislators because delegates were less influenced by the well-healed antilabor lobby and more attuned to popular sentiment.<sup>254</sup> She also notes that the labor movement was successful at conventions because it was motivated to elect its own members as delegates.<sup>255</sup>

Zackin's and Bridges's qualitative findings have been supported by Professor James Strickland's recent quantitative study. Strickland examined lobbying registration data from thirteen constitutional conventions held between 1912 and 1977 to explore the types of groups and interests that were mobilized by convention structure.<sup>256</sup> Strickland constructed a model to measure the effects of convention design (special elections, mandates to reform fundamental law, and ratification referenda) on interest group mobilization as compared to mobilization during ordinary legislative sessions.<sup>257</sup> His results are striking. He found that broad, citizen-based groups such as unions, hobby groups, environmental clubs, right-to-vote associations, and public interest groups were 431 percent more likely to mobilize anew at conventions than focused and wealthy private interests such as corporations.<sup>258</sup> Other personnel-based groups like public unions were also much more likely to mobilize for a convention.<sup>259</sup> Importantly, Strickland controlled for a variety of convention-specific conditions, including the degree of partisan unity at a convention.<sup>260</sup> He found no correlation between partisan unity and mobilization by citizen-based groups.<sup>261</sup> Thus, citizen-based groups appear motivated and active during conventions even when party caucuses are tight. Overall, Strickland concludes that "conventions are typically not subject[] to rampant lobbying by narrow interests."<sup>262</sup> Instead, "conventions are . . . seemingly better venues for broad interests than legislatures."<sup>263</sup>

Of course, these findings provide no guarantee for how any future convention will function. There are myriad conditions that can influence convention performance. For example, as Strickland himself notes, organized interests have changed in structure, financing, and political tactics

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253. *See id.*; GREENWALD, *supra* note 228, at 221 ("At the convention, discipline was less automatic [than in the legislature] since delegates sought no reelection and often had their own independent power bases.").

254. *See* BRIDGES, *supra* note 26, at 67, 117–18.

255. *See id.* at 88.

256. *See* Strickland, *supra* note 26, at 524.

257. *See id.* at 524–28.

258. *See id.* at 531.

259. *See id.* He also found that wealthy private interest groups remained at least as active during conventions as citizen-based groups. *Id.* at 531–32. The implication is that wealthy interest maintained a relatively constant presence whereas citizen-based groups dramatically increased their presence at conventions. *Id.* at 530–32.

260. *See id.*

261. *See id.* at 538.

262. *Id.* at 537.

263. *Id.*

since the time of the conventions in his dataset.<sup>264</sup> However, available evidence suggests that there are good reasons to believe that conventions are unlikely to be the cesspool of wealthy special interest influence that today's convention opponents suggest.<sup>265</sup> They deserve more careful consideration as venues for facing today's democratic ills.

## 2. Are Referenda Effective?

The state constitutional convention is bookended by statewide referenda. The initial convention-call referendum provides voters with a choice on whether to initiate a convention, and the ratification referendum provides voters with ultimate veto power over the convention's work. In theory, these referenda help ensure that conventions remain faithful to statewide popular majorities.

So, how well do they perform in practice? The political science literature suggests that although referenda have limitations, they perform well. Referenda impose real constraints on both the calling of conventions and the work of delegates within a convention. Moreover, those constraints tend to protect against misuse of the convention by special interests while empowering democratic majorities to control convention reforms. The main downside to convention referenda is that they provide special interests with defensive opportunities to squash popular reforms through aggressive “no” campaigns. I first discuss the impacts of the convention-call referendum and then the ratification referendum.

### *a. Are Convention-Call Referenda Effective?*

The political science literature suggests that convention-call referenda are effective (or overly effective) gatekeepers to the convention.<sup>266</sup> Convention calls have become increasingly hard to approve and, as a result, require an extraordinary convergence of wide-ranging groups.<sup>267</sup> The last successful call was in Rhode Island in 1984.<sup>268</sup> Since 1960, there have been fifty-six convention-call referenda and only seven successful positive votes.<sup>269</sup> Moreover, most of the “no” votes were not close: the average was 60 percent against a convention.<sup>270</sup>

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264. *See id.* at 538–39.

265. *See supra* notes 219–37 and accompanying text.

266. For the convention-call referendum, I focus on the degree to which it is effective at protecting conventions from special interests that might try to call conventions for their own purposes and, conversely, the extent to which they provide popular majorities with a meaningful way to convene a convention. The most up-to-date study on convention-call referenda is Lewis et al., *supra* note 26.

267. *See id.*; STURM, *supra* note 26, at 101.

268. Data for all convention-call results since 1965 are available at *Election Results for Constitutional Convention Calls from 1960 to Present*, STATE CONST. CONVENTION CLEARINGHOUSE, <https://concon.info/state-data/u-s-election-results/> [<https://perma.cc/9NXX-P55P>] (last visited Apr. 3, 2024).

269. *Id.*

270. *Id.*

The dominant explanation for voter reticence to conventions is that voters are risk-averse.<sup>271</sup> Because conventions raise the risk of deep reform, successful convention referenda require a convergence of diverse interests willing to assume that risk.<sup>272</sup> The positive side of this phenomenon is that narrow special interests (no matter their wealth) generally avoid any effort to mount successful affirmative convention campaigns.<sup>273</sup> Indeed, wealthy special interest groups are much more successful in lobbying legislators for affirmative relief than voters,<sup>274</sup> which encourages these special interest groups to avoid conventions and instead preserve existing legislative relationships.<sup>275</sup> On the other hand, broad citizen-based groups that can converge on specific popular frustrations are better situated to achieve a positive result in a convention-call referendum.<sup>276</sup>

To achieve the extraordinary support to approve a convention, successful campaigns usually mobilize around specific high-profile initiatives.<sup>277</sup> The result is that successful convention-call referenda operate not only as effective front-end gatekeepers, but also help articulate the scope of the convention's public mandate and priorities once convened.<sup>278</sup> In other words, when voters approve a convention call, the results reliably indicate that a statewide majority wants reform on an identifiable set of issues. From this point of view, the convention-call referenda are extraordinarily effective.

That said, the evidence also suggests that convention-call referenda make blocking conventions too easy.<sup>279</sup> The studies identify several interrelated factors that drive “no” votes.<sup>280</sup> For example, voters rely heavily on elite cues (especially in low-information situations), and entrenched elites have strong incentives to retain the status quo and squash convention campaigns.<sup>281</sup> Some studies have shown that interest group coalitions tend to skew against conventions because even if one group supports reform, it

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271. Lewis et al., *supra* note 26, at 30. *But see* William D. Blake & Ian G. Anson, *Risk and Reform: Explaining Support for Constitutional Convention Referendums*, 20 STATE POL. & POL'Y Q. 330, 335 (2021) (indicating that a convention-call referendum might incentivize risk-taking because any major changes would still require a subsequent ratification referendum—it is a form of “let’s see what we can get” prospecting).

272. Lewis et al., *supra* note 26, at 30.

273. Special interests mostly stay out of convention-call referenda. *See* Sanford V. Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 222 (2016).

274. *See* MATSUSAKA, *supra* note 7, at 187.

275. *See* Snider, *supra* note 31, at 277–88.

276. Lewis et al., *supra* note 26, at 30. Lewis makes two interesting findings: (1) nonwhites were significantly more likely to support a convention than whites and (2) “partisan identification and ideology do not seem to play a significant role in shaping public attitudes on the referendum, suggesting that traditional political factors did not play an important role.” *Id.* at 27.

277. *See id.* at 30.

278. CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 198.

279. *See* Snider, *supra* note 31, at 277–88; Lewis et al., *supra* note 26, at 30.

280. *See* Snider, *supra* note 31, at 258 (collecting literature and factors); John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth & Twentieth Centuries*, 34 J. POL'Y HIST. 297, 327 n.5 (2022); Lewis et al., *supra* note 26, at 19–21, 30.

281. Lewis et al., *supra* note 26, at 24.

likely has a critical ally that opposes reform.<sup>282</sup> There is also the possibility that as state constitutions grow in length, more groups have received constitutional benefits, which makes them less likely to upset the status quo.<sup>283</sup> Finally, some have noted that voters likely reject conventions because they associate them with business-as-usual politics rather than a majoritarian threat to the status quo.<sup>284</sup>

I address some of these concerns below when I propose ways to make the state convention more plausible today. Here, I note only that some of these findings reinforce the effectiveness of the convention-call referendum in blocking undesirable conventions. For example, if a critical group of voters rejects a convention because they perceive the existing constitution to provide valuable benefits, then convention reform is not warranted, and misalignment is probably not at critical levels. Likewise, if there is inadequate interest in a convention call such that there are no public information campaigns in favor of the convention, then misalignment sufficient to warrant reform is unlikely to exist. Likewise, if voters are satisfied with the status quo such that they do not wish to assume the risk of a convention, then the referendum is working well as a gatekeeper.<sup>285</sup> Finally, it is important to emphasize that this body of literature claims only that convention-call referenda are, at worst, underinclusive.<sup>286</sup> It does not claim that conventions are at risk of misuse because referenda are producing unreliable “yes” votes procured by illegitimate interests.

*b. Are Ratification Referenda Effective?*

In theory, ratification referenda provide an important failsafe for democratic majorities to review the convention’s finished work. If a majority determines that convention proposals are worse than the status quo, voters can reject them. In this way, the referendum protects against unpopular reforms and legitimates popular ones.

But do ratification referenda function this way in practice? In general, yes—but it is complicated. Two themes are important. First, despite serious voter information deficiencies, referenda tend to produce reliable aggregate indicators of majoritarian preferences even on complex ballot questions so long as the referenda are contested and generate multiple information

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282. See Snider, *supra* note 31, at 285–87 (documenting several specific instances in which groups opposed convention calls that were seemingly against their interest because of likely alliance with groups that had direct interest in opposing the convention).

283. See *id.* (e.g., local government officials, educators, and laborers).

284. See *id.*

285. In these scenarios, status quo bias is operating to enhance the quality of the referenda results. Rather than distort voting so that the outcome does not represent voter preferences accurately, a preference for the status quo is helping voters to register their contentment with it and their desire to avoid the risks of change. Obviously, this assessment has measures on both sides; some voters who are content with the status quo would surely abandon it for a guaranteed improvement.

286. See *supra* notes 266–83 and accompanying text.



shortcuts for voters.<sup>287</sup> Second, there is considerable evidence that ratification referenda impact how delegates approach their work during the convention in ways that help mitigate partisanship, limit special interest influence, and empower outside groups.<sup>288</sup> Again, these claims are relative to how state policy is made in ordinary sessions.

The most recent and rigorous studies investigating congruence between voter preferences and referenda outcomes find a surprisingly high degree of alignment.<sup>289</sup> These studies undermine the intuitive notion that referenda results are likely to be inaccurate because individual voters neither have the information nor the expertise necessary to vote consistent with their values and interests.<sup>290</sup> As it turns out, voters are incredibly perceptive in processing information shortcuts from intermediaries and using those cues to accurately vote consistent with their values and interests.<sup>291</sup> Moreover, aggregation of votes is an effective method for overcoming information deficiencies.<sup>292</sup> Studies have shown, for example, that California voters are, as a group, able to sort through numerous complex and technical ballot questions and identify those that are consistent and inconsistent with their collective preferences.<sup>293</sup> Indeed, Professor Arthur Lupia has shown that uninformed voters perform

287. The leading study is Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994) (explaining that information shortcuts can include “information about the preferences or opinions of friends, coworkers, political parties, or other groups, which [voters] may then use to infer how a proposition will affect them”); see also Arthur Lupia, *Dumber than Chimps?*, in DANGEROUS DEMOCRACY? (Larry Sabato, Bruce A. Larson & Howard R. Ernst eds., 2001) [hereinafter Lupia, *Dumber than Chimps?*]; Matthew E. Kahn & John G. Matsusaka, *Demand for Environmental Goods: Evidence from Voting Patterns on California Initiatives*, 40 J.L. ECON. 137 (1997).

288. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 374 (1995) (key theoretical work); Engstrom & O’Connor, *supra* note 215, at 442 n.13 (providing the most direct quantitative study and collecting anecdotal evidence from various conventions); CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 83, 160–87; STURM, *supra* note 26, at 119; Tarr, *supra* note 26, at 21.

289. See MATSUSAKA, *supra* note 7, at 169–86 (summarizing literature). Although individual voters may not be well-positioned to vote their values and interests, there is a high degree of congruence between majority preferences and the actual outcome in an election. Matsusaka offers a compelling theory for how this can be true: (1) voters are deft at using information shortcuts (and representatives use shortcuts just as much but with greater bias created by special interest influence); (2) aggregation of votes helps cancel out information errors by individual voters; and (3) public deliberation in referenda campaigns is not any more impoverished than legislative deliberation, which is performative. See *id.* at 173–74.

290. There is a separate body of literature that makes an even deeper critique of referendum voting. See, e.g., CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT (2016) (suggesting that voters are fundamentally irrational and cannot be trusted to make choices for their own interests and values—i.e., when local sports team lose, incumbents are voted out). This work has been harshly criticized for its methodology. See MATSUSAKA, *supra* note 7, at 185. My project here assumes the basic competency of voters. If shark attacks in New Jersey determine presidential elections, the convention cannot save us.

291. Lupia, *Dumber than Chimps?*, *supra* note 287, at 70.

292. MATSUSAKA, *supra* note 7, at 174.

293. Lupia, *Dumber than Chimps?*, *supra* note 287, at 70; MATSUSAKA, *supra* note 7, at 177–79.

almost identically to sophisticated and informed voters if the uninformed voters have access to competitive information shortcuts.<sup>294</sup>

Although none of these studies directly tested convention-ratification referenda, there is good reason to believe that the results would apply with even greater strength in the ratification context.<sup>295</sup> If the keys to overcoming voter deficiencies are turnout and a competitive campaign that induces many different groups to provide information shortcuts,<sup>296</sup> it is hard to imagine a ballot question that would be more high-stakes and energizing than a convention-ratification referendum.<sup>297</sup> Indeed, if a series of insurance referenda in California can produce reliable voting patterns, surely a ratification referendum would generate enough information shortcuts to produce similar results.

To be sure, ratification referenda can present voters with difficult questions, especially when they bundle multiple reforms into one ballot question.<sup>298</sup> It is hard to imagine how a voter could accurately assess whether a whole new constitution better aligns with their interests and values.<sup>299</sup> However, it is important to recognize that ratification referenda are very different from other contexts in which omnibus laws may be problematic. In legislation, for example, single subject rules are designed to limit logrolling and riding in part because legislators are likely to make deals that further their reelection aspirations but misalign with popular preferences. In the convention context, special elections and the ratification referenda are

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294. *See id.* New research suggests that even in the absence of accurate campaign cues, voters can vote effectively. *See* Craig M. Burnett, Elizabeth Garrett & Matthew D. McCubbins, *The Dilemma of Direct Democracy*, 9 ELECTION L.J. 305, 306 (2010) (“[M]ost voters—even those who could not recall credible voting cues or the most basic details of a ballot proposition—cast their votes in a matter consistent with their stated policy preferences . . . .”); Amanda L. Tyler, *Direct Democracy, Misinformation, and Judicial Review*, in MISINFORMATION IN REFERENDA 130 (Baume, Boillet & Martenet eds., 2020).

295. CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 160–89 (providing an empirical analysis of convention-ratification referenda on the assumption that voters were competent). *See generally* Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881 (2010) (theorizing dynamics of ratification referenda).

296. *See generally* Lupia, *Dumber than Chimps?*, *supra* note 287.

297. This is not to say that turnout is always boosted for ratification referenda. Turnout at Maryland’s 1967 ratification referendum was notoriously poor. *See* CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 184.

298. Kogan, *supra* note 295, at 886. There is a body of literature exploring the extent to which bundling or separating constitutional propositions enhances the likelihood of passage. *See id.* at 886 (summarizing literature). The consensus in studying U.S. state constitutions is that separating makes ratification more likely, especially if moderate reforms are separate from controversial reforms. *See* CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 187; Kogan, *supra* note 295, at 886. Interestingly, comparative literature suggests that voters around the world are much more likely to affirm entire constitutions than individual amendments to constitutions. Zachary Elkins & Alexander Hudson, *The Strange Case of the Package Deal*, in THE LIMITS AND LEGITIMACY OF REFERENDUMS 47, 47–49 (Richard Albert & Richard Stacey eds., 2022). One explanation is that the more content in a bundled ballot proposition, the easier it is to build coalitions for its approval, especially if those provisions are offering entitlements. *See id.* at 58–59.

299. *See* Kogan, *supra* note 295, at 885–86.

designed to mitigate those concerns and provide voters with more direct control over lawmaking in the first place. The idea is that logrolling, bargaining, and compromise are more likely to reflect the ordering of popular preferences than rent-seeking by local or private interests.<sup>300</sup> Indeed, as I discuss next, compound ratification referenda can help moderate conventions because delegates want to avoid including “poison pills” that opponents could easily use to torpedo the entire package.<sup>301</sup>

The few studies that have examined convention-ratification referenda confirm these general findings and emphasize the importance of competitive campaigning for the reliability of ratification referenda. For example, a 1973 study by Professors Jay S. Goodman, Robert Arseneau, Elmer E. Cornwell, Jr., and Wayne R. Swanson looked for reliable correlations between positive convention-call votes and their corresponding ratification referenda.<sup>302</sup> They found no clear pattern and concluded that “the conventions and the constitutions they produce act as intervening variables, probably through the mechanism of the ratification campaigns, in the public consciousness.”<sup>303</sup> They noted that many voting blocs that initially supported convening a convention ultimately rejected the convention’s proposals.<sup>304</sup> They explained a collective learning process whereby voters pass from the convention-call referendum, through coverage of the convention and the ratification campaigns, to the final ratification vote.<sup>305</sup> Their findings suggest that voters critically evaluated information shortcuts from the various ratification campaigns before voting.<sup>306</sup>

Aside from the issue of referenda reliability, the literature also shows that ratification referenda tend to impose real and unique constraints on convention deliberations because they alter delegate decision-making in important ways.<sup>307</sup> Professor Jon Elster famously described this as a

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300. Relatedly, Matsusaka has shown that although referenda are subject to information deficiencies, those deficiencies should be measured against comparable deficiencies inherent in alternative processes. Though it might be fanciful to imagine that voters will read and analyze an entire constitution before voting, it is no less fanciful to imagine that representatives in California’s 2022 legislative session read and analyzed the 1,166-plus bills that they considered. Representatives also rely heavily on information shortcuts, which are provided primarily by lobbyists and party leadership. This, of course, suggests that legislators are more closely tied to partisan platforms and special interest contributions; this reality creates its own alignment concerns for the median voter. Thus, Matsusaka concludes that there are good reasons to trust referenda elections notwithstanding real concerns about voter information deficiencies. See MATSUSAKA, *supra* note 7, at 173.

301. See Tarr, *supra* note 22, at 21.

302. See Goodman et al., *supra* note 26, at 587.

303. *Id.* at 595.

304. See *id.*

305. See *id.*

306. See Engstrom & O’Connor, *supra* note 215, at 443–44.

307. See Tarr, *supra* note 22, at 21; STURM, *supra* note 26, at 119 (“The realization that a new or revised constitution must be approved by the electorate has usually restrained radical reforms that would have little chance of acceptance at the polls.”); Engstrom & O’Connor, *supra* note 288, at 442 (the “sensitivity to the public’s eventual response to their product” is an “important factor influencing delegates’ support for change”); Cornwell et al., *State Constitutional Conventions*, *supra* note 26, at 130.

“downstream” constraint on conventions.<sup>308</sup> The idea is simple: “If the framers know that the document they produce will have to be ratified by another body, knowledge of the preferences of that body will act as a constraint on what they can propose.”<sup>309</sup> During ordinary legislative sessions, laws are developed against the backdrop of gubernatorial approval. This results in a high degree of predictability and partisanship because governors and legislators confer and proactively negotiate toward laws that are acceptable to both branches. The governor is also a regular politician subject to reelection and its attendant lobbying influences.

Placing the veto power in the hands of voters changes the decision-making environment for convention delegates.<sup>310</sup> Referenda are less predictable and manageable. Delegates cannot, for example, prenegotiate with voters in the same way that legislative caucuses can with a governor. Moreover, delegates are especially averse to the risk that voters will reject their work.<sup>311</sup> As a result, groups that make credible threats to ratification carry great weight and tend to influence delegate agendas and priorities.<sup>312</sup> This, again, tends to favor broad citizen-based groups more than private special interests because delegates are not subject to reelection. Instead, delegates principally desire to produce reforms that will survive the ratification referendum. Thus, delegates are incentivized to entertain groups that can provide reliable information about the preferences of big voter blocs, and this provides new opportunities for groups that were less effective during ordinary legislative sessions.<sup>313</sup> Indeed, scholars have concluded that credible threats to ratification are so significant to delegates that they can weaken otherwise tight legislative party majorities.<sup>314</sup>

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308. See Elster, *supra* note 288, at 374.

309. *Id.*

310. See Engstrom & O'Connor, *supra* note 215, at 443–44 (summarizing literature and primary sources).

311. This is especially true because delegates are not reelected. Their success is measured primarily by whether the public accepts or rejects their proposal. See Strickland, *supra* note 26, at 524. Of course, delegate motivations are complex and diverse. See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 45 (constructing typology of six “delegate types” reflecting dominant motivations). Not all delegates will be equally attentive to ratification (or assess it properly). Engstrom & O'Connor, *supra* note 215, at 443, 450 (arguing that the 1967 Maryland convention was out of touch with voters, which caused failed ratification, and also finding differential sensitivity to ratification among delegates). This emphasizes the importance of the ratification as a failsafe, as well as the significance of the convention's structure to enable delegate deliberation and conversation, discussed *infra*.

312. See IAN D. BURMAN, LOBBYING AT THE ILLINOIS CONSTITUTIONAL CONVENTION 4 (1973) (“Those active in constitutional reform . . . knew the cold quickness with which an unfavorable constitutional referendum vote could kill their well intended plans,” so they set about “gathering all the good will and endorsements possible, including interest group support”); CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 83 (noting the importance of delegates getting buy-in from a “wide range of interest[s]”); GREENWALD, *supra* note 228, at 266 (quantifying groups at conventions and concluding that groups that “had an already established legitimacy with the referenda decision-makers, the public,” were more active and successful).

313. See GREENWALD, *supra* note 228, at 266.

314. See Tarr, *supra* note 26, at 21 (“[R]ealizing that voter opposition to particular provisions may lead them to reject the entire constitution, delegates may temper their search

Of course, this opens up new questions and uncertainties. Because voters are highly dependent on information shortcuts in ratification referenda, there is the possibility that groups could manufacture threats to ratification to gain influence during a convention. Moreover, these findings presume that delegates have access to reliable information about voter preferences, which requires that they too rely on information shortcuts from organized groups. Nevertheless, the available evidence suggests that ratification referenda impose meaningful and unique constraints on delegate decision-making and that those constraints make conventions more receptive to groups excluded from the ordinary legislative process.

### 3. Does Convention Structure and Authority Matter?

Another core feature of the state constitutional convention is its composition as a unicameral body with the extraordinary power to generate reforms to fundamental law. In theory, this structure helps ensure popular accountability and inclusion during the upfront process of negotiating and drafting constitutional law. The literature suggests that this structure has, in fact, had several positive effects on convention performance.

First, the convention's extraordinary authority to craft fundamental law uniquely mobilizes citizens and groups toward activism.<sup>315</sup> The increased involvement of citizens and the animation of new citizen groups reinforces other aspects of convention structure, such as competitive special elections and information shortcuts for delegates and voters. It also means that more viewpoints and interests are expressed than during ordinary political operations.<sup>316</sup> Various studies have confirmed that conventions, in general, tend to have a mobilizing effect on citizens and civic groups (especially

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for partisan advantage out of fear that clearly partisan proposals could excite controversy and offer political opponents a basis for rallying opposition to the constitution.”); STURM, *supra* note 26, at 119; *id.* at 75 (“[P]artisan conflict generally was muted in most conventions.”). The convention is not a panacea for partisanship, but it does seem to unsettle party cohesion. For example, New York’s 1967 convention was notoriously partisan, but one of the recurring themes in the studies of that convention is that party authority and structure weakened in the convention as compared to the legislature. See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 95–100; GREENWALD, *supra* note 228, at 220–21, 266–76, 276–80; Greenwald, *supra* note 226, at 447 (“In the legislature party discipline is tight. At the convention discipline was less automatic . . .”). Similar occurrences have been documented in other partisan conventions. ZACKIN, *supra* note 26, at 121 n.32; BRIDGES, *supra* note 26, at 113–16, 139.

315. See ZACKIN, *supra* note 26, at 13–15, 37–38, 56, 141, 186–89; CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 184–86 (discussing groups mobilized by conventions and voter mobilization, which was dramatic in some cases) (“In New York, the ratification election mobilized an extra 1.5 million voters. In New Mexico, . . . more people voted in a December special election on the constitution than had voted on the call in the 1968 presidential election.”); Strickland, *supra* note 26, at 531 (finding that conventions had a dramatic mobilizing effect for certain groups based on lobbying presence at conventions compared to these groups’ relationship with the legislature).

316. See Strickland, *supra* note 26, at 531.

“large and heterogenous membership groups” with influence on the voting public).<sup>317</sup>

Second, the unicameral structure of state conventions facilitates majoritarian outcomes. As noted above, the idea is that because conventions host the people’s constituent power, they should be structured to represent the people as closely and immediately as possible without internal checks and balances that might empower minority veto players and undermine majority rule.<sup>318</sup>

But does it work this way in practice? On this point, the evidence is surprisingly scant (probably because the premise seems unassailable).<sup>319</sup> Nevertheless, studies analyzing recent conventions have found that lobbyists at conventions are acutely aware that unicameralism alters delegate decision-making by weakening party cohesion and empowering individual delegates.<sup>320</sup> In bicameral bodies, small committees have extraordinary power because of the role that they play in crafting legislation and coordinating passage through both houses.<sup>321</sup> In a unicameral convention, the process is more direct and relies more heavily on the entire convention for debate, floor amendments, and compromise.<sup>322</sup> Indeed, it is not uncommon for entire articles of a constitution to be rewritten by the convention as a whole during floor debate.<sup>323</sup> This tends to empower simple majorities. Committees certainly play an important role in conventions, but they tend to focus on creating proposals that will gather majority support

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317. See GREENWALD, *supra* note 228, at 278; ZACKIN, *supra* note 26, at 13–15, 37–38, 56, 141, 186–89; CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 184–86. The convention’s mobilizing effect has a proven rationale that favors civic groups over private interests. Legislators are ideal targets for special interest lobbying because of reelection and because they focus on policies that can directly benefit or harm special interests. Delegates, however, expect to discuss “frameworks” that do not necessarily guarantee or predict policy outcomes. See ZACKIN, *supra* note 26, at 27–32 (explaining that even when state conventions took up policy details, it was often through the lens of structural reform). This benefits civic groups that have more generalized structural concerns, and it can motivate popular interest in structural reform in ways that ordinary legislative elections will not. See ZACKIN, *supra* note 26, at 120 (noting that many positive rights were nonstarters during ordinary legislative sessions because the public was not inclined to think critically about structural reform and that the convention mobilized around this opportunity); GREENWALD, *supra* note 228, at 277 (“[C]onstitutional type goals, especially positive reforms, . . . worked hard to incorporate their ideas into the new document . . .”).

318. See *supra* Part II.

319. See Tom Ginsburg & Eric Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1598 (2010); AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 29 (1st ed. 1999) (arguing that unicameralism is a “pure majoritarian model”).

320. GREENWALD, *supra* note 228, at 271–73.

321. See *id.* at 271–74; CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 48.

322. See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 115 (“Committee reports frequently received a rather thorough scrutiny in the Committee of the Whole, and it was not unusual for a convention upon reconsideration to reverse a position . . . [R]evised constitutions were hammered out on the floor of the convention . . .”).

323. See GREENWALD, *supra* note 228, at 221 (“Another difference [from the legislature] concerned floor amendments; rare in the legislature, while at the convention whole articles were written during floor debate.”).

from the whole convention rather than appease minority veto players.<sup>324</sup> This anecdotal evidence is consistent with how political scientists generally understand unicameral bodies to function.<sup>325</sup>

Finally, it is important to recognize that general principles of institutional design suggest that the convention's unicameral structure and majoritarian bend help limit the influence of special interests. When lawmaking power is concentrated in small legislative subcommittees, outside and private interests are better able to influence decision making.<sup>326</sup> As President James Madison explained, smaller decision-making bodies allow for easy "combination for improper purposes."<sup>327</sup> On the other hand, larger decision-making bodies can broaden representation, increase representative accountability, and better defend against collusion by self-interested representatives.<sup>328</sup> If we assume, as the evidence suggests, that conventions rely more heavily on their full membership for debate and decision-making than bicameral state legislatures, conventions offer a much larger body of decision-makers than state legislative committees.<sup>329</sup> This brings the promise of broader and more inclusive representation by delegates.<sup>330</sup> It also suggests that conventions are better suited to combating the influence of special interests than the bicameral legislative committee process.

#### 4. State Conventions Are Not Federal Conventions

In 2006, Professor Sanford Levinson famously suggested that Americans call a national constitutional convention to address various deep structural

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324. See *id.* at 221 (stating "subject matter committees played a more independent role" than in a legislature "because they synthesized individual propositions into draft articles" for floor debate); see also Swanson et al., *supra* note 26, at 187 ("[T]he convention possessed all of the characteristics of a *de novo* deliberative body, unconstrained by the traditions and backlog of behavior patterns that characterize most legislatures, and composed of delegates whose only cues to behavior were internal and individual.").

325. See LUPHART, *supra* note 319, at 211 ("Therefore, for the purpose of measuring the division of legislative power, weak bicameralism still represents a degree of division, whereas unicameralism means complete concentration of power.").

326. Jon Elster, *The Optimal Design of a Constituent Assembly*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 156 (Hélène Landemore & Jon Elster eds., 2012).

327. THE FEDERALIST NO. 55 (James Madison).

328. Madison recognized that larger bodies can be problematic if they are too numerous to accommodate reasoned debate and result in random or impassioned choices. *Id.* Madison's logic does not appear to have accounted for the influence of political parties. See Elster, *supra* note 326, at 156. But larger bodies still create more significant coordination problems. Political parties can mitigate coordination concerns, but it is also true that larger bodies can weaken political party control by making coordination more difficult. See *id.*; Dinan, *supra* note 178, at 422 (discussing evidence that interest groups with influence in the legislature would find it more difficult to coordinate influence in convention).

329. See Kogan, *supra* note 145, app. tbl.1 (listing delegate count for conventions from 1965).

330. There is comparative literature suggesting that, for the most representative results, the size of a popular legislative branch should be roughly the cube-root of the jurisdiction's population. This simplistic formulation has been persuasively criticized. See Giorgio Margaritondo, *Size of National Assemblies: The Classic Derivation of the Cube-Root Law Is Conceptually Flawed*, FRONTIERS PHYSICS, Jan. 2021, at 1. But using it as a benchmark, many conventions appear to fit within the suggested size.

problems with the U.S. Constitution.<sup>331</sup> Levinson's call was met with a variety of responses,<sup>332</sup> including a long list of reasons why we should fear a federal constitutional convention.<sup>333</sup> Two reasons were high on the list.

First, there is concern that a federal convention might “run away” from its mandate and adopt all manner of regressive reforms to constitutional rights and structure because there are no enforceable limits on what it might do.<sup>334</sup> A second, related concern is that there are few (if any) guidelines for how a federal convention would operate. There are no clear rules for how delegates would be selected, no disclosure requirements for funding or lobbying, no accepted protocols for internal convention operations, and no consensus on how convention disputes would be resolved.<sup>335</sup> Thus, many fear that the convention would be “mayhem,” which adds new concerns about public accountability and special interest influence.<sup>336</sup>

These concerns are perhaps well-founded regarding a federal convention.<sup>337</sup> However, in thinking seriously about state constitutional

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331. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 11–16 (2006).

332. See, e.g., Symposium, *Our Undemocratic Constitution*, 55 DRAKE L. REV. 855 (2007).

333. There was an actual list created years later by various groups opposing a balanced budget convention. Letter from Constitutional Rights and Public Interest Groups, Constitutional Rights and Public Interest Groups Oppose Calls for an Article V Constitutional Convention (Mar. 28, 2019), <https://www.commoncause.org/wp-content/uploads/2019/03/ConCon-Opposition-Letter-March-2019.pdf> [<https://perma.cc/4FZU-9ZLY>].

334. Richard L. Hasen, Opinion, *Do We Need a Constitutional Convention on Campaign Finance?*, L.A. TIMES (Jan. 5, 2016, 5:15 PM), <https://www.latimes.com/opinion/op-ed/la-oe-0106-hasen-constitutional-convention-campaign-finance-20160106-story.html> [<https://perma.cc/37E2-FLF2>] (“Danger lies ahead.”); Michael Stokes Paulsen, *How to Count to Thirty-Four: The Constitutional Case for a Constitutional Convention*, 34 HARV. J.L. & PUB. POL’Y 837, 847–48 (2011) (noting this fear).

335. Article V itself says nothing about how the convention should be populated and function. See U.S. CONST. art. V. The 1787 federal convention provides some ideas, but it does not answer many questions and would be inadequate and inappropriate as a guide for today. See generally 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911).

336. Editorial, *Marco Rubio’s Very Bad Idea: Our View*, USA TODAY (Jan. 6, 2016, 4:08 PM), <https://www.usatoday.com/story/opinion/2016/01/06/marco-rubio-constitutional-convention-balanced-budget-editorials-debates/78328702/> [<https://perma.cc/2CQR-6KPM>].

337. However, in a very recent and provocative twist on these themes, Professor David Pozen has argued that the states have generated a “set of governing principles and procedures that together amount to what might be termed the common law of constitutional conventions” that could be leveraged to provide stability, predictability, and legitimacy to an Article V convention. See David Pozen, *The Common Law of Constitutional Conventions*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 11–12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4663760](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4663760) [<https://perma.cc/QC6P-6E5K>]. Pozen identifies eight norms of constitutional convention structure and operation reflected in the common law of constitutional conventions and argues that these norms provide a more constructive environment for an Article V convention than many critics acknowledge. *Id.* (manuscript at 13–19). Pozen’s project is important for many reasons, but for my purposes here, it is worth emphasizing that these norms provide even more stable conditions for state conventions because many of them have been operationalized and enforced by state courts or codified in existing positive state law. See *infra* Part IV.A. And, regarding Pozen’s project, if state constitutional convention experience is to provide some guidance and guardrails for a federal



conventions, it is important to recognize that state conventions operate in a fundamentally different environment. Although a federal convention's harm is potentially limitless and its structure indeterminate, state conventions are inherently bounded and structured. They are subject to significant binding and enforceable legal constraints. They also operate against the backdrop of informal norms and customs developed over the course of more than 233 different state conventions.<sup>338</sup>

Consider, for example, a few of the enforceable constraints on convention elections and processes under federal and state law.<sup>339</sup> The Fifteenth Amendment's prohibition on racial discrimination clearly applies to any elections held related to a convention and would be enforceable in federal court.<sup>340</sup> The Fourteenth Amendment's Equal Protection clause also applies to voting restrictions.<sup>341</sup> There is a split of authority on whether the Court's apportionment rulings apply to the election of delegates when a convention is subject to a statewide referendum,<sup>342</sup> but the Voting Rights Act of 1965 almost certainly applies to delegate elections.<sup>343</sup> This means that delegate districts would be subject to voter dilution claims in federal court. State campaign finance laws also apply to delegate elections and referendum campaigns, and state lobbying laws have been applied to state conventions.<sup>344</sup> Although there are imperfections in all these regulatory frameworks,<sup>345</sup> they provide boundaries and guidelines for how a state convention would function.

Regarding substantive reform, state conventions operate within the boundaries of federal law. No state convention can, for example, diminish rights below the relevant federal floor. Nor can a state convention alter binding federal statutes and regulations on myriad important issues like environmental regulation, civil rights enforcement, and education. The federal Contracts Clause also imposes some limits on reform to a state's existing contractual obligations, including pension funds.<sup>346</sup> Federal law also influences conventions informally.<sup>347</sup>

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convention, it is all the more important that we understand how state conventions have performed in the past.

338. See DINAN, *supra* note 19, at 7–9.

339. Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125, 1125 (2005).

340. See *id.* at 1127.

341. See *id.*

342. See *id.* at 1127–28 (discussing split).

343. See *id.* at 1138 (“[I]t has to be assumed that section 2 of the Voting Rights Act applies to the election of constitutional convention delegates.”).

344. Many state laws and regulations are written to apply to elections for “statewide office” or any election to “public office.” See, e.g., ARIZ. REV. STAT. ANN. § 16-912 (2024); FLA. STAT. § 106.011 (2023).

345. See Snider, *supra* note 31, at 284.

346. See *id.* at 284–86.

347. See, e.g., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 552–53 (Joseph H. Brewer, Chas H. Bender & Chas H. McGurrin eds., 1907) (discussing whether the federal Guarantee Clause limits the use or adoption of the initiative).

Finally, state conventions operate against the backdrop of meaningful precedent and established norms for their operation and configuration. As noted above, the norm is the special election of a unicameral body of representative delegates with the authority to debate and draft constitutional reform subject to a statewide referendum.<sup>348</sup> Many state constitutions provide more detailed guidance on how a convention should be structured and operated.<sup>349</sup> And past practice provides many more detailed informal norms. Professor Albert L. Sturm has documented, for example, how conventions organize committees, resolve internal disputes, dispense funds, record proceedings, accept public comment, hire consultants, and much more.<sup>350</sup> Although these norms are informal, they provide guidance and set expectations for best practices. Additionally, because most states have held multiple conventions, states have individual histories, records, and customs to draw on.<sup>351</sup>

Thus, in thinking about state conventions, it is important to recognize that they do not present the same relative risks or uncertainties as a federal convention. In almost all respects, they are a safer and more predictable endeavor. They should not be dismissed simply because a federal convention might be frightening.

### B. Limitations and Dangers

Any serious discussion of the state constitutional convention must reckon with its limitations and its inherent risks. In this section, I focus on known and potential limitations and dangers with the goal of advancing more serious discussion and study of when the state convention would be constructive and when it might present risks.

#### 1. Convention Logic Presumes Broad Popular Engagement

The literature on state conventions draws attention to the need for broad popular support for convention success. In a simplistic sense, broad popular support is required because the barriers to a convention have proven to be very high. But there are deeper theoretical reasons for recognizing the importance of popular support. Broad popular support is a necessary catalyst for the models and theories of effective convention operations described above. Without it, conventions are far less predictable or effective.

Consider, for example, the role of information shortcuts in producing reliable referenda results and informing delegate deliberations. As noted above, voters rely heavily on information shortcuts in forming opinions about convention referenda, and delegates rely on interest groups to estimate likely

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348. *See supra* Part II.B.

349. 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11 tbl.1.6 (summarizing all provisions); Tarr & Williams, *supra* note 103, at 1094.

350. STURM, *supra* note 21, at 98 n.31, 99–100, 102–03, 118–119.

351. Some state constitutions even incorporate by reference precedents from the last convention. ALASKA CONST. art. XIII, § 3 (“[T]he call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955 . . .”).

referenda outcomes.<sup>352</sup> The quality and effectiveness of shortcuts depends on broad and competitive engagement by interest groups, who are energized by their members. Referenda reliability is also dependent on aggregation to overcome individual voter information problems. Thus, if convention referenda are low-salience and low-turnout, then referenda results are less likely to be reliable because information shortcuts are poor and aggregation less potent. And this has significant downstream effects because, as noted above, convention delegates rely heavily on cues from referenda campaigns to construct reform priorities. Competitive convention campaigns provide critical information to delegates. If these campaigns are unrepresentative, then the convention's work is less likely to be reliable.<sup>353</sup>

Moreover, the convention's independent mobilizing effect appears limited (or at least highly contextual). As noted above, there is evidence that conventions have a disparate mobilizing affect.<sup>354</sup> That is, groups and citizens who are excluded from the political status quo tend to respond better to convention opportunities. For them, the convention is mobilizing. However, on the whole, it is unclear whether conventions generally drive voters to the polls.<sup>355</sup> The evidence does support the conclusion that simply posing a convention-call ballot question is unlikely to independently generate interest.<sup>356</sup> Thus, as Professor Josh Braver has argued, conventions should

352. See *supra* notes 289–97 and accompanying text.

353. As noted above, lack of information shortcuts generally results in a preference for the status quo in convention referenda, which suggests that capture and misuse are unlikely. Waste, then, becomes the more likely downside. Scholars seem to agree that Maryland's 1967 convention is the paradigmatic case for how lack of public engagement can weaken the logic of the convention. See Martineau, *supra* note 227, at 1227 (“[T]he Maryland Convention cannot be considered to have been an exercise of power by the people but was, rather, a body elected by a small percentage of the people, about whom the people knew little, who completed their work without the people having much opportunity or interest in making their views known . . .”); Engstrom & O’Connor, *supra* note 215, at 443. The Maryland convention was also one of the least partisan conventions, see Martineau, *supra* note 227, at 1196, and was considered to follow the “impartial law-giver model” more than other conventions; however, it failed miserably at the polls. *Id.* at 1224.

354. See *supra* note 317 and accompanying text.

355. The evidence is conflicting. See Levinson & Blake, *supra* note 273, at 222 (suggesting no independent mobilization on mandatory convention-call referenda); Benjamin, *supra* note 23, at 1020–22 (same). *But see* CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 184 (finding significant mobilization for delegate elections and ratification).

356. Levinson & Blake, *supra* note 273, at 222. For further support of the distinction in mobilization between a convention call and special elections or ratification, see Norman C. Thomas, *The Electorate and State Constitutional Revision: An Analysis of Four Michigan Referenda*, 12 MIDWEST J. POL. SCI. 115, 118 (1968); Goodman et al., *supra* note 26, at 591. A deeper question is the degree to which Americans pay direct attention to state politics today. See generally David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) (describing second-order nature of state and local voting). To be sure, many older conventions were held when states were more central to political life, and many contemporary Americans are not engaged with state issues. On the other hand, there is reason to believe that this is changing quickly.

be understood as a forum for preexisting popular movements to convene and not a tool for mobilizing otherwise contented electorates.<sup>357</sup>

Another complication is population growth. Political scientists have observed that population growth affects models of representation and accountability.<sup>358</sup> In general, this research suggests that agency costs increase with scale, which might mean that population growth in (certain) states makes a convention untenable or less effective because delegate districts will be too large or conventions too small. On the other hand, there is strong empirical support that convention delegates do not operate with a district mindset but view their role statewide (or through a partisan lens).<sup>359</sup> Moreover, some research suggests that population growth has significantly benefited special interests in influencing state legislators because it has made reelection campaigns more expensive.<sup>360</sup> This dynamic supports the logic of the convention as a relative improvement on ordinary legislative politics.

Finally, it is important to connect the barriers to calling a convention to the theories regarding its operation. Because optimal convention performance relies on broad popular engagement, it follows that barriers to calling a convention should be high enough to avoid conventions unmoored from broad popular support. On the other hand, barriers to calling a convention should not be so high that they empower status quo elites to block popular movements towards reform. Of course, calibrating barriers to a convention is tricky and imprecise, but, as I discuss in the next section, there is good reason to believe that the current structure is imbalanced in favor of the status quo.

## 2. Legislative Obstructionism and Interference

One of the most obvious limitations on state conventions is that they currently are very dependent on state legislatures for their initiation, funding, and operation. This dependence limits their impact as an accountability device because legislatures can control citizen access and convention resources. This is especially problematic in an age of countermajoritarian legislatures.

Regarding initiation, only Florida, Montana, North Dakota, and South Dakota allow voters to initiate a convention call.<sup>361</sup> Fourteen states have constitutional provisions that require a convention call at set intervals (mostly every ten or twenty years).<sup>362</sup> All other conventions must be called by state legislatures.<sup>363</sup> Predictably, state legislatures do not volunteer convention

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357. Joshua Braver, *New York Isn't Ready for a Constitutional Convention*, DISSENT (Nov. 6, 2017), <https://www.dissentmagazine.org/blog/new-york-isnt-ready-constitutional-convention/> [<https://perma.cc/F2FK-VB27>].

358. See MATSUSAKA, *supra* note 7, at 50.

359. CORNWELL ET AL., *THE POLITICS OF THE REVISION PROCESS*, *supra* note 26, at 78.

360. POWELL, *supra* note 11, at 207.

361. See 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11 tbl.1.6.

362. Michigan's is sixteen years. *Id.*

363. See Snider, *supra* note 31, at 269–70.

referenda.<sup>364</sup> Indeed, no state legislature has referred an independent convention call to voters since 1971.<sup>365</sup> Thus, in the vast majority of states, the convention is a nonfactor because legislatures have effectively removed it as a choice for voters.

Moreover, even in states with mandatory convention calls, legislatures work to undermine conventions.<sup>366</sup> In 1920, Iowa voters approved a mandatory convention call, but the legislature refused to convene the convention.<sup>367</sup> Iowa voters have not approved a convention call since 1857.<sup>368</sup> In Oklahoma, the constitution requires a convention call referendum every twenty years, but the legislature has refused to place it on the ballot since 1970.<sup>369</sup> In 1996, a narrow majority of voters in Hawaii approved a mandatory convention, but the legislature did not convene a convention.<sup>370</sup> In 2010, 55 percent of Maryland voters approved a mandatory convention call, but the legislature did not convene it.<sup>371</sup>

Finally, even though forty-one state constitutions contain provisions providing for future conventions, those provisions vary in the degree of independence that they provide for the convention. New York's provision provides a fair degree of independence because it requires delegates to be elected, sets the districts for delegates and the date of the election, and

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364. See Benjamin, *supra* note 23, at 1022 (legislatures are “natural enemies” of conventions); Dinan, *supra* note 178, at 396. Dinan has studied when legislatures refer convention calls. See Dinan, *supra* note 280. He found three dominant explanations: (1) grave popular discontent about malapportionment; (2) popular and legislative support for judicial reform; and (3) popular and legislative support for reform of fiscal limitations. *Id.* at 299. Dinan is careful to note, however, that many past legislative convention calls were also the result of no other method for constitutional change. See *id.* at 319–20. As the legislature has expanded its use of ad hoc amendment procedures, legislative referral of amendment has declined dramatically. Indeed, during the twentieth century, several legislatures bypassed the convention entirely and used ad hoc amendment procedures to present entirely new constitutions to voters. See Marshfield, *supra* note 104, at 98–101.

365. See Snider, *supra* note 31, at 269–70.

366. See Dinan, *supra* note 178, at 397.

367. See Snider, *supra* note 31, at 268–69.

368. See *id.*; *accord Constitution*, IOWA LEGISLATURE, <https://www.legis.iowa.gov/law/statutory/constitution#:~:text=Iowa%20has%20held%20three%20constitutional,of%20the%20State%20of%20Iowa> [<https://perma.cc/WK9A-KZNH>] (last visited Apr. 3, 2024). Iowa has a mandatory regular convention call every ten years. IOWA CONST. art. X, § 3.

369. Snider, *supra* note 31, at 268–69; Levinson & Blake, *supra* note 273, at 215; OKLA. CONST. art. XXIV, § 2 (“[T]he question of such proposed convention shall be submitted to the people at least once in every twenty years.”). Pursuant to Oklahoma law, the legislature must act to place a convention on the ballot. Okla. Op. Att’y Gen. No. 70-125 (Feb. 18, 1970).

370. See Snider, *supra* note 31, at 269.

371. See Steve Lash, ‘No Vote’ Was a ‘No’ Vote on Maryland Constitutional Convention, DAILY RECORD (Nov. 3, 2010), <https://thedailyrecord.com/2010/11/03/%E2%80%98no-vote%E2%80%99-was-a-%E2%80%98no%E2%80%99-vote-on-maryland-constitutional-convention/> [<https://perma.cc/A7TU-JK29>]. Other, more nuanced tactics include sabotaging the referenda by failing to provide any guidance on how the convention will be structured, which tends to provide easy ammunition for “no” campaigns, and scheduling convention-call referenda in off-years or at special elections to minimize visibility. See Benjamin, *supra* note 23, at 1023–24 (explaining that the New York Constitution allows this and that the New York legislature took advantage of it for the 1997 referendum).

requires pay and reimbursement for delegates.<sup>372</sup> On the other hand, Wisconsin's constitution simply provides that after a successful referendum, "the legislature shall, at its next session, provide for calling such convention."<sup>373</sup> Since legislatures are the "natural enemies" of conventions, leaving the convention's structure and operations to the legislature is an invitation for mischief.<sup>374</sup> And legislatures have worked to undermine conventions. A particularly egregious example occurred in Michigan in 1961.<sup>375</sup> After a successful convention call, the legislature allocated only \$5,000 for preparatory work.<sup>376</sup> It also refused to pay for necessary postconvention activities.<sup>377</sup> Ultimately, the governor obtained necessary funds from a private foundation so that the convention could meet.<sup>378</sup> It proposed a new constitution that voters approved.<sup>379</sup>

Thus, although the convention is designed to be a majoritarian institution that enables the electorate to reform government separate from existing officials and entrenched special interests, in most states, at any given time, there is no meaningful way for citizens to pursue an independent convention. If state conventions are to become relevant again, this is a critical problem, and I offer a preliminary framework for solutions in the next part of this Article.<sup>380</sup>

### 3. Implementation Choices Can Matter

State conventions come in many different shapes and sizes. Even if we agree on the basic definition that I offer above (special elections, unicameral generative body, referenda), there is still much to decide about the structure of a convention. And those details can impact how well the convention functions as an accountability device. A full treatment of all design choices and their implications is beyond the scope of this Article, but others have

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372. N.Y. CONST. art. 19, § 2.

373. WIS. CONST. art. XII, § 2; Snider, *supra* note 31, at 269 (Connecticut's provision does not require delegates be elected).

374. Snider, *supra* note 31, at 276.

375. See ALBERT L. STURM, CONSTITUTION-MAKING IN MICHIGAN, 1961–1962, at 30 (1963).

376. See *id.*

377. See *id.* at 31–32; JAMES K. POLLOCK, MAKING MICHIGAN'S NEW CONSTITUTION 7 (1962).

378. See STURM, *supra* note 375, at 31–32 (\$85,000 from W.K. Kellogg Foundation of Battle Creek, Michigan).

379. Mich. Legislature, *History of Michigan's Constitutions*, in MICHIGAN CONSTITUTION (2023), <https://www.legislature.mi.gov/Publications/MICConstitution.pdf> [<https://perma.cc/S5W5-3Z69>].

380. Indeed, even in the four states that provide an explicit right for a citizen-initiated convention call, there is no separate right of citizens to a properly funded independent convention. In Florida, for example, where citizens have a strong right to initiate a convention, the constitution sets specific dates and criteria for election of delegates and even a timeline for convening the convention, but it does not provide any explicit right to funding of any kind. See FLA. CONST. art. XI, § 4. Montana's provisions are a bit better because they require the legislature to provide funds to "provide for the pay of its members and officers and the necessary expenses of the convention," but this still allows for legislative interference. MONT. CONST. art. XIV, § 5.

built helpful tools in this regard.<sup>381</sup> My narrower point here is that the effectiveness of a convention can be affected by the details of its structure.

Consider, for example, decisions related to the selection of delegates. One choice is whether to make delegate elections explicitly partisan or nonpartisan.<sup>382</sup> The twentieth century trend was toward nonpartisan elections, and there is some research suggesting that nonpartisan elections help break down party cohesion during conventions.<sup>383</sup> Another choice is how to structure delegate districting. The twentieth century trend was for delegates to be elected from state legislative lower house districts.<sup>384</sup> But there have been meaningful variations on this, including some delegates being elected at large,<sup>385</sup> all delegates being elected from congressional districts,<sup>386</sup> and odd-number multimember partisan elections occurring within lower house districts.<sup>387</sup>

The trend toward using existing legislative districts has advantages. It is easy to implement and provides some degree of proportional representation in the convention because state legislative districts must comply with Supreme Court apportionment jurisprudence. It would also likely have the support of incumbent officials, making it more feasible in the legislature. And, by using the lower house, conventions have included reasonably large numbers of delegates, which can have benefits for deliberation and mitigating the party cohesion discussed above.<sup>388</sup> However, a major downside is the convention's ability to address redistricting and gerrymandering concerns.<sup>389</sup> If the convention is populated using preexisting gerrymandered districts, there is reason for skepticism that the convention will produce meaningful redistricting reform. That said, even malapportioned conventions have produced redistricting reform when popular pressure for reform was great, suggesting that the broader institutional features of the convention have reach.<sup>390</sup> In any event, the structure of delegate selection surely informs expectations about the convention's prospects for generating certain reforms.

Many other details can matter too. Acknowledging this is important because it highlights that conventions are not panaceas. Their success is, to

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381. See STURM, *supra* note 26; Benjamin, *supra* note 136.

382. See Kogan, *supra* note 295, app. at 892–905 (providing delegate selection rules for all conventions since 1965); STURM, *supra* note 26, at 56–60 (same information for 1938 through 1968).

383. See CORNWELL ET AL., THE POLITICS OF THE REVISION PROCESS, *supra* note 26, at 72; Clark & Clark, *supra* note 26, at 705–07.

384. See Kogan, *supra* note 145, app. at 7 (explaining that Rhode Island's 1986 delegate selection process was nonpartisan with one delegate from each district to lower house and that New Hampshire's and Arkansas's were the same in 1984 and 1978, respectively).

385. See *id.* at 7, 11 (Louisiana 1973, New York 1967).

386. See *id.* at 8 (Tennessee 1971).

387. See *id.* at 10 (Pennsylvania 1967–1968).

388. The average composition for conventions since 1938 is 179 delegates. The median is 112. See *id.* at 7–12; STURM, *supra* note 26, at 56–60.

389. See Dinan, *supra* note 280, at 314–15 (noting this historical problem).

390. See *id.*

some degree, contextual and depends on sound choices at various stages of their design and implementation.<sup>391</sup>

#### 4. The Abusive Convention

An important concern with calling a state convention is that even if it functions ideally, it can be an instrument of political oppression. Indeed, the principal virtue of the convention is that it is more responsive to political majorities than state legislatures because it eliminates internal checks and balances and mitigates special interest influence. By connecting the convention tightly with popular majorities, there are real risks that the convention will use its authority to mistreat political minorities.

Our history with state conventions makes clear that this is something we must take seriously.<sup>392</sup> Although the convention has always aspired to be majoritarian and broadly representative,<sup>393</sup> many early conventions were exclusionary because of restrictions on the franchise and patriarchal theories of political representation. Redemption conventions were abhorrent and used the convention as an instrument for majorities to institutionalize oppression and hate.<sup>394</sup> Clearly, risks to vulnerable political minorities should factor heavily in decisions and conversations about calling state constitutional conventions.

Here, I seek to acknowledge this and offer a few thoughts to help enrich those conversations. First, in assessing the risks created by calling a convention, it is important to assess them relative to risks created by ordinary state government. In our polarized political environment, it is now common for party platforms on rights issues to diverge from a majority of rank-and-file voters in particular states.<sup>395</sup> Abortion policy after *Dobbs* is a good example.<sup>396</sup> In many states, contemporary rights dynamics do not involve abusive majorities looking to deprive political minorities of rights. Instead, they involve misaligned state government potentially seeking to disregard popular preferences because of party machinery.<sup>397</sup> This is the type

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391. It should be noted, however, that quantitative work on state conventions tries to control for contextual factors and tends to reinforce the idea that the basic structure of the convention matters. See Strickland, *supra* note 26, at 532.

392. See HERRON, *supra* note 26, at 189–225.

393. The original Massachusetts convention demonstrates both the aspiration and the imperfect reality of the convention. See ADAMS, *supra* note 106, at 83–90 (describing how franchise was expanded to be more inclusive at the beginning of the process, but as the process became more difficult to manage, the franchise was limited).

394. See HERRON, *supra* note 26, at 189–225.

395. See, e.g., *Views About Same-Sex Marriage by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state/> [<https://perma.cc/RR3X-ACJQ>] (last visited Apr. 3, 2024). Gallup gathers and maintains longitudinal opinion data regarding a variety of issues related to sexuality and reproductive choice. *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<https://perma.cc/3DTR-BZ4C>] (last visited Apr. 3, 2024).

396. See, e.g., *Views About Abortion by State*, PEW RSCH. CTR., <https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state/> [<https://perma.cc/JS4H-PXF5>] (last visited Apr. 3, 2024).

397. See *supra* Part I.A.



of problem that conventions may be able to address precisely because they are tethered closely to popular majorities.

Relatedly, conventions may sometimes be better venues for political minorities to gain influence than legislatures and even courts. As explained above, the special election of delegates, referenda, and internal structure of the convention provide opportunities for civil liberties groups to be active at a convention and to expect greater influence than during ordinary legislative sessions. And there is evidence showing that conventions tend to adopt more moderate proposals in the face of political controversy.<sup>398</sup> Indeed, some theorists emphasize that parliamentary-type decision-making is much better for protecting rights than the antidemocratic and “juristocratic” models associated with the Supreme Court’s role in protecting rights.<sup>399</sup> In short, because circumstances may align for conventions to advance rights, we should not assume that conventions are inherently regressive.

### 5. Polarization and Dark Money

There are several new and emerging threats to the underlying logic of the constitutional convention. Two especially salient threats are polarization and the practice of using dark money to influence referenda and elections.

Political polarization is the idea that voters and political parties are defined by irreconcilable differences such that they seek only to conquer each other rather than compromise and coordinate.<sup>400</sup> “Dark money,” the idea that unidentifiable outside groups invest in election outcomes, feeds into concerns about polarization.<sup>401</sup> In a sense, it is a method of financing polarization by using broader party-aligned resources to support candidates and issues in distant races without revealing this to voters.

Polarization is at record-high levels and seems to influence all American political institutions in ways that we do not yet fully understand.<sup>402</sup> Professor Kathleen Ferraiolo has argued, for example, that even the citizens’ initiative has been transformed by polarization.<sup>403</sup> She argues that the initiative has

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398. See, e.g., STURM, *supra* note 21, at 119. The issue of abortion in the 1969 Illinois convention is illustrative. The committee on the preamble and bill of rights initially proposed that the state’s due process clause be amended to add the phrase “including the unborn.” 3 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1496 (1972). After extensive debate on the floor, however, including testimony from motivated interest groups on either side, a motion was approved to remove the “unborn” clause. *Id.* at 1523. A dominant concern was that it was too extreme to survive the ratification referendum. *Id.* at 1522 (“As soon as [this proposal] was reported in the news media, an immediate reaction started . . . . There were innumerable telephone calls, there were telegrams, there were all kinds of communications from the people . . . . They all expressed confusion, alarm, and outright resentment, and, therefore . . . I am so concerned about the total product of this Convention . . .”).

399. See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

400. See Pildes, *supra* note 18, at 276–81.

401. See Klarman, *supra* note 1, at 204.

402. See Pildes, *supra* note 18, at 276–81.

403. Kathleen Ferraiolo, *State Policy Activism via Direct Democracy in Response to Federal Partisan Polarization*, 47 PUBLIUS 378, 382 (2017).

been hijacked by national agenda items and has lost its focus as a grassroots corrective for recalcitrant state government.<sup>404</sup> It is easy to imagine a similar phenomenon regarding conventions. If voters and officials view a state convention primarily as an opportunity to enact their party's manifesto, then a convention is likely to be nothing more than an extension of party politics. Conventions would produce "Republican" or "Democratic" constitutions that would be accepted or rejected by voters as party loyalists. Dark money practices could further enable this dynamic.

On the other hand, some political scientists have emphasized that direct democracy helps mitigate polarization because voters tend to be more centrist than the political parties that dominate elected offices. Allowing citizens more control over policy development can push outcomes back to the middle when parties are more likely to adopt extreme policies or remain deadlocked.<sup>405</sup>

There is evidence to support this dynamic in state conventions. Researchers that have studied conventions during prior periods of extreme polarization have identified promising trends. Professor Amy Bridges, for example, has studied how Progressive Era conventions performed during partisan battles in Arizona and New Mexico.<sup>406</sup> She notes that the parties were uncompromisingly divided on the key issues of the day (direct democracy and labor issues).<sup>407</sup> During conventions in both states, delegates met in separate partisan caucuses to make decisions before returning partisan resolutions to the convention as a whole.<sup>408</sup> Bridges emphasizes, however, that the convention's features influenced debate within party caucuses on several key issues. The need for popular ratification loosened party cohesion and drove some delegates to break from party leadership on key issues.<sup>409</sup>

An extreme example of partisanship in a convention is the Minnesota convention of 1857. Partisan division was so great that the parties each assembled their own conventions and refused to acknowledge each other.<sup>410</sup> The main point of opposition was the franchise for African Americans.<sup>411</sup> The parties continued to meet separately until popular pressure for a compromise forced a commission of representatives from both parties.<sup>412</sup> That commission failed, however, when party leaders got into a fist fight in

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404. *See id.* at 379–82.

405. *See* MATSUSAKA, *supra* note 7, at 150–51, 155.

406. BRIDGES, *supra* note 26, at 106–12.

407. *See id.*

408. *See id.* at 111.

409. *See id.* at 129. Other studies have confirmed this dynamic in other partisan conventions, including New York's 1967 convention. *See* GREENWALD, *supra* note 228, at 220–22.

410. *See* ANDERSON, *supra* note 152, at 104 (describing parties' expectations in polarizing terms) ("To both parties it was a bitter thing to be compelled to accept compromise where they had hoped for complete victory.").

411. *Id.* at 100–02.

412. *Id.*

the committee room.<sup>413</sup> Ultimately, the two sides reached a compromise that was described as “actually democratic.”<sup>414</sup> The proposed constitution did not enfranchise African Americans, but it specifically enabled the legislature to propose the question at a later referendum that required only a simple majority.<sup>415</sup>

These examples are, of course, anecdotal. To some extent, we just do not know how today’s extreme polarization and dark money would affect state constitutional conventions. It is an important consideration, but it should also be kept in context of the convention’s long performance history, which suggests that it deserves more serious consideration for today’s problems.

#### IV. MAKING STATE CONVENTIONS ACCESSIBLE AND MEANINGFUL TODAY

The above discussion suggests that state conventions may, under the right conditions, have a meaningful role to play in American democratic reform. There are important limitations and qualifications, but the evidence suggests that conventions can provide unique and constructive forums for popular engagement in democratic reform. And, with misalignment growing and alternative processes of reform under attack or inherently inadequate, it is time to give more serious consideration to making state conventions meaningful today.

I begin that process here by making several preliminary suggestions for how state courts and Congress might rebuild the stature of state conventions in American politics. This is not intended to be a full analysis. Much more work remains to be done. However, this part aims to recast the role of state courts and Congress regarding the convention and introduce legal theories to support their active engagement in rebuilding the convention. It is, at most, a preliminary framework for future work.

##### *A. State Courts and the “Law of the Convention”*

In this section, I argue that state courts should take a leading role in reviving the constitutional convention by developing or expanding on several state constitutional law doctrines. Specifically, I argue that state courts should: (1) recognize and enforce a private right to the convention-call referendum; (2) enforce the independence of the convention from incumbent state interference; and (3) enforce the substantive domain of the convention through state constitutional doctrines that limit the use of extra-conventional amendment processes.

At the outset, it is important to recognize that state courts are especially well-suited to developing this body of law. Unlike federal courts, which are

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413. Leah Juster, *Minnesota Constitutional Convention, 1857*, MNOPEdia (Mar. 1, 2019), <https://www.mnopedia.org/event/minnesota-constitutional-convention1857> [<https://perma.cc/NFR2-LKLN>].

414. ANDERSON, *supra* note 152, at 100.

415. *Id.* at 100–01.

insulated from popular majorities and the political branches, the vast majority of state high courts are subject to statewide popular election, retention, or recall.<sup>416</sup> One important consequence of this is that “state courts themselves [are] democratically embedded actors, not countermajoritarian interlopers.”<sup>417</sup> State courts are inherently and intentionally “majoritarian institutions.”<sup>418</sup> They are endowed with extraordinary democratic credentials so that they can act on the people’s behalf in defending against legislative and gubernatorial overreach. My arguments here build on this perspective as well as a growing body of literature that encourages state courts to draw on their democratic credentials to be more active in protecting the majoritarian structure of state government.<sup>419</sup>

### 1. Recognize a Citizen Right to the Convention-Call Referendum

As demonstrated above, perhaps the biggest obstacle to making conventions meaningful today is that state legislatures control access. Because contemporary pressures for constitutional reform involve various legislative failures, it is very unlikely that legislatures will easily capitulate to pressure for a convention call. Indeed, history shows that legislative-initiated convention calls regarding reform to the legislature itself usually require direct federal intervention or something approximating popular unrest.<sup>420</sup> Today, federal law is operating more to enable than constrain state legislatures regarding the law of democracy. Waiting for discontent to spill over into unrest seems ill-advised. But can the law provide a more accessible pathway to state conventions?

There is a simple solution that is grounded in state constitutional text, history, and structure: state courts should enforce a private right to the convention-call referendum.<sup>421</sup> The substance of this right is explicit in state constitutional texts and grounded in state constitutional history and structure. Enforcement of this right is manageable and appropriate for state courts. I first defend the existence of the right and then explain how courts might provide a practical remedy.

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416. 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 195 tbl.5.1.

417. Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1856 (2023).

418. *Id.*

419. See generally Helen Hershkoff, *State Courts and the “Passive Virtues,”* 114 HARV. L. REV. 1833 (2001); Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337.

420. See Dinan, *supra* note 280, at 314–15.

421. My claim is not that every individual citizen has a right to place a convention call on the ballot. My claim is that the people collectively have a right to an initiative process for the convention-call question, which includes the right of individual citizens to petition for a ballot question. This is a limited claim. I do not, for example, claim that the people have an inherent right to the generic initiative process. See Marshfield, *supra* note 104, at 122–28 (arguing that there is no inherent right to an initiative).

Virtually all state constitutions include in their bill of rights a provision that acknowledges the people's inalienable right to reform government.<sup>422</sup> Connecticut's provision is illustrative: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an undeniable and indefeasible right to alter their form of government in such manner as they may think expedient."<sup>423</sup> State courts have long understood these provisions to reflect several foundational doctrines of state constitutional law that, I argue, support a private right to initiate a convention-call referendum.

The first doctrine is that the people have an inherent *legal* right to call a constitutional convention separate and apart from any positive constitutional law or legislation.<sup>424</sup> As John Alexander Jameson said in his famous treatise on state constitutional conventions, the right of the people to change their government "is not a right *under* the constitution" but "a right *over* the constitution."<sup>425</sup> Relatedly, courts have also emphasized that these provisions reflect the doctrine that the constitutional convention is the only legal institution with the inherent authority to act on behalf of the people in changing or creating a constitution—legislatures are presumed to be incompetent in this regard absent explicit authorization.<sup>426</sup> Combining these ideas, courts have held that a convention called by the people, whether authorized in positive law or not, is a lawful convention.<sup>427</sup> Moreover, "the

422. See Steven G. Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 133 (2018) (finding, as of 2018, forty-nine states "include Lockean power clauses in their state constitutions").

423. CONN. CONST. art. I, § 2. The first of these provisions was drafted for the Virginia Declaration of Rights and incorporated by Jefferson into the Declaration of Independence. See JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 60 (1992).

424. See, e.g., *State v. Manley*, 441 So. 2d 864, 872 (Ala. 1983); *Wells v. Bain*, 75 Pa. 39, 47 (1874); *Famper v. Hawkins*, 3 Va. 20, 74 (1793); HOAR, *supra* note 116, at 38–57.

425. JAMESON, *supra* note 137, at 235; HOAR, *supra* note 116, at 49–56 (finding that "the various Bills of Rights admit the existence of a higher power than the constitution, to wit, the will of the people").

426. *Livermore v. Waite*, 36 P. 424, 427–28 (Cal. 1894); *Ellingham v. Dye*, 99 N.E. 1, 7 (Ind. 1912); *Houston Cnty. v. Martin*, 169 So. 13, 15 (Ala. 1936); *Smathers v. Smith*, 338 So. 2d 825, 826 (Fla. 1976); DODD, *supra* note 116, at 72 ("[T]he convention has become in our constitutional system a regular organ for the expression of state will . . . . It is in no sense a revolutionary or extra-constitutional body."); HOAR, *supra* note 116, at 89–91, 160 (characterizing the convention as an ever-present "fourth branch" of government).

427. See, e.g., *Collier v. Frierson*, 24 So. 100, 108–09 (Ala. 1854); *State ex rel. Wineman v. Dahl*, 68 N.W. 418, 418–19 (N.D. 1896); *State v. Am. Sugar Co.*, 68 So. 742, 744 (La. 1915). To be sure, events like Shays' Rebellion put pressure on this idea and incentivized states to formalize amendment rules and liberalize processes for constitutional change. See JAMESON, *supra* note 137, at 104–05. Moreover, the Rhode Island Supreme Court appears to be the one high court authority holding that conventions are creatures of the constitution and not a manifestation of the people's inherent right to reform government. See *In re Const. Convention*, 14 R.I. 649, 649 (1883); HOAR, *supra* note 116, at 43 (discussing case).

settled rule” is that a convention is “called by the people” if it is approved at a statewide referendum.<sup>428</sup>

This doctrine has been used by various courts to uphold the legality of conventions that were called even though the extant constitution did not provide for future conventions.<sup>429</sup> Dozens of other conventions have been called under similar circumstances and not challenged in court because they were presumed to be lawful.<sup>430</sup> Moreover, courts have found conventions to be lawful even when they were called in ways and at times that contradicted provisions in extant state constitutions.<sup>431</sup> The Indiana convention of 1850, for example, was called despite the fact that the extant constitution only accounted for convention calls every twelve years beginning in 1828.<sup>432</sup> Nevertheless, the Indiana Supreme Court held that the convention was lawful because the call was approved at a referendum, which “is a power inhering in the people, as declared . . . in the first article of the Constitution [the Bill of Rights].”<sup>433</sup>

To be sure, these precedents mostly involved legislative action that was not authorized or conflicted with positive constitutional law. However, the second doctrine that courts see reflected in these bill of rights provisions is that the legislature’s role in facilitating the convention call is purely “ministerial” and not within its ordinary lawmaking power.<sup>434</sup> According to Jameson, one speaker at the Virginia convention of 1829 described the legislative convention-call referendum as follows:

The Acts spoken of were called for by their constituents, resulted from the necessity of the case, and were justified by that supreme and paramount

428. *In re Op. to the Governor*, 178 A. 433, 435–36 (R.I. 1935) (responding to a question from the General Assembly on whether it could call a convention without first presenting that question to the people); HOAR, *supra* note 116, at 52 (“Thus we come back to the fact that all conventions are valid if called by the people speaking through the electorate at a regular election.”).

429. *Collier*, 24 So. at 108; *Am. Sugar Refining Co.*, 68 So. at 744; *State ex rel. Wineman*, 68 N.W. at 419–20.

430. HOAR, *supra* note 116, at 40–41.

431. *See id.* at 41–42, 48–49 (noting that conventions were successfully held in Georgia in 1788, 1833, and 1839; Indiana in 1850; Maryland in 1850; Delaware in 1852; and Florida in 1865).

432. *See* IND. CONST. of 1816, art. VIII.

433. *Ellingham v. Dye*, 99 N.E. 1, 16 (Ind. 1912).

434. *See, e.g., M’Cready v. Hunt*, 20 S.C.L. (1 Hill) 1, 271 (1834) (“The legislature in passing the act for calling together the convention, were not acting in their legislative capacity. That act has no relation to the general powers of legislation.”); *Carton v. Sec’y of State*, 115 N.W. 429, 430–31 (Mich. 1908); *State ex rel. Wineman*, 68 N.W. at 419. On this proposition, there is conflicting authority that represents a minority view. *In re Op. to the Governor*, 178 A. 433, 439 (R.I. 1935). However, even this authority does not conclude that the legislature acts in its legislative capacity when it initiates a convention call. Rather, it finds that the legislature acts in a quasi-convention status by initiating the convention. This position not only presents real problems in today’s political environment, in which misaligned legislatures are a key factor driving the need for constitutional reform, but it is also contradicted by a separate body of law holding that the legislature has no implied power to engage in constitutional amendment. If the legislature cannot propose constitutional amendments without specific authority, it seems illogical to conclude that it *alone* can act in a quasi-convention status to initiate a convention on behalf of the people.

law, the *salus populi*. In short, [the legislature] supplied the only mode by which the original right of the people to meet in the full and free Convention to reform, alter, or abolish their form of government, could be exercised without jeopardizing the peace, tranquility, and harmony of the state.<sup>435</sup>

Justice Thomas M. Cooley of the Michigan Supreme Court similarly concluded that the legislature had no inherent right to call a convention and that the legislature's involvement was primarily for logistical reasons.<sup>436</sup> Cooley added, however, that the legislature was an appropriate department to get the ball rolling because it was "nearest to the people."<sup>437</sup> The overall idea is that the people alone hold the right to call a convention, but it is appropriate for the legislature to initiate the convention-call referendum because it is well situated to know the people's preferences regarding the need for a convention call and it can perform the "ministerial" work necessary to coordinate a tricky collective action.

Pulling these doctrines together, it follows that the people have an inherent right to call their own convention. This right is not dependent on positive law, and it cannot be eliminated by positive law. Nor is it dependent on legislative recognition.<sup>438</sup> The legislature has no inherent authority to be involved in the convention-call process because the convention call is not legislative in nature and the underlying right belongs to the people. Legislative involvement is purely for convenience. Thus, other departments that can solve relevant coordination problems can lawfully administer the people's right to call a convention. Moreover, aggressive judicial recognition of this right does not fully implicate traditional separation of powers concerns because the legislature is not acting in its legislative capacity. Courts therefore have more discretion and authority in crafting remedies.

This, of course, raises the question of how courts might better enforce the people's right to call a convention and how voters might structure a lawsuit.

There are several possibilities. First, in the twenty-five states that have a preexisting statewide process for the citizens' initiative or veto referendum,<sup>439</sup> state courts could recognize those processes as available to citizens for the purpose of initiating a convention-call referendum. In those

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435. JAMESON, *supra* note 137, at 579–80.

436. THOMAS COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* 56, 59–60 (Victor H. Lane ed., 7th ed. 1903) (arguing that the legislature does not have inherent power to call a convention but rather operates out of logistical convenience).

437. HOAR, *supra* note 116, at 65 (attributing to Cooley).

438. See Steven Miller, *Getting to a Citizens' Constitutional Convention: Legal Questions (Without Answers) Concerning the People's Ability to Reform California's Government Through a Constitutional Convention*, 44 *LOY. L.A. L. REV.* 545 (2010) (making a similar point about California).

439. See 53 *THE COUNCIL OF STATE GOV'TS*, *supra* note 35, at 240 tbl.6.9. Figure 1 illustrates these states. Kentucky has a very narrow referendum procedure applicable only to laws "classifying property and providing a lower rate of taxation on personal property . . . than upon real estate." KY. CONST. § 171. I have excluded it from this group because of the explicit and significant substantive limitations on the referendum, but it could theoretically be included since it provides a process for the referendum that could be deployed for a convention-call petition.

states, there are already procedures and rules in place that allow citizens to qualify questions for statewide ballots.<sup>440</sup> Citizens could simply follow those procedures but structure their initiative as a convention call. If a state official refuses to place a qualifying petition on the ballot because it is an improper use of the initiative, state courts could issue a writ of mandamus to require that the question be placed on the ballot.<sup>441</sup> In doing so, the court need not (and should not) hold that existing statutory (or constitutional) schemes implementing the generic initiative and referendum process include an implicit right to the convention-call referendum.<sup>442</sup> Instead, courts should hold that the state constitution recognizes a right of citizens to petition for a constitutional convention and that the state government cannot discriminate against that right in its administration of ballot questions.<sup>443</sup> This approach would help foreclose gamesmanship by obstructionist legislatures that might amend the statutory scheme to prohibit its use for convention calls.<sup>444</sup> It is

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440. See, e.g., JOHN THURSTON, 2024 INITIATIVES AND REFERENDA HANDBOOK: FACTS AND INFORMATION FOR THE 2024 GENERAL ELECTION 54–60 (2023); CAL. CONST. art. II, § 8(b).

441. In Maryland, only the statutory veto referendum is available. MD. CONST. art. XVI, § 1 (“The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor . . .”). The petition I am suggesting would not be a responsive petition, but an affirmative petition for the convention-call question to be placed on the ballot. Similarly, in Illinois, where only constitutional amendments are permitted by initiative, objections might be made that a convention call is not a constitutional amendment. ILL. CONST. art. XIV, § 3 (limiting the initiative to amendments of the legislative article within the constitution). Illinois also has significant subject matter limitations on the initiative that would surely be triggered by the petition I am proposing. See *id.*

442. See *Cohen v. Att’y Gen.*, 259 N.E.2d 539 (Mass. 1970) (holding that a constitutional amendment creating a citizens’ initiative in Massachusetts was not intended to allow convention-call initiatives).

443. A question left unanswered by my preliminary analysis is the standard of review for evaluating legislative restrictions on the right to petition for a constitutional convention. For present purposes, I argue only that the state cannot categorically foreclose the use of initiative processes for a convention call because the right to petition for a constitutional convention is a constitutional right.

444. Others have suggested that citizens use the initiative to simply adopt statutes calling a convention (or, alternatively, adopting a statute that allows the initiative to be used to adopt a statute calling a convention). See J.H. Snider, *Rauner’s Best Route May Be Constitutional Convention*, STATE J. REG. (Dec. 27, 2015), <https://www.sj-r.com/story/opinion/letters/2015/12/28/rauner-s-best-route-may/32824577007/> [<https://perma.cc/26E7-UNYS>]; J.H. Snider, *States with the Implicit Constitutional Convention Initiative?*, STATE CONST. CONVENTION CLEARINGHOUSE, <https://concon.info/state-data/map-of-u-s-constitutional-initiative-states/> [<https://perma.cc/KY2H-QMYX>] (last visited Apr. 3, 2024); John W. Hempelmann, *Convening a Constitutional Convention in Washington Through the Use of the Popular Initiative*, 45 WASH. L. REV. 535, 577–81 (1970). This is a clever approach, but it has limitations that I seek to avoid. First, it would leave the issue in the hands of future legislatures because all initiative statutes can eventually be modified by legislatures (subject to waiting periods and higher thresholds). Second, by not affirming a constitutional right, state courts have less ability to monitor the legislature’s response to the initiative, which is likely to be hostile. Third, as I have argued elsewhere, the initiative is a creature of positive law. There is no inherent right to the general citizens’ initiative. Without recognizing a constitutional right to the convention-call referendum, there is a weaker basis for finding the general initiative scheme problematic for excluding convention calls. Finally, this approach is not useful in states without the initiative, but my approach sets the stage for courts in non-initiative



also more consistent with state constitutional structure. Figure 1 illustrates the pathways to an independent convention call available in each state.<sup>445</sup>

*Figure 1: Citizen Access to Convention Calls*



Although this approach might seem too activist for courts, it is consistent with the doctrine that the right to call a convention belongs to the people and not the legislature. By providing a streamlined and direct pathway for voters to decide on a convention call, state courts eliminate the legislative monopoly on calling conventions and share that power with voters. Moreover, this approach is also consistent with the idea that state courts should act as democratic agents rather than countermajoritarian “interlopers.” By giving life to the people’s right to a convention call, the court is simply opening pathways for more majoritarian influence in state government without overturning any legislative policies or decisions. Finally, this approach demonstrates respect for traditional separation of powers principles because it defers to legislative decisions regarding the appropriate regulation of the initiative process in general (e.g., signature counts and verification processes)

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states to enlist legislative assistance in an administrative capacity. Of course, this approach deserves state-specific analysis on a much deeper level. For example, a state with a recall process and a periodic convention call might conclude that, as an interpretive matter, it would make little sense to allow convention calls to pass through the recall process because this would effectively render the periodic convention call redundant. I believe there are compelling counterarguments on these issues, but it is not my purpose here to fully analyze all of those issues. More work is needed.

445. It reflects the most accessible citizen pathway only. For example, Oklahoma is coded “general initiative” even though it also has a periodic convention question. OKLA. CONST. art. XXIV, § 2. Likewise, Rhode Island is coded “statewide recall” even though it also has a periodic convention call. R.I. CONST. art. XIV, § 2. Mississippi has an initiative process in the constitution, but the court recently declared it to be inoperative. *See In re Initiative Measure No. 65: Mayor Butler v. Watson*, 338 So. 3d 599, 615 (Miss. 2021).

but asserts the court's role in protecting fundamental democratic rights from discrimination.<sup>446</sup>

The situation is more complicated in states that do not have an initiative or referendum process because there is no direct path to litigating this issue. However, in addition to the twenty-five states mentioned above, there are an additional eleven states that have initiative processes established for the recall of statewide elected officials.<sup>447</sup> Those procedures could be used by voters to instigate lawsuits just as described above, although the misfit for a convention-call referendum is even more obvious and would likely face a steeper climb.

There are surely other strategies available for voters looking to enforce this right. It is not my purpose here to scrounge for them all. I note only that, in general, state courts have more relaxed justiciability requirements than those imposed on federal courts by Article III.<sup>448</sup> Several state courts have explicitly held that plaintiffs can sue to enforce shared constitutional interests even without any particularized harm.<sup>449</sup> These courts see value in allowing plaintiffs to invoke the courts "to secure the enforcement of legal principles that touch others as directly as themselves and that are valued for moral or political reasons independent of economic interests."<sup>450</sup> Thus, the Supreme Court of Ohio has explained: "This court has long taken the position that when the issues sought to be litigated are of great importance and interest to the public, they may be resolved in a form of action that involves no rights or obligations peculiar to named parties."<sup>451</sup>

These public-oriented justiciability concerns reflect what Professor James A. Gardner has described as "active judicial governance" by state courts.<sup>452</sup> They reflect an awareness by state courts that they are active participants in the democratic process and that they should engage with significant issues of generalized concern. Enforcement of the constitutional right to a convention-call referendum against the backdrop of an inherent legislative conflict of interest would seem to fit nicely within this understanding of the state judicial role. Moreover, this perspective might open pathways for declaratory judgment actions or other options.

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446. Something like this approach appears to have occurred in Michigan in 1960. *See* STURM, *supra* note 375, at 24. After the legislature refused to put a convention call on the 1959 ballot, citizens mobilized and used the initiative to propose an amendment to the existing constitution that required a convention call the next year and set specific rules for the convention. *See id.* The amendment qualified for the ballot and voters approved it. *See id.* Voters then approved the convention call that occurred the next year. *See id.* at 27. Michigan now operates under the constitution created by that convention.

447. *See* 53 THE COUNCIL OF STATE GOV'TS, *supra* note 35, at 11 tbl. 6.18.

448. *See* Hershkoff, *supra* note 419.

449. *See id.* at 1854 n.113 (listing cases).

450. *Id.* (quoting Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 4 (1984)).

451. *State ex rel. Ohio Acad. of Trial Laws. v. Sheward*, 715 N.E.2d 1062, 1082 (Ohio 1999).

452. *See* James A. Gardner, *Active Judicial Governance*, 51 NEW ENG. L. REV. 545 (2018).

Of course, this approach raises various new concerns. Some might worry, for example, that convention calls will become too common. Some might scoff that this is purely an academic exercise because it is unlikely (yet) to find willing champions to sponsor and pursue it. These are real issues that need to be considered more fully. My purpose here is not to fully defend this approach as the best (and only) option. My more modest goal is to instigate a serious discussion of the convention's value and plant seeds for how citizens and courts might reinvigorate the convention if and when the circumstances warrant. As I discuss below, even if states do not call conventions, there can be various positive effects of making it a more credible threat to recalcitrant legislatures. There are various historical examples of legislatures adopting important popular reforms only after credible convention threats by citizens. For the most part, this dynamic is now absent from American politics.

## 2. Enforce Convention Independence

Even if state courts recognize a private right to the convention-call referendum, voters and courts will be dependent on incumbent state government to administer convention elections, set rules for delegate selection, fund the convention, and address other critical issues. However, for state conventions to be meaningful, they must be independent (to some degree) from incumbent government interference. State courts have long recognized this general principle and have enforced convention independence through a few different doctrines.<sup>453</sup>

First, courts have held that state government cannot take official actions that would explicitly interfere with the basic nature, structure, and operations of the convention as an independent body.<sup>454</sup> For example, in 1935 the Rhode Island Supreme Court was asked by the governor to provide a written opinion as to whether the General Assembly could adopt a statute calling a convention in which “the general officers of the state shall by virtue of their offices be members of such convention” and set the internal “organization and conduct of such convention.”<sup>455</sup> The court concluded that this was impermissible. It wrote:

A constitutional convention is an assembly of the people themselves acting through their duly elected delegates. The delegates in such an assembly must therefore come from the people who choose them for this high purpose and this purpose alone. They cannot be imposed upon the convention by any other authority . . . . No one, not a delegate, no matter how exalted his station in the existing government, can be assured either a

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453. See HOAR, *supra* note 116, at 164 (“The courts will assist the convention to perform its legitimate function and will prevent the encroachment of any other branches of government.”).

454. See, e.g., *Carton v. Sec’y of State*, 115 N.W. 429, 433 (1908) (issuing writ of mandamus requiring secretary of state to place convention proposals on the ballot).

455. *In re Op. to the Governor*, 178 A. 433, 436 (R.I. 1935).

voice or a vote in such a convention unless he comes there with a commission from the people as their delegate.<sup>456</sup>

Second, courts have recognized that certain issues lie within the convention's exclusive jurisdiction.<sup>457</sup> These include establishing rules of order and procedure, selecting officers and committees, and resolving delegate investiture disputes.<sup>458</sup> There are various decisions and treatises commenting on the legality of limiting a convention's substantive agenda (the so-called "limited convention").<sup>459</sup> There are conflicting authorities, but the dominant approach is that the legislature does not have the authority, after a convention call, to limit the substantive scope of a convention.<sup>460</sup> The people, however, can limit the convention by approving a limited convention call at the onset.<sup>461</sup> Courts are divided on their authority to intervene if a convention exceeds its authority.<sup>462</sup> Some hold that they may enjoin placing the ultra vires proposals on the ballot, but if those proposals are approved by voters, they are lawfully ratified.<sup>463</sup>

In any event, the broader principle recognized by state courts is that incumbent state government cannot encroach on the convention's independence. As noted above, there are myriad ways that contemporary state governments might work to interfere with a convention's independence. State courts would likely have to play a role in defining and protecting that independence. I do not portend to provide answers for how courts should resolve these issues. I mean only to situate them within the general rule that courts should protect convention independence and flag a few likely points of tension between future conventions and legislatures. Two critical issues that may arise are funding for the convention and districting for delegates.

Regarding funding, one issue might be the amount of funds needed to promote the convention's work in a ratification campaign. As explained above, ratification campaigns are difficult because opposition coalitions can form easily.<sup>464</sup> One solution, which past conventions have used, is for the convention to invest heavily in ratification campaigns.<sup>465</sup> This would have beneficial effects on the underlying logic of the convention's design

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456. *Id.* at 452. On the issue of whether the legislature could limit the substantive agenda, the court adopted the majority approach, which is that it could propose a limited agenda to voters, who could approve it, but the legislature had no authority itself to limit the agenda. *See id.* at 452–53.

457. *See, e.g.,* Wells v. Bain, 75 Pa. 39, 55 (1873); State v. Neal, 42 Mo. 119, 123 (1868); HOAR, *supra* note 116, at 171; DODD, *supra* note 116, at 88.

458. *See* DODD, *supra* note 116, at 88.

459. Tarr & Williams, *supra* note 103, at 1085; HOAR, *supra* note 116, at 120; DODD, *supra* note 116, at 72.

460. *See* Tarr & Williams, *supra* note 103, at 1087–88 (listing cases and concluding that the "majority of state judicial rulings tend to confirm this point").

461. *See id.*

462. *See id.* at 1091.

463. *See, e.g.,* Malinou v. Powers, 333 A.2d 420, 422 (R.I. 1975) (refusing challenge after referendum); Snow v. City of Memphis, 527 S.W.2d 55, 58 (Tenn. 1975) (entertaining post-referendum challenge).

464. *See supra* notes 300–06 and accompanying text.

465. *See* STURM, *supra* note 26, at 77–78 (describing convention promotional efforts).

discussed above. However, legislatures have cut convention funding when reforms threaten legislative or partisan interests. Courts could play a constructive role here by ensuring that legislatures were not using funding cuts or draconian underfunding to curb the convention.

Regarding convention districting, state legislatures usually establish districts from which delegates will be chosen.<sup>466</sup> A large literature has developed in favor of state courts exercising more authority over partisan gerrymandering of state legislative districts based on democracy guarantees in state constitutions. There are various paradigms for how this might be done, but the baseline democratic principles applicable to legislative districts would surely apply for convention districts.<sup>467</sup> Courts could play an important role if the legislature manipulated districts.

### 3. Enforce the Substantive Domain of the Convention

At times, legislatures have worked to circumvent the convention by using ad hoc amendment rules to propose wholesale constitutional change.<sup>468</sup> These instances allow state legislatures significant discretion and influence over the content and structure of the document designed to limit and regulate their own conduct. As such, there should be limits on what legislatures can pass through ad hoc amendment rules, at least in the absence of explicit popular abrogation of those limits.<sup>469</sup> This principle is deeply embedded in state constitutional history, structure, and the text of many existing state constitutions, but contemporary state courts generally refuse to enforce it without good reason.<sup>470</sup>

In other work, I have developed and defended this argument in detail, and argued that state courts should play a larger role in enforcing substantive limits on ad hoc amendment.<sup>471</sup> Here, I note only that by allowing state legislatures unlimited scope in their use of ad hoc amendment procedures, courts effectively eliminate the constitutional convention from state politics and surrender the constitution to the legislature. Enforcing substantive limits on ad hoc amendment will naturally (and properly) revive the utility of the convention. And, for all the reasons listed above, it will better empower statewide popular majorities to exert influence in state constitutional reform.

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466. Interestingly, Michigan's 1960 citizen-workaround, *supra* note 443, included restrictions on convention districting to limit legislative discretion. MICH. CONST. of 1908, art. XVII, § 4 (1960) ("[T]he electors of each house of representatives district as then organized shall elect 1 delegate for each state representative to which the district is entitled and the electors of each senatorial district as then organized shall elect 1 delegate for each state senator to which the district is entitled."). This suggests interesting possibilities for citizens looking to place convention-call referenda on future ballots.

467. New York's constitution sets the districts in relation to legislative districts to avoid any convention-specific gerrymandering. N.Y. CONST. art. XIX, § 2.

468. *See* Marshfield, *supra* note 104, at 82–88, 98–100.

469. *See id.*

470. *See id.*

471. *See id.*

### *B. Supplemental Congressional Solutions*

In many states, popular majorities are at a disadvantage in pursuing democratic reform because state government is controlled by powerful minority forces. As I argue above, state courts can help, but their influence is inherently limited by their nature as courts. They cannot, for example, appropriate funds. To truly energize state conventions as viable pathways for reform, citizens need resources and indications that they can withstand foreseeable resistance from misaligned state officials. In this section, I consider how Congress could address some of these issues through Spending Clause legislation that offers conditional grants to fund state conventions.

My discussion here is preliminary and exploratory. My goal is to sketch the beginnings of an idea and hopefully open new conversations about how to rebuild and reinvigorate the state convention as a constructive democratic institution. As such, it raises more questions than it answers.

#### 1. Imagining Federal Grants to State Conventions

My suggestion is that Congress adopt a statute that allows for conditional federal grants to state constitutional conventions that have been convened by statewide referenda. This statute could take various forms, and it is not my purpose here to fully explore and analyze all options. My goal instead is to demonstrate how this option could be used to energize the state constitutional convention in constructive ways.

For that to occur, the broad goal of the federal statute should be to incentivize popular majorities to pursue conventions as forums for democratic reform. The principal benefit of my suggestion is that it would connect democratic majorities who want a convention with independent funding. Ideally, this will incentivize grassroots convention campaigns that are currently stunted by the convention's financial dependence on incumbent state governments. It would also lower the financial cost of a convention for individual states, which might make voters more willing to call a convention in the first place.

In doing this, the statute should rely on the convention's proven design features (a convention-call referendum, representative special election of delegates, and a ratification referendum) as a guide for establishing conditions to federal funds. An essential precondition should be that the convention is approved by a statewide referendum pursuant to state law and administered by state institutions. This ensures that federal funds are used only for conventions that have the proven support of voters. Moreover, it limits federal intrusion into state affairs because it depends on state law and institutions to produce a convention-call referendum.

The federal statute should attach additional conditions designed to ensure the convention's independence from obstructionist state officials. It should condition funds on a statewide ratification referendum. It should also address how delegates are selected. The statute should condition funds on the special election of delegates based on a scheme that is fair and representative. To be sure, this is an endeavor fraught with difficulty. But there are usable

measures of partisan gerrymandering and alternative selection methods from which Congress could work.<sup>472</sup> Alternatively, Congress could condition funds on convention maps being drawn by an independent state commission.<sup>473</sup>

A further advantage of my proposal is the unusual context for Congressional debate regarding districting. Districting for an unknown future convention does not have obvious or immediate partisan significance. Congress would be adopting a generalized standard without knowing where it would be applied or how it would ultimately impact any final reforms in any state.<sup>474</sup> To be sure, this proposal would introduce new uncertainties, which Congress might want to avoid for legitimate and self-interested reasons. But it also offers a space for Congress to set districting standards without any immediate winners or losers. To the extent that there is still opportunity in Congress for bipartisanship on democratic reform, this may be a constructive environment for it to materialize.<sup>475</sup>

My proposal could include myriad other conditions designed to protect convention independence and integrity. It is not my aim here to explore all options. I note only that the state's long history of using conventions, as well as the body of research surrounding their effectiveness, provides a useful record to begin work.<sup>476</sup> Moreover, this plan is not a panacea, and it may be a political nonstarter in Congress. It is also sure to invoke comparisons to congressional Reconstruction, which would give certain groups strong arguments against accepting federal funds and could create new coalitions against calling conventions. Nevertheless, it could provide a constructive way to indirectly facilitate democratic reform in the states through an institution that has a proven track record of overcoming misalignment.

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472. See, e.g., Stephanopoulos & McGhee, *supra* note 3.

473. The "For the People Act" already considered how to operationalize this possibility for congressional districts. H.R. 1, 117th Cong. § 2401 (2021).

474. One difficulty with my proposal is that some state constitutions already determine the districts for a convention, which might limit their ability to apply for funds if those districts are unfair, which would also undermine the purpose of my proposal because those would likely be states in which outside incentives for a convention would be useful. There are solutions to this. State constitutional law, for example, generally holds that these constitutional provisions cannot limit the people's authority to call a convention on whatever terms they please. But I reserve this level of analysis for future work.

475. I do not mean to be (too) pollyannish. There are myriad reasons why this discussion might be swallowed up by the usual partisan forces. For example, any concession on districting in this context might be used against one side or the other in another context. Moreover, the prevailing view is that Republicans currently have a better position in state legislatures. Thus, it is easy to imagine that Republicans would be unwilling to adopt legislation that might destabilize that advantage.

476. My proposal also raises questions of administration, which in turn raises questions of tactic and gamesmanship. Generally, state and local entities apply for federal grants administered by federal agencies. Congress should consider who can apply for federal aid and when. My proposal imagines that aid is available only after a positive convention-call referendum, but these details might impact how incumbent state government behaves and how voters perceive the availability of federal funds. For example, if state governments sabotage grant eligibility by refusing to pass post-referendum enabling legislation consistent with federal funding conditions, there is very little that voters could do, and the program would collapse. There are solutions to these issues, but Congress must be thoughtful in this regard.

## 2. Brief Thoughts on Constitutionality

My proposal likely triggers federalism concerns because it recommends a degree of federal involvement in state constitution-making. Federal involvement of this kind is not new. The federal government heavily regulates the constitution-making processes of new states seeking admission.<sup>477</sup> Moreover, following the Supreme Court's apportionment rulings in the 1960s, federal courts effectively ordered states to convene constitutional conventions to remedy legislative malapportionment.<sup>478</sup> In any event, my proposal is likely constitutional because it satisfies the Supreme Court's Spending Clause jurisprudence and does not offend the Tenth Amendment or any other federal limitations on congressional involvement in state constitutionalism.

The Spending Clause allows Congress to spend "for the . . . general Welfare of the United States."<sup>479</sup> The purpose of the law that I propose would be to improve and protect democracy in the United States. This likely satisfies the Supreme Court's broad and deferential approach to this requirement.<sup>480</sup> Moreover, it is buoyed by the Guarantee Clause, which requires the federal government to "guarantee to every State in this Union a Republican Form of Government."<sup>481</sup>

Conditions on general welfare spending must be reasonably related to the federal interest underlying the grant.<sup>482</sup> The conditions that I suggest here—convention-call and ratification referenda and special election of delegates pursuant to a fair and representative districting scheme—are related to American democracy for all the reasons I have explained above. One might argue that these conditions relate more to state democracy than national democratic concerns. However, as Professor Carolyn Shapiro has shown, state democratic failures have spillover effects.<sup>483</sup> Moreover, state governments continue to exercise significant control over various aspects of federal elections, which makes the democratic quality of state government a federal interest justifying these conditions.<sup>484</sup>

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477. See PETER ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787*, at 169–71 (1983).

478. See, e.g., *Butterworth v. Dempsey*, 237 F. Supp. 302 (D. Conn. 1964).

479. U.S. CONST. art. I, § 8.

480. See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 665 (1985) (examining funds received by states under federal law); *United States v. Butler*, 297 U.S. 1, 65–66 (1936). The Hatch Act, 5 U.S.C. §§ 7321–7326, for example, has survived challenges under the spending clause. *Oklahoma v. U.S. Civ. Serv. Comm'n*, 330 U.S. 127, 143 (1947).

481. U.S. CONST. art. IV, § 4. Shapiro, *supra* note 91 (arguing that Congress has some authority to regulate democracy in the states pursuant to the Guarantee Clause); Procaccini, *supra* note 2 (same).

482. *U.S. Civ. Serv. Comm'n*, 330 U.S. at 143.

483. Shapiro, *supra* note 91, at 222.

484. This seems analogous to the Court's reasoning in *Oklahoma v. United States Civil Service Commission*. See 330 U.S. at 143 (upholding the Hatch Act under the Spending Clause). For the same reasons I give in my Tenth Amendment analysis, I do not see any facial problems with my proposal and the Court's ruling in *National Federation of Independent*



Finally, my proposal would not violate the Tenth Amendment because it would not commandeer any state officials or institutions.<sup>485</sup> Although federal inducement regarding state constitution-making is, admittedly, a bold interjection of federal influence into a foundational state activity, the Tenth Amendment prohibits only federal commandeering and coercion of state officials and institutions.<sup>486</sup> Thus, the Court has made clear that Spending Clause legislation does not offend the Tenth Amendment even if it expands federal influence into issues that it could not regulate directly.<sup>487</sup>

### C. Credible Convention Threats

State conventions hold great potential as forums for reform, but simply reviving them as credible pathways for change would likely have other positive secondary effects. There is significant evidence, for example, that the threat of citizen initiatives incentivizes state legislatures to preemptively adopt laws that partially satisfy popular demands, thus reducing misalignment indirectly.<sup>488</sup> Moreover, James Kenneth Rogers has argued that the threat of a federal convention was a “key factor” causing Congress to “act preemptively” in proposing the Bill of Rights, Seventeenth Amendment, Twenty-First Amendment, Twenty-Second Amendment, and Twenty-Fifth Amendment.<sup>489</sup> Professor Robert F. Williams has likewise argued that the threat of state constitutional conventions has caused state legislatures to entertain ad hoc reform on popular issues to avoid a full-scale convention.<sup>490</sup>

Making state conventions more credible by providing broader access to citizens and funding from Congress might help the public leverage accountability from state government. Indeed, history suggests that legislatures fear few things more than a state constitutional convention. Simply making the convention a more credible threat might help mitigate misalignment in state structure and policy as state officials would now have

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*Business v. Sebelius*, 567 U.S. 519 (2012), that federal conditions on spending cannot be coercive.

485. *Printz v. United States*, 521 U.S. 898 (1997).

486. Setting aside that my proposal does not involve direct regulation, the Court abandoned the idea that the Tenth Amendment prohibits Congress from passing laws that affect states’ “traditional governmental functions” in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985). It now looks primarily at whether congressional action commandeers or compels state action on a federal policy. See *Reno v. Condon*, 528 U.S. 141 (2000).

487. *New York v. United States*, 505 U.S. 144, 166–67 (1992). The federal government does have some direct regulatory authority over state constitution-making because of the basic voting guarantees and due process protections contained in the Fourteenth Amendment.

488. See MATSUSAKA, *supra* note 7, at 154–68.

489. James Kenneth Rogers, *The Other Way to Amend the Constitution: The Article V Constitutional Convention Amendment Process*, 30 HARV. J.L. & PUB. POL’Y 1005, 1008 (2007).

490. Robert F. Williams, *Are State Constitutional Conventions Things of the Past?: The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL’Y SYMP. 1, 4, 9–10 (1996).

to consider the potential of a convention before rejecting popular pressure toward reform.

#### CONCLUSION

Scholars have offered many compelling ways to enhance American democracy. Creative solutions abound, from ranked-choice voting and multimember districts to open primaries, campaign finance reform, and parliamentarianism. But many of these solutions are nonstarters because there is no appropriate forum for their debate and adoption. Existing institutions and officials are beneficiaries of the incumbent system with little incentive to make space for reform. What America needs is more than creative democratic fixes. It needs real but safe opportunities to debate and implement those fixes while preserving some degree of continuity and connection to our constitutional traditions and commitments. Fortunately, the state constitutional convention has been hiding in plain sight. It is not perfect. It has limitations and dangers. But it also holds unique promise and value for democratic reform in America.