CHAPTER 11

EARLY STATE HISTORY AND CONSTITUTIONS

JOHN KINCAID

The most significant academic and judicial state-constitutional developments in recent decades have been rising interests in teaching state constitutional law comparatively (U.S. Advisory Commission on Intergovernmental Relations, 1988; Williams, 2009) and in using state constitutions to reform state governance (Tarr and Williams, 2006), achieve objectives not attainable in the national arena (U.S. Advisory Commission on Intergovernmental Relations, 1989; Shaman, 2008), and influence federal policy-making (Gardner, 2005). These developments partly reflect liberal responses to conservative federal trends, especially a more conservative Supreme Court and Republican control of the presidency for 20 of the last 32 years. These trends also reflect reactions to the increasing nationalization of public policy, which has led both liberals and conservatives to employ state constitutional tools to protect state prerogatives from federal intrusions and project state values onto the national scene. Voters have been especially active in approving amendments that express their values and restrain state and federal power. Nationalization also has prompted originalists to examine the first state constitutions for insights into the meaning of the federal Constitution as a constraint on federal power (e.g., Rakove, 1990).

A state constitution is a state's highest law, except when the U.S. Constitution, federal statutes, or treaties are applicable. State constitutions also are dynamic because they are substantially democratic. Unlike the U.S. Constitution, they are, except in Delaware, revised and amended only with voter consent. This democratic foundation, coupled with the need for state constitutions to address numerous matters, such as education, corporations, and local government, also makes them bellwethers of socioeconomic and cultural change. Every era of state constitutional development has involved struggles over the nature of democracy and government, the socioeconomic structure of society, and the culture of the polity. Indeed, state constitutional histories have been
defined by recurring struggles to reform, and usually restrain, governments believed to have been captured by interests hostile to the public's interest.

**BACKGROUND**

Many Americans do not know that their state has its own constitution. In a 1988 national poll, only 44 percent of the respondents knew their state has its own constitution. Five percent volunteered that it has its own constitution and also relies on the U.S. Constitution. Nineteen percent believed that their state relies on the U.S. Constitution only, and 32 percent did not know or answer the question. Another question was whether their constitution has "a bill of rights or some other provisions that protect individual rights." The results were slightly better: 56 percent said "yes"; only 6 percent said "no." However, 38 percent did not know or answer the question (U.S. Advisory Commission on Intergovernmental Relations, 1988, 6).

One reason for low visibility may be that even when state political developments involve the constitution, it is often invisible to the public. In 2011, for instance, Wisconsin captured headlines when its Democratic senators fled to Illinois for several weeks so as to prevent a Senate vote on a Republican-sponsored bill repealing most collective-bargaining rights for most public employees. The media hardly explained that Wisconsin's Constitution (Art. VIII, Sec. 8) requires a quorum of three-fifths of the Senate's thirty-three members in order to vote on a fiscal-affairs bill. Republicans held 19 seats, one short of the 20 needed for the quorum. The 14 Democratic senators fled Wisconsin because the constitution allows the legislature to compel its members' attendance. After negotiations failed to bring the Democrats back, the Republican Senate majority removed the collective-bargaining provisions from the fiscal-affairs bill and, by an 18–1 vote, enacted the provisions separately. This required, under the constitution, only a simple-majority (17 senators) quorum. These events unfolded, moreover, while thousands of people protested at the state capitol, exercising the free-speech and assembly rights guaranteed by Sections 3 and 4 of the Wisconsin Constitution's declaration of rights.

Political scientists are well aware of state constitutions, but those documents are like the dark side of the moon. Research has illuminated most other facets of state and local government more extensively. The dearth of research may be due to the challenge of studying 50 documents that have 7,227 amendments and vary in length from New Hampshire's 9,200 words to Alabama's 365,000 words (The Book of the States, 2010: 11). Moreover, the states have operated under 147 constitutions since 1775. Historical documents are scattered across the states and many have been lost over time, making systematic comparative research difficult. Although there are general similarities—such as the separation of legislative, executive, and judicial powers—across all 50 constitutions, there is a daunting diversity of specifics. For example, 49 states have a balanced budget requirement, but that rule is
constitutionally mandated in only thirty-two states, and even those requirements vary as to their definition of a balanced budget, exemptions, and other details (Snell, 2010: 3).

More attention is given to state constitutions by the law profession, in part because lawyers and law professors must stay abreast of constitutional developments in their state. The constitution is subject to frequent amendment in some states, and in all states the highest court engages in constitutional interpretation and judicial review. Another important reason for legal attention has been a concerted effort since the 1970s to elevate the importance of state constitutional interpretation as a countervailing power to the conservative trend in constitutional interpretation emanating from the U.S. Supreme Court since the appointment of Chief Justice Warren Burger by Republican President Richard M. Nixon in 1969. The most notable manifestation of this development is the so-called new judicial federalism, triggered largely by U.S. Associate Justice William J. Brennan (1977). The new judicial federalism refers to state courts, legislatures, and voters providing more rights under state constitutions than the U.S. Supreme Court provides under the U.S. Constitution (Friedelbaum, 1988; Kincaid, 1988). More recently this has spawned an effort to dethrone the U.S. Supreme Court as the monopolistic interpreter of constitutional norms. As two advocates of this view assert: "Successive generations of scholars and jurists have lurched violently from a dismissive view of state constitutions as documents of purely parochial import ... to an aggressively ambitious approach that understands state constitutions as fundamentally freestanding sources of fully developed, independent legal norms" (Gardner and Rossi, 2010: 3).

Although the general public lacks awareness of state constitutions, public officials and advocacy groups recognize their importance. Consequently there is considerable constitutional activity. One measure is the 112 state constitutional amendments adopted in 2004–5, 158 in 2006–7, and 84 in 2008–9 (Dinan, 2010: 5).

Recent controversies over gay marriage illustrate the importance of state constitutions to advocacy groups. When it seemed that Hawaii's supreme court might legalize same-sex marriage in 1995, opponents campaigned to enact state laws banning it. As illustrated in Figure 11.1, a spate of such enactments occurred in 1996–2000.

Only three constitutional bans were adopted then. But after the high court of Massachusetts ruled (Goodridge, 2003) that the Bay State's constitution compels legal recognition of gay marriage, opponents campaigned for constitutional bans rather than statutory bans on same-sex marriage. Iowa's supreme court ruled unanimously (Varnum, 2009) that its state statutory prohibition of same-sex marriage violated the state constitution's equal protection clause. Opponents have failed to overturn this ruling with a constitutional amendment, but they exercised another constitutional right by unseating the three justices, including the chief justice, during their retention elections in 2010.

State constitutions, therefore, play central roles in state and local governance (Tarr, 1996, 1998). Insofar as states are laboratories of democracy, they are important for national policy debates (Kincaid, 1988).
The fundamental difference between the federal and state constitutions is that the peoples of the American states delegate powers to the federal government through the U.S. Constitution, while they limit government powers through their state constitution. Except for what the U.S. Supreme Court declared to be inherent “powers of external sovereignty” ([United States] 1936), the U.S. Constitution consists of limited, delegated powers; the U.S. government can do only what it is permitted to do by the Constitution. All non-delegated powers are reserved to the states or the people, as affirmed in the Tenth Amendment.

A common misunderstanding is that the U.S. Constitution also grants powers to the states. It does not. It imposes some limits on state powers (especially Art. I, Sec. 10) and a few requirements on the states (especially Art. IV, Secs. 1–2). Otherwise, it reserves to the states certain key powers needed for the federal government’s operation, such as holding elections for Congress and the presidency and ratifying amendments. The U.S. Constitution is, therefore, “incomplete” (Lutz, 1988). It does not vest plenary power in the federal government, and it relies on the states for much of its execution: “The states
are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution” (Lutz, 1988: 24–5).

State constitutions limit rather than delegate powers because the states possess inherent powers. Their governments can do whatever they are not prohibited from doing by the federal or state constitution. This conception stems from the liberal social-compact theory that underlies American constitutionalism. Under this theory, the people consent to a body politic that possesses all conceivable government powers. The operation of this polity, however, is subject to majority rule and abuses of power. State constitutions, therefore, limit the inherent plenary powers of the state by imposing certain prohibitions (e.g. a declaration of rights found in all state constitutions), certain structural requirements (e.g. the separation of powers), certain procedural rules on the exercise of power (e.g. size of legislative quorums), and certain mandates (e.g. a requirement that the state provide free, public elementary and secondary education). Occasionally, citizens authorize the legislature to exercise a particular power, such as levying a specific tax; however, the legislature could exercise that power without such authorization.

Another important federal-state difference is that state constitutions delegate powers to local governments: counties, municipalities, townships, school districts, and special districts. Such power conferrals imply limits on state authority to intervene in local matters; however, because it is impossible to demarcate the boundaries between state and local authority precisely, the boundaries are fluid and often contested.

**State Constitutional History**

Modern written constitutions were invented by the states based on their colonial charter (Hsueh, 2010) and indigenous covenantal experiences (Lutz, 1980a). Eighteen state constitutions were adopted prior to ratification of the U.S. Constitution in 1788. The Massachusetts Constitution of 1780 (Peters, 1978), written mostly by John Adams, is the world's oldest written constitution still in effect. The states were seedbeds of constitutional debate during 1776–89 (Hoffman and Albert, 1981; Kruman, 1997) and produced constitutional designs that were both models and warnings for the framers of the U.S. Constitution (Adams, 1980).

**Revolutionary Era: Democratic Experimentation and Political Identity Formation, 1776–88**

An enduring state constitutional theme is the importance of public consent and control of government. Notions of democracy embedded in many early state constitutions stemmed from the assumption in Whig political theory of the existence of “a homogene­ous people” (Lutz, 1980b: 11) who share a community of interest that is rooted in civic
virtue and ascertainable through public deliberation. A constitution was not merely a frame of government but also a vision of the polity and definition of the people who constitute it. By contrast, Federalist theory emphasized self-interest as the proper basis of constitutionalism and sought means "of curing the mischiefs of faction," as James Madison put it in *Federalist* 10. Whigs encouraged factional consensus while Federalists welcomed factional contests.

This Whig orientation toward a common public interest also was rooted in the police power, which is possessed by state governments but not the federal government and which necessitates state legislation governing public health, safety, welfare, and morals—all of which originally fell beyond federal purview. Although, in reality, matters subject to the police power are contested by various interests, Whig theory emphasized deliberative consensus and cultural homogeneity. For example, while Whig theory tolerated religious diversity, at least among Protestants, it sought deliberative consensus on key moral principles common across sects. However, as the nation's population became more diversified from Jewish and Roman Catholic immigration, Whig theory experienced strains. Additionally, many police-power matters, such as prohibitions of abortion, alcoholic beverages, same-sex marriage, and Sunday shopping, entail zero-sum outcomes not amenable to consensual compromise. Exercise of the police power, therefore, has generated some sort of *kulturkampf* in every era of state constitutional development.

The Continental Congress advised the colonial legislatures in 1775 to draft constitutions. During 1776–88, 12 states drafted their first constitution. Connecticut relied on two slightly modified colonial charters; Rhode Island also adapted its colonial charter; and three states revised their constitution by replacing their first one with a new one. Massachusetts and New Hampshire pioneered election of a special convention to draft a constitution and citizen approval of a constitution. Today, these are widely accepted international standards of democratic constitutional adoption.

The early state constitutions established various styles of democratic government, with the Pennsylvania Constitution of 1776 being regarded as the most radically democratic (Selsam, 1971). For example, it created a unicameral legislature with no gubernatorial veto. (It was replaced by a less democratic constitution in 1790.)

Eight of the early constitutions contained a distinct declaration of rights. The Virginia Declaration of Rights, written mostly by George Mason in 1776, became the model of modern bills of rights. In accord with Whig theory's emphasis on public control of government, the early constitutions emphasized frequent rotation through short terms of office (1–3 years). All of the constitutions instituted a separation of powers, usually with an explicit statement, such as that in Article XXX of the Massachusetts Declaration of Rights of 1780; however, the legislature, as the people's principal representative, was made dominant (Williams, 1988), and also bicameral in 12 states, while most governors were weakened by short tenure, restricted re-eligibility, and few veto, appointment, or budget powers. In Maryland, the governor was selected by the legislature for a one-year term. New York established a council of revision headed by the governor to exercise veto powers. It was abolished
in 1821, but such a council was included in the Virginia Plan for the proposed federal constitution and debated extensively by the Constitutional Convention before being rejected (Anderson, 2006). State high courts, however, began exercising judicial review in 1780, even though this power was not explicitly included in any constitution.

Most state constitutions also imposed property qualifications for holding public office as well as property or taxing requirements for voting (usually white males only), although the franchise was then broader than anywhere else in the world (Lutz 1980b). Some also set forth pay details. For example, Tennessee’s 1796 Constitution limited, until 1804, legislators’ per diems to $1.75, the governor’s salary to $750 per year, and judges’ salaries to $600 (about $10,200 in 2011).

**Antebellum Era: Expanding Democracy and Restraining Entrepreneurial States, 1789-1865:** This era was the most fecund. Twenty-two states entered the union with new constitutions, and 42 revised their constitution (i.e. replaced an old constitution with a new one). The revision number is high in part because southern states adopted one or more constitutions after secession.

This era was marked by expansions of public consent and control, most notably, the abolition of property and taxing requirements for voting and office-holding and the movement to universal white-male suffrage during the Jacksonian era (1824-40). In a major departure from federal constitutional practice, state constitutions also established elections of judges, beginning with Mississippi in 1832 and New York in 1845. By 1865, most states held judicial elections.

From 1789 to about 1842, states were the major actors in the federal system. They financed infrastructure, development, and government operations from asset income derived from canal tolls, bank-stock dividends, and land sales, as well as indirect business taxes. By 1841, state debt stood at $193 million compared to $25 million for local governments and $5 million for the federal government (Wallis, 2000: 67). This aggressive economic policy-making produced excessive debt, economic dislocations, corruption, and other problems that motivated citizens to impose further constitutional limits on state powers.

The era was characterized, therefore, by substantive and procedural limitations on state legislatures, such as debt and tax limits, prohibitions on lending the state’s credit to private entities and on subsidizing economic development, limits on banks, prohibitions on special legislation for private interests and for specific localities, and provisions for general laws governing private business incorporations. Legislatures were reined-in by making representation more equitable, reducing legislative membership, limiting the duration of legislative sessions, and creating semi-independent boards and commissions to oversee various functions. Executive power was enhanced by subjecting all governors to popular election, increasing tenure to four years, and improving veto, appointment, and pardon powers. At the same time, the Jacksonian impulse for popular control begat many independently elected executive officials, such as lieutenant governor, attorney general, secretary of state, treasurer, and comptroller, as well as popular election of judges having limited tenure.
Provisions also were made to amend and revise constitutions with more popular participation, especially the submission of amendments to the people for ratification. Overall, the era solidified three elements of popular sovereignty.

First, the people, through their elected delegates, “represent” their sovereignty in a convention called to constitute a government. Second, the constitution thus framed is ratified by the people and given effect by their majority. Third, the people retain the right to revise, and presumably to abolish, the constitution by the ongoing exercise of their sovereignty. (Peterson, 1966: xiv)

Constitutional changes also expanded the role of government as citizens sought to regulate corporations and the emerging railroad industry. Most constitutions also established free public schools, and 15 state universities were created by 1850 (Richards, 1955: 47), even while the southern states maintained slavery.

It was this era of state constitutionalism that was observed by Alexis de Tocqueville. He did not like what he saw. The federal Constitution, he argued, is vastly superior to the state constitutions because the latter are too democratic. They are vulnerable to the “two main dangers” that “threaten the existence of democracies”: “complete subjection of the legislative power to the will of the” people and “concentration of all the other powers of government in the” legislature (de Tocqueville, 1969: 155).

Urban-Industrial Immigrant Era: Racism, Equality, and Assimilation, 1866–1899: This era was marked by extensive constitutional change in the South as those states adopted Reconstruction constitutions in 1866–9 and then dismantled those documents, especially during 1890–1908, to write new charters that rejected federally imposed values of Reconstruction and restored white supremacy, excluding blacks from elections, politics, and government, segregating races in public places, and banning interracial marriage. For the most part, the U.S. Supreme Court upheld these constitutions (e.g. Williams, 1898).

The era saw thirty-one constitutional revisions and nine new constitutions produced by states entering the union, making it the second most fertile period for constitutional change. Together, this and the antebellum era account for 76 percent of all state constitutional revisions in U.S. history and 65 percent of all first state constitutions.

The post-war era—which was marked by considerable interstate borrowing of constitutional ideas as well as the rise of Populism and Progressivism—continued the democratization, government limitations, and government expansions of the previous era. With the rise of giant corporations and big cities, constitutional change also focused on regulating business and the economy, protecting agriculture, recognizing labor unions, altering state-local relations, providing social services, and initiating natural-resource conservation. The 1870 Illinois Constitution regulated warehouses and grain elevators. Colorado (1876) and Idaho (1889) outlawed child labor in mines (Friedman, 1988), and New York (1894) mandated that a preserve “be forever kept as wild forest lands.”
With the rise of strong political parties, Cook County, Illinois, introduced nonpartisan judicial elections, but by the end of the era, only several states had amended their constitutions to adopt this innovation. Today, only 14 states use nonpartisan elections to select appellate court judges for a full term; 18 employ nonpartisan elections to choose some or all trial-court judges.

Constitution-makers continued to adhere to the Whiggish idea of a common good, but this good was defined less by what it was than by what it was not, namely, rule by or on behalf of a segment of society. Nineteenth-century constitution-makers believed that powerful minorities, rather than tyrannical majorities, posed the most serious threat to liberty, and so they included numerous provisions designed to protect the many against the special privileges and advantages of the wealthy or well-connected few (Tarr, 1998, 100). Such provisions included numerous subject-matter restrictions imposed on legislatures and rules requiring equal and uniform taxation (Binney, 1894).

Voters also insisted that bills deal with single subjects and have clear titles, be read several times in open chamber before floor votes, and be enacted quite often by a majority of the members of the legislature, with some types of bills needing super-majority support. By 1900, legislatures had lost their once exalted position as "thirty-three state constitutions limited the length of legislative sessions, and only six state legislatures met annually" (Tarr, 1998: 121). Boards and commissions continued to proliferate as did elective executive offices, both state and local, even while some governors were given the item veto and more were offered re-election opportunities.

This era also marked the flowering of local governments as the nation's workhorse governments. From 1842 to the mid-1930s, local governments were the major fiscal actors, relying heavily on property taxes. By 1902, property taxes accounted for 42 percent of all federal, state, and local revenues (Wallis, 2000: 70). Even by 1932, local governments accounted for more than half of all government revenue. Cities borrowed heavily after the Civil War "to build schools, improve streets, establish water supplies, and erect public buildings," but the 1873–79 depression "brought many cities to the brink of bankruptcy, resulting in new constitutional provisions limiting the extent and character of local borrowing" (Sturm, 1982: 67). In the face of heightened state-local tensions, produced also by conflict between growing urban Catholic and Jewish immigrant populations and rural-dominated Protestant legislatures, a significant innovation was the introduction of home rule for cities in the Missouri Constitution of 1875 (now contained in about three-fourths of state constitutions).

The principal source of intrastate cultural conflict was immigration, which brought many Catholic and Jewish immigrants from southern and eastern Europe, and Asian immigrants as well, into an historically northern European Protestant country. Struggles emerged over voter qualifications, mechanisms to control state and local government institutions, and cultural issues such as alcoholic beverages and religion. Many states adopted Blaine amendments that prohibit appropriations of public funds for "sectarian" schools such as those established by Catholic and Jewish immigrants. U.S. House Speaker James G. Blaine proposed such an amendment to the U.S. Constitution in 1875,
but it was narrowly defeated in the Senate. Such a provision, found in thirty-seven state constitutions today, is more restrictive than the U.S. Constitution’s establishment clause.

Era of Progressive Reaction: Professional Efficiency and Public Efficacy, 1900–1945: This era was marked by almost schizophrenic constitutional reform. Progressives advocated not only professional, elitist, and nonpartisan expertise and efficiency in government but also popular control of government through such mechanisms as the initiative, referendum, recall, and primary elections. The era continued the democratization, government limitations, and government expansions of the previous eras, but Progressives mounted a trenchant critique of the constitutionalism of the previous eras. They attacked such core principles as the separation of powers (seen as obstructing efficient and equitable policy-making), bicameralism (seen as obstructive, especially senates), representative government (seen as too easily captured by special interests), and limited constitutionalism (seen as too restrictive of political reform). Overall, contended Progressives, “an increase in popular participation would actually invigorate the spirit of these principles” (Dinan, 1999: 985 and 2009). The principal Progressive innovation was direct democracy, first adopted in Oregon in 1902. By the mid-1920s, 19 states had adopted the statutory initiative, 14, the constitutional initiative, 21, the referendum, and ten, the recall (Sturm, 1982: 69).

Although the National Municipal League (1963), a Progressive group, issued a widely consulted Model State Constitution in 1924 that emphasized efficient, streamlined constitutionalism, Progressive successes were limited and mostly blunted in the South and Northeast. Only Nebraska adopted a unicameral legislature in 1934. However, the Missouri Plan (or merit plan) for selecting and retaining judges was first adopted in 1940 and is now used by 23 states. At the same time, southern states consolidated white supremacy.

Seven constitutional revisions occurred during this era, and Arizona, New Mexico, and Oklahoma entered the union with their first constitutions, making this era the fifth most fecund in U.S. history. However, the era witnessed the biggest expansion and diversification of state taxation in U.S. history. Forty-nine states adopted a gasoline tax; thirty-two states enacted an individual and/or corporate income tax; 33 levied a cigarette tax; 29 introduced taxes on distilled spirits; and 24 adopted a general sales tax. Although most of these innovations required no constitutional authorization, they laid the foundation for later legislative rate increases that triggered constitutional revolts against taxes.

Meanwhile, departments, agencies, boards, and commissions proliferated to address expanded economic and social policy-making. Attempting to improve efficiency, Progressive governors such as Robert M. LaFollette of Wisconsin (1901–6) Charles Evans Hughes of New York (1907–10), and Woodrow Wilson of New Jersey (1911–13) pressed for executive reorganization and consolidation. By 1938, 26 states had instituted some reorganization (Sturm, 1982: 69).

The federal Immigration Act of 1924 substantially reduced immigration. However, cultural struggles from the previous era continued as white ethnic political machines in northern and Midwestern states battled native Protestant and rural interests to control
local and state governments. The enactment of national Prohibition in 1919 and its repeal in 1933, for example, made state constitutions fields of combat again over alcoholic beverages. Otherwise, the northern white ethnic political machines and southern white party organizations that sustained President Franklin D. Roosevelt's New Deal coalition did not champion Progressive constitutional reform.

Post-War Professional Reform Era: Modernizing States and Complementing Federal Power, 1945–1977: This era also emphasized professionalism and efficiency, with the New Jersey Constitution of 1947 and Alaska Constitution of 1956 epitomizing the ideals. Alaska's constitution followed many tenets of the Model State Constitution. The New Jersey document created the nation's most powerful governor and abolished all other elected executive offices, including lieutenant governor (re-established in 2005). By allowing the governor to appoint all executive officials, most with Senate consent, the constitution reflected the value of managerial efficiency that drove many of this era's reformers. Another "major goal was to reform New Jersey's creaky and archaic court system. The guiding impulse was not a change in substantive law or in the balance of power; the impulse was strictly technocratic" (Friedman, 1988: 39).

Also illustrative of professionalism were the decline of popularly elected constitutional conventions and rise of constitutional commissions consisting of appointed experts. It became more common for "political elites and professional reformers" to campaign "for constitutional revision, with the populace reduced to rejecting convention calls and proposed constitutions" in order "to register its distrust of a process it no longer" felt under its control (Tarr, 1998: 170).

This era also opened new fields by embedding rights to a clean or healthful environment in the constitutions of Illinois and Pennsylvania in 1970, Massachusetts in 1971, Montana in 1972, and Hawaii in 1978 and providing for environmental protection in some constitutions. Fourteen states (e.g. Illinois in 1971 and Connecticut in 1974) also adopted amendments guaranteeing equal rights for women (i.e. "little ERAs") from 1971 through 1974. A movement to constitutionalize a right to privacy began with Illinois in 1970 and spread to South Carolina (1971) and Alaska and Montana (1972).

This era was the fourth most fecund. Eleven constitutional revisions occurred during 1946–77, with the Georgia Constitution of 1976 being the last. In addition, Alaska and Hawaii entered the union with their first, and still only, constitutions. Emphasis was placed on professionalizing legislatures, increasing legislator salaries and benefits, instituting longer sessions and annual sessions, increasing office, equipment, and staff resources, and providing research and bill-drafting services. In 1947, only six legislatures met annually; by the end of this era, 36 did so (45 by 2010). Efforts also were made to streamline the executive branch, especially by reducing independently elected executive officials and increasing gubernatorial tenure. In 1947, only 26 governors served a four-year term; at the start of 1978, 45 did so (48 by 2010). Reformers eliminated many elected offices, but voters insisted on retaining elections of the attorney general in 43 states, the treasurer in 36 states, and the secretary of state in 35 states. Attempts were made, as well,
to reorganize, rationalize, and professionalize state court systems and to improve equity, efficiency, and ethics in their operation.

This era also completed the previous era's precedent of tax adoptions. Seventeen more states adopted cigarette taxes; 16 introduced a general sales tax; 13 more enacted a corporate income tax; 12 more adopted an individual income tax; three more levied distilled spirits taxes; and one added a gasoline tax. State adoptions of such major taxes stopped in 1976 when New Jersey enacted an individual income tax in the face of a state supreme-court mandate. However, a constitutional amendment stipulated that all income-tax revenue be dedicated to property-tax relief (Salmore and Salmore 1998: 247).

Overall, what characterized this era was elite-driven change intended to modernize states' constitutions. Many reformers echoed de Tocqueville's criticism of state constitutions and embraced the more elitist federal document as their model.

Another facet of elite reform was a turn toward federal intervention to improve state and local governments. Federal intervention increased exponentially during this era, beginning with efforts to end racial desegregation. These interventions triggered needs to adjust state constitutions to federal programs and requirements and to ignore provisions overridden by federal laws (Kincaid, 1993), producing a bump-up in constitutional revision compared to the previous and following eras. The U.S. Supreme Court played a major role in altering state constitutional norms by, among other things, leading state high courts to interpret state constitutions in ways similar to federal constitutional interpretation, ordering "one person, one vote" legislative redistricting (Reynolds, 1964, striking down provisions of the Alabama Constitution), which destroyed historic community bases of representation, and voiding state prohibitions on abortion (Roe, 1973), which sparked a continuing nationalized kulturkampf having numerous state ramifications.

Another theme of the era was that modernization would enhance states' capacities for modern governance sufficiently to complement federal intervention by enabling states to manage burgeoning federal programs and also fend off needs for more intervention. Reformers argued that archaic constitutions presiding over horse-and-buggy governments invited federal intervention and that by modernizing state constitutions and waving goodbye to the good-time Charlies who occupied many governors' mansions (Sabato, 1983), states would be better able to counterbalance and complement federal power. One prominent reformer endorsed both federal intervention and state constitutional reform when he opined that many states "need to modernize their constitutions in order to bring them up to the requirements of the twentieth century" (Anderson, 1955: 213) while also contending that state and local governments "do their work much better" when they are "under firm and forward-looking national leadership" (Anderson, 1955: 243).

Reformers also sought to destroy traditional party organizations. The corruption associated with those "machine" organizations was seen as requiring root-and-branch reform. This era also saw the rise of public employee unions and organized interests in state capitals such that by 1980, "there were 15,064 organizations registered to lobby in
Many states instituted collective bargaining rights for public employees, though only a few (e.g., Florida and Hawaii) constitutionalized the right. Although this era produced tremendous benefits, such as greater racial and gender equality and social welfare, it left a legacy that became a target of revolt.

**CURRENT ERA: PUBLIC REVOLT AND MODERNIZING RESTRAINT, 1978-PRESENT**

Voter approval of California's Proposition 13 in 1978 can be said to mark the onset of the current state constitutional era, which has seen a reassertion of public control. The Jarvis-Gann citizen initiative amended California’s constitution by shifting property-tax valuation from current market values to acquisition values. It limited tax increases to 2 percent per year (unless a property is sold) and required two-thirds majorities to approve state statutes and local referenda increasing other taxes. Many observers argued that Proposition 13 triggered a nationwide tax revolt (e.g., Massachusetts' statutory Proposition 2½ in 1980) and helped usher Ronald Reagan (California’s 1967-75 governor) into the White House in 1981, although evidence for these claims is weak. Nevertheless, Proposition 13 acquired iconic status and marked the start of a popular revolt against the modernization and professionalization of government of the previous era, as reflected in efforts since 1978 to impose term limits on state legislators and tax-and-expenditure limits on state and local governments.

An outstanding characteristic of this era is that no state has adopted an individual or corporate income tax, general sales tax, or distilled spirits tax since New Jersey adopted its income tax in 1976 (although in 1991 Connecticut expanded its tax from capital gains and dividends to earned income as well). Since 1978, moreover, Californians have added more property tax limits and also rejected a 2004 proposition to lower from two-thirds to 55 percent the legislative vote needed to pass a budget and enact new budget-related taxes.

*Dearth of Constitutional Revision:* Another remarkable characteristic of this era is the paucity of constitutional revision. This is the most infertile era of state constitutional history (see Figure 11.2). Only two states have adopted revised constitutions: Georgia (1982) and Rhode Island (1986), although the latter was merely a rewrite involving eight amendments.

Calls to revise constitutions have failed, even though 14 constitutions require a call for a constitutional convention to be placed before voters periodically (e.g., every ten or 20 years). This idea originated in New York in 1846, but eight of the 14 states did not adopt it until the 1945-77 era, perhaps because it was included in the Model State Constitution (Benjamin, 2002). The provision is intended to facilitate modernization and prevent constitutions from being captured by special interests.
Yet, during 1978–2010, voters in these 14 states rejected 29 of 32 convention calls, and courts rejected one of the three approvals (Hawaii in 1996) because the “yes” vote did not reach a majority of those who voted in the election. Missouri, for instance, has a 20-year call cycle, but voters have not approved a call since 1942 (which produced the current 1945 constitution). Iowans rejected calls in 1980, 1990, 2000, and 2010, and, despite severe socioeconomic decline, Michiganders rejected convention calls in 1978, 1994, and 2010. New Yorkers, whose constitution is 118 years old, overwhelmingly rejected such a call in 1997. Oklahoma has a 20-year call cycle, but the legislature has not placed a call on the ballot since 1970.

In 2002, anticipating a convention, Alabamians mandated that any convention-proposed constitution be ratified by a majority of the state’s qualified electors voting on the question. However, Alabama, which has no periodic calls, failed to convene a convention, and, in 2003, voters rejected a gubernatorially initiated package of constitutional tax reforms (Thomson, 2006). Vermonters rejected a convention in 1982; in Florida, which also lacks periodic calls, voters rejected a constitutional revision in 1978. In 2002, Floridians required all citizen-initiated amendments to be accompanied by an economic impact statement (an idea also adopted in North Dakota in
in 2006, they required constitutional amendments or revisions to be approved by 60 percent of the electors voting on the measure.

The only document-wide revisions commonly approved by voters during this era have been calls, such as that in Texas in 1999, “to eliminate duplicative, executed, obsolete, archaic, and ineffective provisions” and to convert to gender- and race-neutral language. However, Nebraskans rejected a 2000 proposal to gender-neutralize their constitution.

Absent research on the dearth of contemporary constitutional revision, one can only speculate on the reasons. One possibility is the absence of a broadly accepted vision of state constitutionalism, such as Whig theory, Progressivism, or the Model State Constitution. These conceptions still influence debates, but no new rationale has surfaced to motivate revision. A recent call for “constitutional reform” by a project supported by the Ford Foundation, reiterated the previous era’s rationale that reform is needed “to make state governments more effective, equitable, and responsive, and to equip them to deal with the challenges of the twenty-first century” (Tarr 2006: 4). This rationale hardly stirs citizens’ souls. Instead, it is what many Americans distrust because they believe that Progressive-type reforms will increase state governments’ ability to tax and regulate them.

Another revision obstacle may be the decline of public trust in all governments since Watergate. Furthermore, on various confidence measures, state government often ranks below local and the federal government (Cole and Kincaid, 2006). Voters may doubt the ability of any legislature, commission, or convention to produce an acceptable new constitution.

Increased intrastate party competition since the 1930s may also inhibit revision. Rising party competition was especially evident during the previous era (1945–77) when reliably one-party states disappeared, especially as Republicans gained ground in the South. There was a further increase in competitive states after 1977 (Jewell and Morehouse, 2001). Polarization among party elites and activists during the current era (McCarty et al., 2008; Abramowitz, 2010) has likely further weakened possibilities for reaching bipartisan compromises on constitutional revision. The parties espouse different views on the nature of government. The composition of a constitutional convention, moreover, could be similar to that of presidential nominating conventions in which the activists who capture delegate seats hold more extreme views than those of the median voter.

The rise of the religious right since the early 1970s has added another impediment to revision. A constitutional convention would attract ardent proponents and opponents of abortion, affirmative action, gay marriage, and other divisive cultural issues. Such activists could easily derail a convention.

Another possible obstacle is that the tremendous increase in the number of interest groups operating in state capitals since the 1960s, coupled with the diversification of state economies and state populations, has reduced the ability of reformers and state leaders to generate a common will and rationale for constitutional revision. The heightened organizational consciousness of racial and ethnic minorities in the current era
adds more voices to revision politics. Revision, moreover, affects powerful private and public interests. Hence, centrifugal forces may predominate over the centripetal forces of compromise needed for revision. The multiplicity of entrenched interests may also make groups risk averse. Why open a Pandora's Box with constitutional revision when many interests can achieve objectives through statutes and amendments?

The vastly increased scope and depth of state government since the 1960s has created considerable complexity and interdependence that can be difficult for citizens to sort out in a convention. Governance could be unsettled and complicated, even inadvertently, by constitutional revision. State high courts have become more activist as well, promulgating major policies through constitutional interpretations that could be altered or reversed by constitutional revision. Prominent examples are the New Jersey Supreme Court's 1982 *Mount Laurel II* decision, which ordered all municipalities to permit construction of specified numbers of low-income homes, and *Abbott* decisions, beginning in 1985, that require redistribution of state funds to poor school districts. Recent political developments have led the court to weaken these controversial policies such that neither proponents nor opponents would probably want to risk combat in a constitutional revision process. Likewise, in California, citizen constitutional and statutory initiatives have cluttered government with so many rules and policies favorable to diverse interests that a call for an overall revision of the 1879 constitution to streamline and rationalize state and local government could encounter a buzz saw of resistance (cf. Cain, 2006).

Another possible reason for the dearth of revision is the massive increase of federal involvement in state and local governments since the late 1960s. State and local governance is so infused with federal funds and regulations that disentangling purely state functions for purposes of constitutional revision could be difficult. This massive federal presence also narrows the space available for state constitutional action. Another recent example is the U.S. Supreme Court's *McDonald* (2010) decision, which incorporated the Second Amendment to the federal Constitution into the Fourteenth Amendment, thereby recognizing a federal individual right to bear arms. The last time the Court incorporated a provision of the U.S. Bill of Rights was in 1969 (*Benton*). Fifty-five percent of all incorporations occurred during the 1960s, and all narrowed the space available for state constitutional action. *McDonald* will constrain state constitutional and statutory regulation of guns.

The dearth of revision is reflected even in Florida, the only state having a constitutional requirement for the three branches of government to appoint a constitution revision commission every twenty years. Voters rejected all of the first commission's (1977–8) proposals, but approved eight of nine proposals proffered by the second commission (1997–8). However, except for an equal-rights-for-women amendment, the 1998 proposals involved modest technical matters and government reorganization, not significant constitutional change. To achieve success, the commission avoided volatile issues such as abortion, homosexuality, and medical marijuana (Salokar 2006).
Consequently, Florida's initiative process has produced more significant constitutional changes than its revision process. Floridians have used constitutional initiatives to, for example, prohibit indoor smoking, animal cruelty, and gay marriage; impose tax and revenue limits, term limits on legislators, medical practice, malpractice, and tort reforms; and mandate government transparency, English as the official state language, universal access to pre-Kindergarten, reduced K-12 class sizes, and establishment of an Everglades Trust Fund.

Amendment Proliferation: Although many characteristics of the contemporary era appear to hinder constitutional revision, these factors do not impede piecemeal amendments. Amendomania (Comment, 1949) is flourishing. Amendment rather than revision may be more successful because single amendments affect fewer powerful interests than revision. Revision packages of constitutional changes easily become a "can of worms" rejected because of one or two controversial provisions or because different interests reject different provisions of a package. A revision also can be rejected if voters object to an unrelated proposition on the ballot, as happened with Florida's 1978 revision proposals, which suffered a backlash from voters opposed to an initiated amendment to establish casino gambling. Piecemeal amendments originated by legislatures have already surmounted major interest-group hurdles, such as super-majority legislative votes, before they reach the citizens. In 1996, New Mexicans even allowed amendments to be proposed by an independent commission established by the legislature for that purpose. In addition, amendments initiated by citizens circumvent the legislative interest-group process and appeal directly to voters, thus requiring interest groups to organize differently and behave more diffusely than when they lobby legislators or constitutional conventions and commissions. Failed amendments, moreover, can be proposed again more easily than can rejected revision packages.

It might be argued that change through a convention or commission is superior because those bodies can manage change logically and coherently. Piecemeal amendments can produce a hodgepodge of incoherent provisions. However, few conventions or commissions produce logical, coherent documents because their processes are subject to political forces during deliberations and their products are subject to electoral forces during ratification. Prospective concerns about electoral forces shape convention or commission deliberations. Furthermore, after voters approve a new constitution, it experiences later amendment.

Amendment may also trump revision because another characteristic of this era is that use of the initiative (constitutional and statutory) has reached historic highs. The average number of initiatives "doubled from 31 a year in the 1970s to 62 a year in the 2000s" (Bowser, 2009: 18). Constitutional amendment by initiative is available in 18 states: Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. Successful initiatives encourage legislators and interest groups in other states to propose similar policies.

In summary, the current era has been defined by voter enthusiasm for piecemeal amendments that restrain government, and voter aversion to overall revision.
Tax and Expenditure Limits: Amendment support has been driven partly by public desires for tax and expenditure limits (TELs). TELs reflect a backlash against the Progressively driven modernization movements of the previous two eras, which fostered income and sales tax adoptions, especially during the Great Depression when widespread revolts targeted the mainstay of state and local finance—the property tax. Revolts became so severe in Chicago that Mayor Anton Cermak urged Congress to send “money now or militia later” (Beito, 2009: 78), and Illinois enacted a sales tax in 1933. Numerous constitutional limits were placed on property taxes, a pattern revived by California’s Proposition 13.

In 2003, Texans approved an amendment, labeled Proposition 13, permitting counties, cities, towns, and junior-college districts to freeze property taxes on the residence homesteads of the disabled and elderly. Arkansans approved a new property tax limit in 2000, and Indians approved a tax cap in 2010. Many amendments grant exemptions for specific taxpayers such as widows and widowers (e.g. Florida 1988), disabled veterans (e.g. New Mexico 1998), and individuals age 65 or more (e.g. Tennessee 2006) and for specific property such as motor vehicles owned by former prisoners of war (Georgia 1998) and home additions constructed to house elderly parents, grandparents, or a spouse (Florida 2002). In 2004, Oregonians authorized owners whose property values are reduced by environmental or land-use regulations to claim compensation. If government fails to compensate within two years, the claimant can use the property under regulations in place when the property was purchased. Voters weakened this provision, however, by a 2007 amendment.

TELs broader than Proposition 13 also arrived in 1978 when Michiganders approved the Headlee Amendment, which limits the state’s own-source revenue collection to no more than 9.49 percent of state personal income. If revenue exceeds the limit by more than one percent, the excess must be remitted to taxpayers. If the excess falls below one percent, it can be deposited in the state’s budget stabilization (“rainy day”) fund. The amendment also curbs backdoor tax increases by prohibiting the state from reducing its funding of existing state mandates on local governments. The state also cannot deny reimbursement to local governments for new mandates or reduce the proportion of state funds awarded all local governments below the level of fiscal year 1979. In 1979, Washingtonians limited the growth of state revenue to the growth of total state personal income. Missouri’s Hancock Amendment (1980) limits total state revenues and expenses to a percentage of state personal income, requires the state to fund mandates on local governments, and requires new local taxes, licenses, and fees to be approved by local voters. In 1982, Mainers required the state’s income tax to be adjusted for inflation, and Floridians limited state revenue growth in 1994. Such amendments gained traction in part because revenue growth in most states during recent decades has exceeded personal-income growth.

After rejecting a TEL in 1986, Coloradans approved a new device in 1992—a Taxpayer Bill of Rights (TABOR). This amendment received considerable national publicity, but was later weakened and did not spread to other states. In fact, Nebraskans rejected a TABOR cap on their state budget in 2006. Utahans rejected a TEL in 1988, and Oregonians rejected major TELs in 2000 and 2006.
Other approaches to tax limits include, for example, a 1993 Texas amendment prohibiting the legislature from imposing a personal income tax without voter approval, a 1994 Florida amendment allowing initiated amendments to cover multiple subjects, a 1996 Florida requirement that new taxes to be enacted by constitutional amendment be approved by two-thirds of the voters, 1996 Nevada and South Dakota rules for a two-thirds legislative vote to enact a new tax or tax increase, and a 1998 Montana amendment requiring an election and voter approval of any new or increased tax enacted by state or local governments, school districts, and other taxing districts. In 2010, Nevadans rejected an amendment to allow the legislature to make certain tax changes without voter approval. Maine finally repealed its poll tax in 1978, and, in 1981, Washington repealed its inheritance and gift taxes and limited the state's death tax to the allowable federal estate-tax credit. In 2000, South Dakotans repealed the inheritance tax and prohibited the legislature from enacting a new one.

Voters have not embraced all anti-tax amendments. In 1983, Ohioans rejected the need for a three-fifths legislative vote to raise taxes; in 1999, Iowans rejected a proposal to require a 60 percent legislative vote to increase taxes. A few small tax increases have been adopted, such as a 2008 Minnesota vote increasing the sales tax by three-eighths of one percent. In 2010, Arizonans approved a temporary (three-year) sales tax increase. However, even when taxes are maintained, there have been numerous amendments dedicating specific tax revenues to specific purposes, such as a 1988 California vote requiring a minimum of 40 percent of the state's budget to be spent on education and a 2006 Minnesota vote dedicating 40 percent of vehicle sales tax revenues to public transportation. Voters also have approved many specific trust funds (e.g. the Alabama Capital Improvement Trust Fund and County and Municipal Government Capital Improvement Trust Fund in 2000).

Limits on state borrowing proliferated during the 1840s, and limits on local borrowing spread after the Panic of 1873, thus reducing the need for contemporary restraints. In 1988, Missourians even loosened a restraint by mandating a four-sevenths majority of those voting to approve bond issues for constructing and improving schools, roads, bridges, and job development projects on municipal, primary, and general election days, while keeping a two-thirds majority rule for other election days. In 2010, Arkansans made it easier for their state to issue bonds to attract industry, and Arizonans authorized more higher education bonds in 2006. In 2008, though, New Jersey voters expanded the categories of bonds needing their approval.

A marked characteristic of this era also has been adoption of a rainy day fund by 47 states. Prior to this era, only New York (1945), Florida (1959), and Tennessee (1972) had such a fund. Most recently, Missourians created a budget reserve fund in 2000 for use by the governor with approval of two-thirds of the legislature during a disaster or revenue shortfall. In 2007, Washingtonians approved transferring 1 percent of general state revenues to a rainy day fund every year. However, Alabamans rejected a fund in 2002.

**Term Limits:** Although term limits date back to Pennsylvania's 1776 constitution, the federal Constitution, much to Anti-Federalists' objections, did not follow the precedent
of the Articles of Confederation by term limiting members of Congress. However, rotation in office and popular support for it during the nineteenth century obviated the need to constitutionalize term limits, but when the Progressives' push to professionalize state government contributed to rising incumbent reelectios after World War II, a term-limits movement emerged during the late 1980s and succeeded in limiting legislators in twenty-one states during 1990–6. The movement lost steam by 1997, although Nebraskans constitutionalized legislator term limits in 2000 because their 1992 and 1994 approvals were voided by their supreme court.

Thus far, the only other constitutional term limits vacated by a state supreme court occurred in Oregon in 2002. The court held that the ballot measure violated the constitution's single-subject rule. Fourteen states now have standing constitutional limits. By contrast, of the six states that adopted statutory term limits, only Maine's law remains intact. Term-limit laws were struck down by the high courts of Massachusetts (1997), Washington (1998), and Wyoming (2004) and repealed by the legislatures of Idaho (2002) and Utah (2003). Thus, while the term-limits movement has made little progress since 1996, voters have not repealed any term limits. In 2006, South Dakotans rejected a package of legislatively proposed constitutional changes because it included a term-limits repeal. They refused to repeal term limits again in 2008. Only Mississippians have rejected constitutional limits on legislators (1999). In 2006, Coloradans rejected limits on appellate court judges. However, voters in Arkansas (2004), Montana (2004), and Maine (2007) rejected proposals to increase the number of terms served by limited legislators. In 1992, Ohioans imposed term limits on their lieutenant governor (governor was already term limited), attorney general, secretary of state, treasurer, and auditor; in 2010, Oklahomans approved term limits for the same officers as well as the state labor commissioner, schools superintendent, and insurance commissioner. In 2008, Louisiana voters imposed term limits on members of boards and commissions.

Additionally, Minnesotans adopted recall of state officials in 1996; New Mexicans approved recall of county officials in 1996; and, in 2010, Illinoisans adopted recall of their governor in response to scandals that precipitated Governor Rod Blagojevich's impeachment and removal from office in January 2009.

*Government Organization, Structure, and Powers:* Government organization continues to be subject to constitutional adjustment. In 1996, for example, North Carolinians finally gave their governor a veto power; in 1995, Mainers gave their governor an item veto. In 2002, Wyoming voters rejected an amendment to limit the governor's item veto only to appropriations bills. In 1990 and 2008, though, Wisconsinites deprived their governor of the item-veto power to create new words in bills or veto words and numbers in appropriations bills.

In 1995, Texans removed the office of treasurer from their constitution, as did Minnesotans in 1998, while voters in North Dakota (2000) and Nebraska (2010) rejected such a measure. Texans (1991) and Utahans (2010) amended their constitutions to establish an ethics commission. In 1988, Floridians created a Department of Veterans Affairs and a Department of Elder Affairs.
During this era, several more states authorized annual legislative sessions (e.g., Washington in 1979, Kentucky in 2000, Arkansas in 2008, and Oregon in 2010), although the legislature is limited every other year in Arkansas to a 30-day budget session and to a 35-day session in Oregon. In 1998, Nevadans reined in their legislature to 120 days every two years. Coloradans did the same for their annual legislative sessions. In 1980, Illinoisans reduced their house of representatives from 177 to 118 members, and, in 1994, they moved adjournment from June 30 to May 31. In 2010, Alaskans rejected adding seats to their legislature. In 2004, Nebraskans mandated that their legislature achieve a two-thirds rather than simple-majority vote to amend, repeal, modify, or impair an initiated statute enacted by the people.

Judicial selection has become contested in recent years, and the Missouri Plan—a product of the previous two eras—has not fared well against direct election. In 1987, Ohioans rejected a proposal to abolish direct election of their supreme court and appeals court judges. In 2000, Arkansans approved nonpartisan judicial elections, and Floridians declined to end elections of circuit and county court judges. In South Dakota, where the Missouri Plan covers appellate judges, voters in 2004 rejected merit selection for circuit court judges. In a highly publicized and externally financed 2010 vote in which former U.S. Supreme Court Justice Sandra Day O'Connor urged Nevadans to adopt the Missouri Plan, voters rejected the plan by 57.7 percent. Otherwise, in Hawaii, where judges are appointed by the governor with legislative consent, voters refused to repeal judges' mandatory 70-year-old retirement age. Reflecting public concern about high-court activism, moreover, Oklahomans in 2010 forbid their state courts from using international law or Sharia in their rulings.

In 2002, Rhode Islanders answered the following ballot question affirmatively: “Should the Rhode Island Constitution be changed to eliminate Article 6, Section 10, which preserves to the General Assembly today broad powers granted to it by King Charles II of England in 1663 and also be changed to expressly provide that the legislative, executive, and judicial branches of Rhode Island government are to be separate and co-equal consistent with the American system of government?” An amendment was approved in 2004.

Transparency has been a public concern as well. In 2004, for example, Californians enhanced public access to government information. In 2007, Texans required a recorded vote to be taken by their house of representatives on final passage of any bill or resolution proposing or approving a constitutional amendment, or any other non-ceremonial resolution, and to provide public access to those votes on the internet for two years.

A few state constitutions (e.g., Utah in 1990, Indiana in 2004, and Colorado 2010) have been amended to provide for relocation of the state capital and continuity of government in the event of a major disaster.

Local Government and State-Local Relations: Given that local governments are constitutional creatures of the states, they figure prominently in state constitutions. The principal trend during the current era has been to try to restrict state imposition of unfunded mandates on local governments (e.g., the 1978 Headlee Amendment in Michigan, Florida in 1990, Maine in 1992, Oregon in 1996 and 2000, and Louisiana in
In 2004, Californians provided that local property and sales tax revenues stay with local governments rather than being sent to the state treasury, except if the governor declares an emergency and two-thirds of the legislature concurs. In 2006, Virginians allowed local governments to create tax increment finance (TIF) districts, but in 1986, Coloradans required any franchise to be granted by a home-rule municipality to be subject to initiative and referendum. In 2002, Floridians required free pre-kindergarten education to be offered to all 4-year-olds.

Several states (e.g., Colorado in 1980, Nebraska in 1996 and 1998, and Alabama in 2008) imposed requirements for voter approval of local government mergers. In 2000, South Dakotans authorized local voters to initiate ballot measures to merge, eliminate, or jointly finance local offices, functions, or governments so long as any measure is approved by a majority vote in each affected government unit. In 1998, Californians authorized municipalities to enter sales-tax revenue-sharing agreements with other local governments. In New Hampshire in 2000, however, voters rejected municipal home-rule by a narrow margin. Otherwise, in Texas (2001), voters approved municipal donations of outdated and surplus firefighting equipment to less-developed countries; in 2003, they approved such donations to the Texas Forest Service.

**Campaigns, Elections, and Voting:** In this post-Watergate era, election reform has been on state agendas, but reforms have been managed more through statutes than constitutional change. The Florida Sunshine Amendment of 1976, which was the first successful constitutional initiative in Florida’s history, imposed certain disclosure requirements on state and local candidates and election officials. A sweeping 1998 amendment authorized public financing of campaigns for statewide candidates who consent to campaign spending limits, mandated that ballot-access requirements for independent and minor-party candidates not exceed those for majority-party candidates, permitted all electors to vote in any party’s primary if the winner will have no general-election opposition, and made school-board elections nonpartisan.

In 1996, Nevadans approved campaign contribution limits, and Coloradans approved an amendment that included caps on individual and PAC contributions to candidates, a ban on direct corporate and union contributions, stricter disclosure rules for campaign contributions, and voluntary spending limits. Coloradans strengthened contribution and spending limits in 2002 and also authorized citizens to organize small-donor committees. In 1984, Coloradans had approved a voting integrity measure and also authorized motor-voter registration. In 2002, Arkansans repealed a constitutional election-purity rule that ballots be traceable back to individual voters through a tracking number.

Constitutional changes in California have included, for example, disqualification for federal, state, and local office of a candidate adjudged to have libeled an opponent (1984); prohibition of party endorsements of candidates for nonpartisan offices (1986); extension to 180 days the time available to hold a recall election (1994); a requirement to count every vote legally cast (2002), which was a reaction to the 2000 recount controversy in Florida; approval of a nonpartisan Citizens Redistricting Commission (2008); and establishment of a single primary open to all voters, with the top two winners competing

In 2010, Floridians mandated that legislative and congressional districts be drawn so as to create “fairness,” be “as equal in population as feasible,” and utilize “city, county and geographical boundaries.” In 2010, Oklahomans approved a redistricting commission consisting of three Democrats and three Republicans. In 2006, they authorized package stores to sell alcoholic beverages on election days. Oregonians in 2002 prohibited circulators of initiative petitions from being paid on a per-signature basis, and Alaskans in 2004 required initiative petitions to have signatures from more voting districts.

In 1977, Ohioans ensured the voting eligibility of persons registered for at least 30 days; in 2008, Marylanders approved early voting; and in 2010, Vermont voters allowed 17-year-olds to vote in primaries if they will be 18 by the general election. A number of states, like New Jersey in 2007, removed such words as “idiot” and “insane person” from the voter qualifications section of their constitution and substituted language such as “person[s] who have been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting.”

**Civil Rights:** The proliferation of “little ERAs” in the early 1970s did not extend into the current era. Vermont rejected an ERA in 1986. Only Florida and Iowa adopted such amendments, both in 1998. Florida’s amendment also bans discrimination based on national origin and physical disability. Eighteen constitutions (including California from 1879 and Wyoming from 1890) have such a provision now. Similarly, a movement to constitutionalize a right to privacy, which began with Illinois in 1970, did not accelerate in the current era. Only Hawaii (1978) and Florida (1980) added an explicit right to privacy to their bills of rights.

Most prevalent has been voter approval of victims’ bills of rights in about twenty states, starting with California in 1982 (and supplemented in 2008). A movement also has developed to make the right to bear arms more constitutionally explicit (e.g. North Dakota in 1984, Maine in 1987, Wisconsin in 1998, and Kansas in 2010). Idiosyncratically, Californians adopted a reporter shield right in 1980; in 2004, they constitutionalized a right to engage in stem-cell research. In 1998, Nebraskans added an equal-protection-of-the-laws clause to their constitution, while South Carolina repealed its miscegenation clause, as did Alabama in 2000. In 2009, Texans elevated a statutory right of access to public beaches to a constitutional right. Washingtonians prohibited student busing for racial integration in 1978, and New Mexicans rejected a legal holiday honoring Cesar Chavez in 2002, but Wyoming constitutionally strengthened equalization of school funding in 2006. A number of states, such as Missouri (1998), Alabama (2000), California (2000), and Arkansas (2006) have constitutionalized a right of religious organizations and other nonprofits to conduct bingo games, raffles, and sweepstakes.

This era has not, however, been friendly to others. In 2006, Arizonans denied publicly funded services to illegal aliens (California’s 1994 Proposition 187 was a statute that was quickly blocked by federal courts). In 1998, Tennessee voters repealed their constitution’s requirement that prisons be “comfortable.” Montanans amended their constitution to specify that criminal law and punishment are based on principles not only of
prevention and reformation but also public safety and restitution. Massachusetts limited the voting rights of incarcerated felons in 2000, and Rhode Island denied such rights in 2006 (but with post-prison restoration). New Jersey voters in 2000 authorized their legislature to disclose publicly information such as the identity and location of sex offenders. In 2010, North Carolinians prohibited convicted felons from serving in the legislature and other offices. In 2002, though, Virginians authorized their supreme court to consider DNA evidence that might exonerate a convicted felon. In 2009, New Yorkers permitted prisoners to perform volunteer work for nonprofit organizations.

**Abortion, Assisted Suicide, and Stem-Cell Research:** The U.S. Supreme Court nationalized legal abortion in 1973 but left assisted suicide to the states in 1996. Despite controversies over these issues, there has been less state constitutional than statutory action. In 1984, Coloradans banned public funding for abortions while Washingtonians rejected such a ban. In 2004, Floridians amended their constitution to allow the legislature to enact a parental notification law; in 2008, Californians rejected such notification. In 2008 and 2010, Coloradans rejected amendments applying the word "person" to any fertilized egg, embryo, or fetus.

Interestingly, voters have declined to treat assisted suicide as a constitutional right. Voters approved assisted suicide statutes in Oregon (1997) and Washington (2000); voters in California (1992), Michigan (1998), and Maine (2000) rejected such statutes. In 2009, Montana's supreme court ruled that state statutes protect physicians from prosecution for aiding the deaths of terminally ill patients but declined to declare assisted suicide a state constitutional right.

Stem-cell research became controversial when President George W. Bush curtailed federal support in 2001. This produced reactions in a number of states, with voters in California (2004) and Michigan (2008) constitutionally approving it. Missouri voters also approved it, but with some limits.

**Affirmative Action:** During this era, affirmative action has been subject to constitutional challenges. In 1996, California became the first state to ban affirmative action by public institutions. Subsequently, voters approved bans in Nebraska (2008), Michigan (2006), and Arizona (2010). Coloradans defeated a proposed ban in 2008. By contrast, in 1997, New Yorkers approved preferential treatment of veterans in civil service, and, in 2004, Louisianans approved preference points for veterans in the civil service and state police service.

**English as Official State Language**

Responding to a rising Latino population, a movement emerged during the current era to make English the official language of states. Constitutional amendments accomplishing this were approved in California (1986), Colorado and Florida (1988), Alabama (1990), Arizona (2006), Missouri (2008), and Oklahoma (2010). Earlier constitutional
adoptions of English occurred in Louisiana (1812) as a precondition of admission to the union, Nebraska (1920), Massachusetts (1975), and Hawaii (1978).

**Eminent Domain:** The U.S. Supreme Court’s 2005 *Kelo* decision upholding the authority of local governments to take private property and transfer it to another private party for economic development triggered a counter movement in the states. Nevadans approved a Property Owners Bill of Rights in 2006 and adopted it in 2008. Voters also approved eminent domain restrictions in Florida, Georgia, Louisiana, Michigan, New Hampshire, North Dakota, and South Carolina in 2006, followed by California in 2008. In 2007, Texans approved an amendment providing that if the purpose of a taking is not implemented, the original owner can repurchase the land for the price paid by the government to acquire it. Voters in a few states (e.g., California and Idaho in 2006) rejected eminent domain restrictions.

**Environmental Protection, Animal Rights, and Hunting:** Although more than 21 state constitutions have environmental protection provisions and six guarantee some environmental rights (Wilson 2004), the environmental rights movement begun in the previous era did not continue in the current era. Instead, voters have approved numerous amendments for specific purposes such as forest preservation in Georgia (2008), a Michigan Natural Resources Trust Fund (1984), and a Clean Water Trust Fund in New Mexico (2006). In 1993, Maine voters mandated a two-thirds legislative vote to reduce the size or change the purpose of any state park or recreation land.

By contrast, animal rights emerged as an issue in the current era. In 1988, for example, South Dakotans banned corporate hog farms. In 2002, Floridians protected pregnant pigs, Oklahomans banned cockfighting, and Georgians provided for sterilization of dogs and cats. Californians prohibited narrow confinement of farm animals in 2008, and Ohioans created a Livestock Care Standards Board in 2010, while Missourians imposed constitutional rules on dog breeders. Alabamans, though, approved amendments to promote production and marketing of sheep and goats (2002) and shrimp and seafood (2004).

Rights to hunt and fish first appeared in the Vermont Constitution of 1777. Rights to fish were included in the constitutions of Rhode Island in 1844 and California in 1910. In response to animal-rights and environmental advocates, voters have recently approved a spate of amendments guaranteeing rights to hunt and fish in Alabama (1996), Arkansas (2010), Georgia (2006), Louisiana (2004), Minnesota (1998), Montana (2004), North Dakota (2000), Oklahoma (2008), South Carolina (2010), Tennessee (2010), Virginia (2000), and Wisconsin (2003), although Arizonans rejected such a right in 2010. In 1998, Utah voters imposed a two-thirds vote requirement in order to enact an initiated state law that would allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife. In 2004, Alaskans rejected an amendment to prohibit baiting or feeding bears in order to hunt, photograph, or view them. In 2008, they rejected an amendment to prohibit the shooting of wolves, wolverines, or grizzly bears on the day they are spotted from aircraft. In 2010, North Dakotans rejected a ban on fenced hunting on game preserves.
Gambling and Lotteries: The contemporary era has witnessed widespread adoptions of state lotteries (43 at present) as state officials have searched for new revenue sources in the face of public resistance to taxes. However, only a few have been established by constitutional amendment, such as Colorado (1980), California (1984), Florida (1986), Wisconsin (1987 and 1993), Texas (1991), South Carolina (2000), and Arkansas (2008). In 1986, North Dakotans rejected a lottery, but in 2002, they approved a statutory initiative for North Dakota to join a multi-state lottery. The paucity of constitutional action might be due to fears by proponents that constitutional measures might fail on the ballot. Voters in a number of states, such as Colorado (1984), Florida (1994), and Oklahoma (1998) have rejected constitutional proposals to establish casino gambling, though more recently, voters may have become more receptive, as in Ohio’s 2009 constitutional vote approving casinos in the state’s four major cities. However, in 2004, Michiganders made any new forms of gambling subject to voter approval.

Health Issues and Tort Reform: Medical marijuana has achieved legality in 15 states since first being legalized by statute in California (1996), but only Nevada in 1998 and 2000 and Colorado in 2000 have enshrined it in their constitutions, presumably making it less vulnerable to repeal than the statutes in the other 13 states. Meanwhile, a few states have constitutionalized prohibitions on tobacco smoking in enclosed workplaces (e.g., Florida in 2002) or all indoor places. By contrast, Oregon voters in 2007 rejected an 84.5-cent cigarette-tax increase to fund a Healthy Kids Program, and Californians rejected a similar amendment in 2006. A few states (e.g., Oklahoma in 2000) established some type of tobacco-settlement trust fund.

In 2003, Texans approved a constitutional limit on medical malpractice awards. In 2004, Floridians prohibited the licensing of physicians adjudged to have had three malpractice incidents. They also imposed limits on amounts of attorneys’ contingency fees.

Most dramatic, and in direct contradiction of the federal Affordable Care Act of 2010, were constitutional amendments approved in Arizona and Oklahoma in 2010 prohibiting the enactment of laws or rules requiring any person, employer, or health-care provider to participate in any health-care program.

Labor and Unions: Minimum-wage increases require constitutional action in some states. Increases were approved, for example, by voters in Florida and Nevada in 2004 and Ohio in 2006, but not by voters in Missouri in 1996.


In 2001, Oklahomans banned new employment contracts that require joining, remaining, quitting, or paying dues to a labor organization to get or keep a job, or paying a labor union or obtaining labor union approval to get or keep a job. Employees must approve deductions from wages paid to unions.

In 2010, Save Our Secret Ballot pushed four states—Arizona, South Carolina, South Dakota, and Utah—to pass constitutional amendments to ban card check for union
organizing. The South Dakota amendment was phrased as a right to secret ballots in federal, state, and union representation elections. The National Labor Relations Board has challenged these amendments, arguing they are preempted by federal laws.

Other Issues: Ohioans rejected a 1982 amendment to allow the Ohio Rail Transportation Authority to levy a 1 percent sales tax to construct high-speed rail. In 2004, Floridians repealed an earlier amendment to their constitution that required the state to build and operate high-speed ground transport. In 2011, Florida, Ohio, and Wisconsin rejected federal grants for high-speed rail, and President Barack Obama sharply reduced his high-speed rail initiative in a budget compromise with Congress. In a seemingly ill-timed move in 2006, South Carolinians authorized “prudent investing in all stocks as a means of seeking higher profits” for the state’s retirement systems.

**Resurgence or Death of State Constitutionalism?**

In certain respects, state constitutions have resurred in recent decades, as reflected in the large numbers of amendments on diverse subjects approved by voters. Also, since the 1980s, originalists have promoted the relevance of the first state constitutions by combining them for clues about the original meanings of the federal Constitution, although there is debate over the appropriate scope of this comparison (Nitz, 2011). Originalists have turned to contemporary state constitutions, too, in efforts by some to expand state high-court activism and by others to deter state high courts from interpreting the state documents as “living” constitutions.

The most prominent manifestation of state constitutional resurgence has been the so-called new judicial federalism whereby state high courts, legislatures, and voters grant more rights protections than the U.S. Supreme Court affords under the U.S. Constitution. States also recognize rights not available under the federal Constitution. The movement’s paradigmatic cases involved shopping malls. In 1972, the U.S. Supreme Court held that protestors had no First Amendment right to distribute leaflets in a privately owned shopping mall (Lloyd, 1972). In 1979, California’s supreme court ruled that protestors do have such a right under California’s declaration of rights (Robins, 1979). In 1980, the U.S. Supreme Court declined to reverse the California court, acknowledging instead the state court’s authority to employ its constitution to protect rights not recognized by the U.S. Supreme Court. Subsequently, in 1983, the U.S. Supreme Court clarified state authority by holding that when a state court makes a “plain statement” basing a rights ruling solely on “independent and adequate” state constitutional grounds, the ruling is immune from U.S. Supreme Court review (Michigan, 1983).

State high courts have since issued hundreds of such rulings, and a huge and mostly supportive literature has developed around the new judicial federalism. For example, while the U.S. Supreme Court since Earl Warren’s era (1953–69) has constrained the
JOHN KINCAID

exclusionary rule and restrained criminal defendants’ rights, many state courts have retained and expanded Warren-era precedents under their constitutions. The New Jersey Supreme Court has been especially active, ruling, for example, in contradiction of the U.S. Supreme Court (California, 1988) that under the New Jersey Constitution’s search-and-seizure provision, police need a warrant to search a person’s curbside trash (State, 1990). A few other high courts (e.g. New Hampshire in 2003) have ruled similarly. Consequently, in these states, federal agents do not need a warrant to search curbside trash, but state and local police do. In 2008, Vermont’s Supreme Court departed from federal precedents by ruling that a warrantless helicopter survey of a person’s yard in order to discover marijuana violated the defendant’s state constitutional rights of privacy (State 2008). Another example is a Tennessee Supreme Court ruling (Planned Parenthood 2000) that the state constitution’s privacy provisions make abortion a “fundamental right” and that any law related to abortion is subject to strict judicial scrutiny—a greater abortion protection than required by the U.S. Constitution.

Some advocates urge state high courts to uncouple themselves from canons of federal constitutional interpretation so as to forge independent state constitutional rules of interpretation. Others argue a much more assertive role whereby state courts would interpret state constitutions oppositionally “with the deliberate purpose of undermining acts of the national government that the state court believes threaten liberty” (Gardner, 2005: 19). Others argue that state constitutional interpretation should perform an important instructive function for the federal courts.

However, efforts by the bench and the bar to capture state constitutions via interpretation are encountering opposition. In 1990, for example, Californians amended their constitution to stipulate that criminal defendants have no greater constitutional rights than those available under the federal Constitution. In 1982, Floridians mandated that their constitution’s search-and-seizure provisions be interpreted in lockstep with the U.S. Supreme Court’s interpretation of the Fourth Amendment to the U.S. Constitution. In 2000, they approved an amendment preserving capital punishment and requiring the state constitution’s cruel-or-unusual-punishment provision to conform to the U.S. Supreme Court’s interpretation of the U.S. Eighth Amendment. After the Florida Supreme Court voided this amendment, voters in 2002 changed their constitution’s “cruel or unusual punishment” provision to “cruel and unusual punishment” in conformity with the Eighth Amendment and again mandated that their constitution be conformed to the U.S. Supreme Court’s Eighth Amendment jurisprudence.

Opposition also is expressed by voters unseating judges whose state constitutional interpretations violate prevailing norms and by voters rejecting proposals to abolish judicial elections that have been forwarded by such prominent groups as Justice O’Connor’s Judicial Selection Initiative, Justice at Stake, the Brennan Center for Justice, American Judicature Society, League of Women Voters, Open Society Institute, National Center for State Courts, and New York Times. The political, economic, and cultural stakes now involved in state constitutional interpretation are reflected in dramatically increased spending on judicial elections, as seen in the sudden infusion of large sums of money into an April 2011 nonpartisan Wisconsin judicial election that pitted
a conservative incumbent against a liberal challenger whom public employee unions believed would vote to nullify the state's new Republican-supported anti-collective bargaining statute. The high-court activism characteristic of the current era appears to be provoking voter desires for restraints. Historically, state high courts have been, to borrow Alexander Hamilton's phrase, "the least dangerous branch" of state government, but many voters no longer believe this.

Both high-court interpretation and voter amendment of constitutions reflect the demise of state constitutionalism as a grand vision of the body politic. Whereas constitutional development and revision in previous centuries often involved efforts to define or redefine a state's polity, the dearth of constitutional revision since the 1970s appears to reflect an inability to forward any compelling vision or definition of state political life. Instead, state constitutions are mainly arenas for interest-group contests. A key contest is between advocates of interpretation and advocates of amendment. Most advocates of interpretation seek expansions of state powers; many, perhaps most, advocates of amendment seek restraints. However, given that voters can initiate amendments in 18 states and must approve amendments in 49 states, the historically most fundamental feature of state constitutionalism seems to be enduring, namely, the constitution as the people's limit on state power.

References


Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W. 3d 1 (Tenn 2000).


