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Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania

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RIGHTS, REVOLUTION, AND THE PARADOX OF CONSTITUTIONALISM: THE PROCESSES OF CONSTITUTIONAL CHANGE IN PENNSYLVANIA

by Harry L. Witte*

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I. INTRODUCTION

By the eve of the American Revolution, Pennsylvania already possessed a constitutional tradition that encompassed both a significant degree of self-governance and respect for individual rights. Both strands of that tradition were preserved and expanded in 1776, when the Commonwealth joined the Revolution, framed its first independent constitution, and formed a new government. Two fundamental principles were set down in the 1776 constitution: the inviolability of basic, individual rights, and the inherent right of the people to control, reform, or abolish their government as they saw fit. Although each principle may be seen as critical to one ideal of democracy or another, together they placed the right of the majority to govern and the right of minorities to be free of certain reaches of government in potential opposition.

Despite the tension between these constitutional values, during the Commonwealth’s first century of independence, Pennsylvanians adapted remarkably well to both, although not without exception. Between 1789 and 1874, the people exercised their fundamental right of sovereignty and, in conventions of their delegates, framed three new constitutions. Although these constitutions, like their revolutionary antecedent of 1776, were proposed, debated, and adopted during periods of intense factional strife, at each turn the primacy of individual rights was reaffirmed.

The Constitutional Convention of 1872-1873, however, became the last occasion for Pennsylvanians to exercise popular sovereignty free of control by the existing organs of their
government. A legislatively initiated amendment process, first inserted in the constitution of 1838 and inadvertently modified in its practical application by the constitution of 1874, has become the primary means of revising the text of the Commonwealth’s organic law. Reliance on this process effectively has transferred the greater part of the right to control constitutional change from the people to the General Assembly and the state judiciary. When a more recent convention framed portions of the present text in 1967-1968, both individual rights and the processes of exercising popular sovereignty by amending the constitution had been placed beyond the convention’s reach.

Individual rights have survived this transfer of power, largely intact, and in some respects even expanded. But the diminution of popular participation in the debate over constitutional change has contributed to the impoverishment of the discourse over rights. In Pennsylvania today, and in most of the United States, rights are the business of the courts and the legislature. The sovereign people, and the rich diversity of their voices, are at the sidelines of the process of giving contemporary meaning to rights.

This Article will examine the devaluation of popular sovereignty in the processes of constitutional change in the Commonwealth and will situate this change in the more general development of American constitutionalism in our federal system. The Article begins with a discussion of the paradox of ensuring minority rights in a majoritarian structure of self-governance and its implications for constitutional amendment procedures. Because state constitutions, compared to their federal counterpart, tend to be relatively open to revision, concern for preservation of the language of individual rights in state texts has led to a variety of mechanisms, actual and proposed, for limiting popular control of the amendment processes.

These control mechanisms tend to produce a model of state constitutional change that—in its heavy reliance, direct or indirect, on judicial supervision—parallels the federal model. I will argue that the structure of federalism makes so large a measure of judicial control of state constitutions both unnecessary and counterproductive. It is unnecessary because safeguards for the protection of minority rights in the state amendment processes exist in the Federal Constitution. It is counterproductive because popular
participation in the debates over rights is essential to the growth of rights. Rather than inviting judicial displacement of popular sovereignty in the processes of state constitutional change, this view assigns state majoritarian processes an institutional role in the rights discourse of our federal system.

Building on the differentiation between state and federal constitutional change, the Article will then focus on the path of constitutionalism in Pennsylvania. Beginning with a brief review of the history of constitution-making in the Commonwealth, this inquiry will examine the two methods that have been used to reform the state’s organic law: the constitutional convention, which was the principal means of revision during the first one hundred years of independence, and the legislatively initiated process that largely has supplanted it. An understanding of how these revision processes may, or may not, respond to the will of the people will require analysis of the role the state judiciary has assumed in supervising their functioning.

Returning to its central theme of preserving individual rights in a majoritarian state, the Article then will review the impact that the processes of textual change have had, over time, on the Commonwealth’s Declaration of Rights. The Article will close with a suggestion that we reconsider Pennsylvania’s departure from its revolutionary roots and, subject to the moderating influence of the equality principle the federal structure provides, reassert the voices of the people in the state constitutional amendment process.

II. THE PARADOX OF THE PEOPLE’S RIGHTS

To appreciate the significance of the process of textual change, we must first understand that to talk about a constitution is to talk about rights. Even when the specific text examined seems devoid of "liberty," "equality," or other, plainly rights-oriented themes, concern for text as constitutional language implies concern for its impact on rights. The text of the United States Constitution of 1787 is virtually silent on the subject of individual rights, yet in its
preamble it proclaims the grand purpose of securing "the Blessings of Liberty" for the people and their posterity.\(^1\)

Constitution talk is rights talk, of course, because constitutions distribute and define political power: Who shares it, for which purposes, under what limitations? The relationship between rights and political power is most obvious when a constitution textually prohibits the exercise of governmental authority in ways thought to interfere with liberty ("No person shall be attainted of treason or felony by the Legislature"\(^2\)), or when the exercise of certain governmental authority is mandated in ways thought to advance

\(^1\) "Liberty," like other transcendental values animating constitutional discourse, is as elusive a concept, in the abstract, as it is evocative. Certainly, the term is no less popular today than it was in 1787, but there is no single understanding of its dimensions now and was none then.

The problem of constitutional language becomes particularly acute when its arguments are borrowed from other generations. "Liberty" in 1787 reflected more a concern for democratic self-government than for deprivations caused by governing majorities, though the latter concern was certainly thought important by many. Its shift in emphasis to individual rights did not come for several generations, and was perhaps best marked by the 1859 publication of John Stuart Mill's *On Liberty*. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L.J.* 1193, 1215 (1992).

In its classical expression during the revolutionary period, "liberty" involved the subordination of private interest to the greater interest of the community. The "public good" and personal "liberty" were not thought to be conflicting values however. If individuals possessed political liberty, they could maintain the "public rights of the collective people" against the "privileged interests of their rulers," and the self-interest of the community would itself ensure the preservation of personal liberty. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 53-57, 60-61 (1972). As Amar observes, "Madison thought otherwise, but was a man ahead of his time." Amar, *supra*, at 1215.

The trans-generational difficulty is mitigated if we recognize the declaratory, as well as authoritative, value of constitutional language. It is in this sense that text has its greatest capacity to constitute, or define, us as a "people." Abraham Lincoln demonstrated this dramatic power in our basic texts when he, in effect, read the Declaration of Independence into the Constitution to establish that African Americans were included in the covenant. See *Created Equal? The Complete Lincoln-Douglas Debates of 1858*, at 81-82 (Paul M. Angle ed., 1958). (Of course, this only mitigates, not resolves, the difficulty; 135 years later, rhetoric and reality are not yet fully reconciled).

individual or community well-being ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education . . . .")3. The relationship between rights and political power also exists, however, in the provisions establishing the basic structure of government. The proponents of the Federal Constitution of 1787, for example, intended the "Blessings of Liberty" it promised to be ensured primarily by the creation of a limited national government and by a system of vertical and horizontal checks and balances on all governmental authority.4


4 The relationship between the structural nature of the 1787 Constitution and liberty is cogently described by Professor Ely. JOHN H. ELY, DEMOCRACY AND DISTRUST 88-94 (1980).

The Federalists argued that the 1787 document's structural innovations were the ideal defense of liberty, and that they made a bill of rights not only unnecessary but unwise. THE FEDERALIST No. 84, at 531 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). The Anti-federalists were concerned primarily about the transfer of authority from the states to the national government, and their contentions concerning the absence of a bill of rights were advanced as much to defeat that transfer altogether as to create additional limits on the new government's exercise of power. See WOOD, supra note 1, at 542-43.

Although most analysis of the relationship between structure and rights focuses on the Federal Constitution, that relationship may be even more important in state charters. The Pennsylvania Constitution of 1874, for example, was framed, in large part, in response to concerns about abuses of legislative power reflected in the granting of privileges to powerful economic interests. In the interest of promoting individual and community rights, that document therefore addressed both the General Assembly and former beneficiaries of special privileges, including railroads, in some detail. See ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 99-104 (1960); Donald Marritz, Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution, 3 WIDENER J. PUB. L. 161, 183-96 (1993).
Since its founding, American constitutionalism has harbored a paradox. "We the [sovereign] People" establish constitutions (national and state) to establish fundamental ground rules for self-governance. Being sovereign, we can change those ground rules at will, as long as our power of self-governance is not usurped. In the event of usurpation, our rightful recourse is revolution. At least, that is how it goes in theory.\(^5\)

Our constitutionalism, however, does not embrace self-governance as an end, but as a means of ensuring liberty. As a consequence, the ground rules specify not only the structure of our government, but also the limits and obligations imposed on the power we delegate to our government. These limits and obligations reflect the rights we deem to be fundamental. To the extent the individual rights protected by the limits are valued by the majority, there is no tension. However, when the majority loses its faith in a right, its courage, or its simple good sense, self-governance and its objective, ensuring liberty, are in opposition.

The Pennsylvania Constitution of 1776\(^6\) illustrates this paradox. Section 5 of the Declaration of Rights establishes the first component:

\[\text{[G]overnment is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men, who are a part only of that community: And that the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government}\]

in such manner as shall be by that community judged most conducive to the public weal.\(^7\)

The Framers of this section obviously believed the right for which they made this "declaration" was not simply a formal, theoretical basis for government in general, but a power to be claimed by the people in real time and in real places.\(^8\) That, of course, is precisely what they were doing as they wrote it. Having no authority by positive law to seize power from the existing government, the Framers and their allies exercised the sovereign power of "the people out-of-doors," described by Gordon Wood in the *Creation of the American Republic*.\(^9\)

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\(^7\) *Pa.* Const. of 1776, ch. I (Decl. of Rights), § V, *reprinted in 8 Sources*, supra note 6, at 278. The right of the people to alter or abolish their government now resides in Article I, Section 2, which provides:

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish government in such manner as they may think proper.

*Pa.* Const. art. I, § 2. With the exception of the word, "[t]hat," which was the first word of the section in the 1790 constitution but was deleted in 1874, and the substitution of "inalienable" for the 1790 "unalienable," also in 1874, the right has been expressed in this language since 1790. *Pa.* Const. of 1790, art. IX, § 2, *reprinted in 8 Sources*, supra, at 286, 292; *Pa.* Const. of 1838, art. IX, § 2, *reprinted in 8 Sources*, supra, at 296, 303; *Pa.* Const. of 1874, art. I, § 2, *reprinted in 8 Sources*, supra, at 310; *Pa.* Const. art. I, § 2.

\(^8\) Defining the "community" entitled to assert the right may be problematic, however. Was it necessarily the preexisting, politically defined "Pennsylvania community" as a whole, or might it have been a smaller part, one capable, for example, of being defended by the westerners who dominated the 1776 convention, if the colonial government, dominated by easterners, had been less inclined to pacifism? Section 15 addresses the "natural inherent right to emigrate from one state to another . . . or to form a new state in vacant countries, or in such countries as . . . can [be] purchase[d]," possibly negating any suggestion of a right of succession in Section 5. *Pa.* Const. of 1776, ch. I (Decl. of Rights), § XV (emphasis added).

\(^9\) *Wood*, supra note 1, at 306-43 (describing convention processes and formal and informal committees). The descriptive phrase for informal bodies exercising quasi-governmental political power, has been used by others. *See*, e.g., *Staughton Lynd, Intellectual Origins of American Radicalism* 171 (1968).
Section five is only one of sixteen sections in the 1776 Declaration of Rights, and its rank does not suggest that it was considered the most important. At least four additional sections address what are primarily community rights regarding the control of the government; other sections arguably do so as well. Several rights we take to be individual rights today, including rights of free speech and assembly, are declared for the people, and they, too, may have been thought to protect the community more than individuals. But several rights, including those declared in the first two sections of the Declaration of Rights, are plainly intended to protect individuals. Section One situates individuals in society by providing: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Professors Robert F. Williams and Seth F. Kreitner have discussed the meaning of this section, and whether it is "merely descriptive

\[10\] PA. CONST. of 1776, ch. I (Decl. of Rights), § III (power to regulate the police); § IV (government officers accountable to the people); § VI (right to change public officials); § XIV (duties owed by public officers), reprinted in 8 SOURCES, supra note 6, at 278-79.

\[11\] For example, the right to bear arms, in Section XIII, seems concerned primarily with a community right of defense. PA. CONST. of 1776, ch. I (Decl. of Rights), § XIII, reprinted in 8 SOURCES, supra note 6, at 279.

\[12\] Id. § XII, reprinted in 8 SOURCES, supra note 6, at 279.

\[13\] Id. § XVI, reprinted in 8 SOURCES, supra note 6, at 279.


\[15\] PA. CONST. of 1776, ch. I (Decl. of Rights), § I, reprinted in 8 SOURCES, supra note 6, at 277-78. There has been little substantive change in this language since 1776. The 1790 constitution deleted the express reference to the "natural" source of rights and added rights regarding "reputation" to the enumeration. PA. CONST. of 1790, art. IX, § 1, reprinted in 8 SOURCES, supra, at 286, 292. Section 2 provides for freedom of conscience in matters relating to religious worship.
rather than normative." However, what is particularly interesting in the present context is that the rights addressed are deemed "natural, inherent and inalienable."

This natural law baseline is consistent with the theory of government expressed in the Declaration of Independence, which was available to the Pennsylvania convention when it drafted the Declaration of Rights,\(^{17}\) as well as with its privileged place in the text. The primacy of rights in the 1776 constitution generally is reiterated in Section 46 of the Frame of Government, which instructs that the Declaration of Rights is part of the constitution, "and ought never to be violated on any pretense whatever."\(^{18}\) A rights theory, however, can only be in complete harmony with a principle of pure majoritarian rule to the extent there exists a common understanding of the rights secured and the ruling majority is firm in its resolve not to derogate.\(^{19}\)

\(^{16}\) Seth F. Kreimer, The Right to Privacy in the Pennsylvania Constitution, 3 WIDENER J. PUB. L. 77, 89-93 (1993) (arguing Section 1 establishes a normative right to privacy); Robert F. Williams, A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine, 3 WIDENER J. PUB. L. 343, 344-46, 348-51 (1993) (early focus of equality doctrine was more on republican values relating to self-governance than on individual rights); see also Robert F. Williams, Equality Guarantees in State Constitutional Law, 63 Tex. L. Rev. 1195, 1205 (1985) (arguing that early equality provisions in state constitutions were more descriptive than normative).

\(^{17}\) J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 177-78 (1971).

\(^{18}\) PA. CONST. of 1776, ch. II (Frame of Gov't), § 46, reprinted in 8 SOURCES, supra note 6, at 277, 285. Gordon Wood asserts that Pennsylvania was one of "the most radical states," along with Georgia and Vermont, in its effort to insulate individual liberty from legislative, as well as magisterial, infringement. The revolutionary constitutions of these states went beyond "simple admonitions" in prohibiting encroachments into the organic law by legislatures. He adds, "Americans were to spend the following years in expanding such prohibitions and in attempting to make them effective." WOOD, supra note 1, at 272-73.

\(^{19}\) Although one can make the problem disappear by adopting a theory of "natural law" that has all "right-thinking" people agreeing because, after all, it is nature's law, this would reduce bills of rights to lists of truisms, a position not taken by either side in the debates as to their necessity.
The potential for conflict arises at two levels. First, in the area of ordinary legislation, the 1776 constitution established a system of legislative preeminence, with mechanisms of direct democracy that effectively established "the people" as the lower house.\textsuperscript{20} Although this system was intended to ensure that the Assembly itself stayed faithful to the constitution and to the people's rights, the abuse of individual rights was not uncommon during the revolutionary period.\textsuperscript{21} Second, even assuming that no derogation from constitutional norms arises in ordinary legislation, may the people exercise their "inalienable and indefeasible right to alter, reform or abolish their government . . . as they may think proper," by curtailing other fundamental rights set forth in the Declaration? If they did, could that be law? These were not idle questions during the Founding Decade.

\textsuperscript{20} WOOD, supra note 1, at 366; see infra text accompanying notes 184-89; see also Robert F. Williams, The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism, 62 TEMP. L. REV. 541, 558 (1989) (describing theory of popular democracy as check on legislature).

\textsuperscript{21} Gordon Wood describes the views of the opponents of the 1776 constitution: "The . . . Assembly, with its test oaths, suffrage requirements, and enlarged fees for offices, the anti-Constitutionalists charged, was repeatedly violating all that the radicals had formerly stood for. Such acts against the Constitution, the Republicans argued, were mere nullities, passed against the true authority of the people." WOOD, supra note 1, at 443.

In fact, the abuses had begun before the constitution was framed. The advocates of independence and a new government, in calling the convention, ensured their own representation by eliminating the property requirement that had disenfranchised many under the colonial government. However, they then proceeded to disenfranchise many of their opponents by establishing test oaths for electors who would choose the delegates and for the members of the convention. SELSAM, supra note 17, at 138-39.

Viewed in the context of war, however, it might fairly be asked whether these abuses were truly the product of a system of government with insufficient checks on majoritarian excesses. The relatively well-developed checks of the federal system, for example, gave scant protection to the rights of Japanese-Americans on the west coast during World War II. Indeed, in some respects, such as the recognition of rights of conscientious objectors, the 1776 constitution seems remarkably tolerant of its opponents. See infra notes 319-20 and accompanying text.
The trite theory of popular sovereignty gained a verity in American hands that European radicals with all their talk of all power in the people had scarcely considered imaginable except in those rare times of revolution. "Civil liberty" became for Americans "not 'a government of laws,' made agreeable to charters, bills of rights or compacts, but a power existing in the people at large, at any time, for any cause, or for no cause, but their own sovereign pleasure, to alter or annihilate both the mode and essence of any former government, and adopt a new one in its stead." American liberty seemed in fact to have made revolution perpetual and civil disorder legitimate.²²

Theories of perpetual revolution and the legitimacy of civil disorder found no harbor in the 1787 Federal Constitution, but the debate over the role of popular sovereignty in the processes of state constitutional change has endured.

III. PROCESSES OF CONSTITUTIONAL CHANGE

If a constitution is about rights, then to talk about a constitution is also to talk about changes in rights. This is not a point of simple theory or semantics, because neither the distribution of the political power sought to be contained and guided by the text, nor the aspirations of those who hold that power or seek a share of it, are static. As power shifts from one group to another, from one generation to the next, a constitution is tested in new directions and withdrawn from old ones. A measure of elasticity in the constitutional vessel that regulates this political power is required if the vessel is to endure. Elasticity can be found either in the process by which the text is altered or in the processes by which it is interpreted and applied in its daily life.

The Federal Constitution and state constitutions, generally, address the problem of constitutional elasticity in very different ways. In modern times, the federal model has been the focus of most discussion, and our tendency, again in modern times, to look

²² WOOD, supra note 1, at 362 (quoting Hichborn, Oration, Mar. 5, 1777, in Principles 47 (Niles, ed.)).
at state constitutions through a national lens\textsuperscript{23} has strongly influenced our way of thinking about state constitutional change as well. Thus, although in terms of popular sovereignty the federal model is a poor example for the states to follow, it must be put in perspective.

\textbf{A. The Federal Model of Constitutional Change}

Nearly all analysis of federal constitutional change focuses on the judicial process, and particularly on the role of the Supreme Court. This is primarily because the text's powerful formula for self-preservation, found in Article V, requires that nearly all of the document's elasticity be found in the interpretation provided by the institutions it created.\textsuperscript{24} Of those institutions, the Supreme Court has most aggressively asserted its role as oracle of constitutional doctrine and of change in that doctrine.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{23} See generally Robert F. Williams, \textit{In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result}, 35 S.C. L. REV. 353 (1984) (discussing federal court dominance of constitutional interpretation).
  \item \textsuperscript{24} Article V of the United States Constitution provides:
    \begin{quote}
    The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.
    
    U.S. CONST. art. V.
    
    In \textit{Cooper v. Aaron}, the Court affirmed that \textit{Marbury v. Madison} "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." Cooper v. Aaron, 358 U.S. 1, 18 (1958).
  \end{quote}
\end{itemize}
The preeminence of interpretation as the means of federal constitutional change reflects the remarkable immunity of the federal text to revision. In order to accomplish what may be called an "ordinary" textual change, a proposed amendment requires the agreement of two-thirds of each house of the Congress and the assent of three-fourths of the states, expressed either through their legislatures or through state conventions called for that purpose. Although Article V also provides a mechanism for what might be called "extraordinary" change, through the calling of a national constitutional convention, that method has yet to be successfully invoked.

In the 205 years since the ratification of the 1787 Constitution, only twenty-seven amendments have been added to the original text and the last required more than 200 years to get there. Even the number twenty-seven is misleading, since the first ten amendments came, more or less, as part of the original package, and three others were more a product of the Civil War than of the Article V procedure. This means that "ordinary" textual change comes into the Federal Constitution, on the average, every fifteen years, and that no "extraordinary" change has ever occurred.

Many of the founding period theoreticians held views of the amending process very different from the one that eventually emerged from the Philadelphia convention in 1787. Thomas Jefferson's theory of the right of the people to abolish old forms of government and to institute new ones, essentially adopted in Pennsylvania's Declaration of Rights, is best known through the Declaration of Independence. Later in life, Jefferson expanded upon his concern that each generation should take responsibility for its own organic law:

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26 New Hampshire ratified on June 21, 1788, making the Constitution effective, by the terms of Article VII, for the first nine ratifying states. On May 29, 1790, Rhode Island became the last of the original thirteen states to ratify.

27 See William Van Alstyne, What Do You Think About the Twenty-Seventh Amendment?, 10 CONSTITUTIONAL COMMENTARY 9 (1993).

28 This is the right of the people to "alter, reform or abolish their government." Pa. Const. art. I, § 2.
"Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution."  

Jefferson was not a delegate to the 1787 Convention, and Article V follows a very different philosophy of the amending process. His theory, however, is reflected in state constitutions.  

B. The "Problem" of State Constitutional Change

The state amendment processes tend to be much more accessible. Pennsylvania, from independence to date, has had five distinct constitutions. The most recent version has itself been amended twenty times since becoming effective in 1968.  

Pennsylvania is not exceptional, either in its number of constitutions or in its rate of amendment. Louisiana holds the distinction of adopting the largest number of constitutions, a total of eleven since 1812. Massachusetts claims the honor of possessing the oldest state constitution, operating today under a charter adopted in 1780. This claim may be somewhat overstated,

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30 Jefferson's comments on amendment processes generally were directed more to state constitutions than to the national one. His insistence "that the earth belongs in usufruct to the living; that the dead have neither powers nor rights over it," however, reflects his overall philosophy of government. Id. at 63 (emphasis deleted) (quoting 6 The Works of Thomas Jefferson, supra note 29, at 3-4) (internal quotations omitted).


32 See infra note 203.

however, since, as of January 1, 1992, the 1780 document had been amended 117 times, and comprised 36,690 words, 12,400 of which had been annulled.34

Jefferson's theory of periodic revision of constitutions has found favor in the states. Fifteen states mandate constitutional conventions at specified intervals, ranging from nine to twenty years, and fourteen states submit the question whether to call a convention to the electorate at regular intervals.35 Other avenues of state constitutional revision,36 including amendments proposed by state legislatures, specially called constitutional conventions, and the voter-driven constitutional initiative process, offer more frequent opportunities for change.

The profound difference between the United States Constitution and state constitutions in their relative amenability to textual change has important implications both for the meaning of constitutionalism and the meaning of rights. If the states are closer to the Jeffersonian ideal of periodic review by succeeding generations, or simply to review at a majority's will, this may reflect a greater concern for the liberty of self-governance than for the protection of minorities and individuals from the excesses of popular rule. This "problem," of course, is not new, but it may mean that the current interest in state constitutions as instruments of ensuring individual liberties37 is misplaced or, at most, represents a temporary palliative while we wait for the United States Supreme Court to recover its balance in weighing governmental interests against the rights of individuals.

34 Id. at 21 n.(i).
35 Id. at 4.
36 The term "revision" sometimes carries a technical meaning for state constitutions, signifying a more fundamental change than that effected by simple "amendment." See Amador Valley Joint Union High Sch. Dist. v. Board of Equalization, 583 P.2d 1281 (Cal. 1978). In this Article, "revision" is used interchangeably with "amendment," and signifies any modification of a constitutional text.
37 The focus of this Symposium is the protection of individual rights under the Pennsylvania Constitution. To place Pennsylvania in the national context, Helen Hershkoff describes the general trend toward increased reliance on state constitutions as sources of rights. See Helen Hershkoff, State Constitutions: A National Perspective, 3 Widener J. Pub. L. 7 (1993).
State constitutional amendments that affect individual rights come in several forms. First, rights that are found by state courts to be secured by state constitutions may be curtailed by constitutional amendment. Second, preemptive restrictions on a state's power to legislate or judicially to interpret rights may be added to constitutions. Third, constitutional amendments may add rights, or expand existing rights.

Concern over the excesses that may accompany majoritarian self-rule obviously relates to the first two categories of amendments. For example, Pennsylvania voters adopted language intended to overrule a state supreme court decision that granted broader protection against self-incrimination than that recognized by the United States Supreme Court, and Colorado voters attempted to curtail their state's authority to regulate discrimination against gay and lesbian members of the community. This is where the debate over the need to curb majoritarian rule is engaged. Critics of majoritarian rule advance two very different methods of controlling the majority. One method relies exclusively on state mechanisms and norms; the other relies on state enforcement of a federal norm that the federal authorities have left dormant. Each method raises its own problems.

C. State-Based Curbs on Majoritarian Control

The search for a "fix" for the excesses accompanying popular control of the processes of state constitutional change generally turns, although not necessarily expressly, to the federal model. That is, the search focuses on mechanisms by which the text of rights may be immunized against change or on methods of

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38 State amendments that expand rights, such as Pennsylvania's Equal Rights Amendment, Article I, Section 28, are not generally viewed as problematic. Of course, there may be considerable disagreement as to whether a particular amendment expands or restricts rights.

39 See infra notes 335-36, 343-44 and accompanying text.

40 See infra notes 103-06 and accompanying text.

41 See infra notes 42-100 and accompanying text.
subjecting the process of change to close review by the state judiciary, or both.

Professor Ken Gormley has articulated the argument for the immunization approach by distinguishing two divergent functions of state constitutions.\textsuperscript{42} One function concerns the "nuts-and-bolts" of state government, while the other addresses the protection of the "unalterable rights" of citizens.\textsuperscript{43} The first function demands a relative ease of change in the constitutional text that governs; the second function, however, requires a tighter amendment procedure "in order that these essential liberties will not be subjected to an uprooting each time a majority of the electorate is stirred by the winds of bias, politics, or sensationalism of issues."\textsuperscript{44} Gormley suggests four mechanisms for entrenching constitutional provisions that protect individual liberties: requiring super-majorities for approval of proposed amendments,\textsuperscript{45} counting voter abstentions in amendment referenda as negative votes,\textsuperscript{46} elaborate publication provisions,\textsuperscript{47} and requiring that amendment proposals be presented with "simplified, neutral" language.\textsuperscript{48}

Professor Michael Colantuono has developed a variation of the immunization argument in some detail, expanding it to cover all provisions in state constitutions.\textsuperscript{49} Although he does not suggest that super-majorities are necessary, Colantuono advances the thesis

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id}.
\item \textit{Id}.
\item \textit{Id}.
\item Professor Gormley would require, "at a minimum," that a majority of the voters who participate in any part of the election in which a proposed "rights" amendment is on the ballot approve the amendment. He notes that amendment issues generally gain the attention of a smaller number of voters than other issues or offices on the ballot. \textit{Id}. (citing Article II of the Ohio Constitution as an example).
\item \textit{Id}. at 46.
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
that complex amendment procedures are to be preferred over simple ones because they lead to greater deliberation.\textsuperscript{50} This, he argues, would promote popular sovereignty and political stability and better preserve minority rights.\textsuperscript{51}

Although Professors Gormley and Colantuono focus on the political mechanisms that control state amendment processes, they both demand significant judicial oversight in the operation of those mechanisms. Gormley favors judicial supervision of ballot language and of state-sponsored explanatory discussions of proposed amendments.\textsuperscript{52} Colantuono strongly criticizes state court decisions that approve extra-textual means of constitutional revision, implying that state courts should have an activist role in reviewing the political actors' compliance with the text-based mechanisms.\textsuperscript{53}

Regardless of the specifics, any demand for strict compliance with a particular mechanism for effecting textual change will invite substantial judicial involvement in the amendment process. This recognition of judicial authority to supervise the process of state constitutional change parallels, but does not replicate, the model of federal judicial power.\textsuperscript{54} The Supreme Court's authority to control federal constitutional change is exercised almost exclusively through its interpretation of text outside of Article V. The infrequency of successful recourse to the Article V processes

\textsuperscript{50} Id. at 1508-10.
\textsuperscript{51} Id. at 1500-11.
\textsuperscript{52} Gormley, supra note 42, at 46. Even if one accepts the premise that the judiciary \textit{ought} to be the gatekeeper in a constitutional amendment process, there are practical questions as to its ability to determine the appropriateness of descriptive language, whether it be ballot language or mandatory, pre-election publication of explanations of amendment proposals. \textit{See} Grose v. Firestone, 422 So. 2d 303 (Fla. 1982).
\textsuperscript{53} Colantuono, supra note 49, at 1481-92. One argument criticized by Colantuono is that the act of voters in ratifying the revision is an exercise of popular sovereignty, curing any defect in the process that led to the proposal's placement on the ballot. Although not mentioned by Colantuono, a variation of this theory was once the rule in Pennsylvania, though its current status is in doubt. \textit{See infra} notes 222-315 and accompanying text.
\textsuperscript{54} \textit{See supra} notes 24-30 and accompanying text (discussing the model of federal judicial power).
themselves has left the Court's power to supervise *textual* change a largely uncharted and highly controversial subject.  

The call for state courts to take an activist role in supervising textual change, as a matter of state constitutional law, poses some fundamental problems. Such power, of course, is cumulative with the state judicial power to make authoritative statements regarding the meaning of state constitutional language generally. Granting courts the power to defeat any effort to undo their decision by changing the language that was interpreted runs the risk of making them authoritarian.

The disequilibrium this "fix" brings to a theory of checks and balances, however, is only part of its price. As will be further developed below, an activist judicial involvement in state amendment processes, even when accomplished in the name of "rights," impedes the development of "rights" in our federal system. Furthermore, to the extent that the judicial "fix" is intended to protect minority rights, a better tool is available, the equality principle contained in the Fourteenth Amendment.


56 This argument parallels Professor Tribe's argument against federal judicial supervision of the Article V ratification process. See supra note 55.

57 Professor James Henretta suggests a different argument for an active judicial role in supervising the amendment process, seeing at least the possibility of its advancing popular sovereignty. *James A. Henretta, Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819 (1991). His concern over abuse of the amendment processes by the political branches in ways that limit popular participation are well taken, and are in accord with the position taken here.
Examination of a recent contribution to an old debate about the Guaranty Clause will help illustrate these concerns.

**D. State Judicial Review Under the Guaranty Clause**

The most intriguing theory supporting state judicial intervention against majoritarian excesses in the state constitutional amendment process—and the one that best underscores the seriousness of the issue, both in the problem it addresses and the threat posed by the solution—is Judge Hans A. Linde’s recent call for a state revitalization of the Article IV, Section 4, Guaranty Clause of the Federal Constitution. ⁵⁸ Accepting the United States Supreme Court’s refusal to give federal judicial recognition to the Clause,⁵⁹ Judge Linde makes a powerful plea for state judges and other state officers to invoke the Clause in the special case of initiative amendment proposals to state constitutions.⁶⁰

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Discussing the historical and theoretical linkage of popular sovereignty and elected judges, however, Professor Henretta notes, in the context of supervision of legislative processes, that "[t]he record is mixed" on whether judges in fact became "the guardians of the people." ⁶¹ If the courts in fact are guardians, the limited, "abuse of discretion" standard of review advanced in this Article for state constitutional amendment processes would enable them to fulfill their proper role. See infra text accompanying notes 316-44. If the courts are not guardians, limited review would promote the principle of checks and balances.

⁵⁸ "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4.

Professor Merritt shares a partial listing of other arguments for the Clause, some restricting state processes, others, like her own, shielding them from federal processes. *Id.* at 22-29. "The two faces of the guarantee clause thus complement one another," she says, but concedes that the point at which the
The initiative process permits citizens to bypass state legislatures by placing proposed constitutional amendments on the ballot for voter approval or rejection. Although Pennsylvania does not recognize this procedure, the constitutional initiative is available in some form in seventeen states, and it provides a stark illustration of our paradox because it allows direct majoritarian incursions into the text of rights. Janice May points out that constitutional initiative procedures typically involve procedural and subject matter limitations, and are particularly susceptible to judicial scrutiny. The initiative is an exercise of shield becomes a sword "depends on the meaning courts attach to the phrase 'republican form of government.'" Id. at 26 n.139.

The legislative initiative process permits similar bypass, or override, of the legislature for regular laws.

Judge Linde addresses his theory to both forms of the initiative, the legislative as well as the constitutional, without differentiation. Although the two forms occupy different ranks in the hierarchy of state law, the one being revisable by ordinary legislative action and the other only by constitutional amendment, Oregon's initiative provision also addresses them similarly, the only significant distinction occurring in the number of signatures required on the respective initiative petitions. Or. Const. art. IV, § 1.

Judge Linde earlier suggested his theory in State v. Wagner, 752 P.2d 1136, 1197 n.8 (Or. 1988) (Linde, J., dissenting), in the context of the constitutional initiative, and in his most recent work, he takes a recent, unsuccessful constitutional initiative campaign in Oregon as his point of departure. Linde, supra note 60. He first developed the theory in the context of the legislative initiative, in Hans A. Linde, When Is Initiative Lawmaking Not "Republican Government"?, 17 Hastings Const. L.Q. 159 (1989). Professor Jennifer Friesen endorses both applications. See Jennifer Friesen, Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law, 3 Widener J. Pub. L. 25, 51-53 (1993). I am here interested only in the application of Judge Linde's theory to constitutional amendments. However, the availability of state revision, through normal legislative processes, of statutory law enacted through Article IV, Section 1 of the Oregon Constitution, suggests to me that the theory is even more problematic when applied to the legislative initiative.

See May, supra note 33, at 24 (Table 1.3).

Janice C. May, The Constitutional Initiative: A Threat to Rights?, in Human Rights in the States: New Directions on Constitutional Policymaking 163 (Stanley H. Friedelbaum ed., 1988). She contends that the principal check on the procedure, however, is the electorate's tendency to reject proposals submitted under it. Id. at 178-79.
direct democracy, and, to the extent that these limitations are
designed to ensure the integrity of the process, they are analogous
to state procedures governing voting, such as a registration
requirement.

Judge Linde’s theory, however, is very different from a state
procedural limitation, because it would have the validity of a ballot
proposal determined by examining its substance and the motivation
of its proponents.\(^64\) His theory is also very different from a state
restriction on the subjects addressable through the initiative,\(^65\)
its subject to state revision, in its invocation of the Federal
Constitution. Finally, Judge Linde’s theory is a significant
departure from state judicial review of state amendments under
other federal norms, such as the Equal Protection Clause, in its
reference to a federal provision the national authorities have
deprecated to elaborate.\(^66\)

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\(^{64}\) See generally Linde, supra note 60, at 31-43.

\(^{65}\) For example, Article XIV, Section 3 of the Illinois Constitution limits
initiative amendments to revision of the "structural and procedural subjects
contained in Article IV," relating to the legislature. ILL. CONST. art. XIV, § 3.
Substance may be implicated as well by a state’s procedural limitations on
amendments, as occurred when Californians seeking wholesale elimination of
independent state guarantees of rights of defendants in criminal proceedings ran
afoul of that state’s procedural requisites for constitutional "revisions," described
by Professor Friesen, supra note 61, at 48-49 (citing Raven v. Deukmejian, 801
P.2d 1077 (Cal. 1990)).

\(^{66}\) The lack of federal elaboration of the Guaranty Clause does not
necessarily mean a state decision applying it would escape Supreme Court
review. Although the Court in Pacific States Tel. & Tel. Co. v. Oregon, 223
U.S. 118 (1912), refused on justiciability grounds to review a state court
judgment upholding the validity of an initiative measure against a Guaranty
Clause challenge, a state court judgment invalidating such a measure would
present the issue in a different light. It is possible, therefore, that Judge Linde’s
approach would lead to the development of a jurisprudence of the Clause by the
Supreme Court.

That is not the only possible outcome, however. Certainly, if a federal
court may not decide a Guaranty Clause claim because its enforcement is
assigned exclusively to the federal political branches, id. at 147-48 (citing Luther
v. Borden, 48 U.S. (7 How.) 1 (1849)), it is difficult to understand how a state
court may exercise such federal power to determine the standard for a
republican form of government. The text itself assigns responsibility for
effecting the guarantee, and thus for establishing the standard, to the United
Judge Linde's thesis begins with the unassailable proposition that "the framers [of the 1787 Constitution] distinguished a republican form of government from direct democratic lawmaking," and indisputedly opted for the former over the latter. The Framers' concerns about the dangers of "unbridled 'interest' and 'passion'" led to the creation of the intricate system of representation and institutional checks contained in the Federal Constitution. But while the federal system of representative government certainly reflects the framers' views of "republican" values in the summer of 1787, this does not mean that the single appearance of that term in the Constitution, in the Guaranty Clause, imposes a similar set of constraints on state self-governance.

Judge Linde acknowledges that the term "republican" was used with many different meanings during the years leading to the formation of the 1787 Constitution. He asserts, however, that the "fundamental transformation" of political thought in that epoch nonetheless gives content to that term in the Guaranty Clause. He argues that although not all uses of the initiative process necessarily violate the Clause, recourse to the initiative "for motives that the designers of republican government most feared" must be excluded, even though the same lawmaking measures might be valid if adopted through "republican" processes. Judge

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67 Linde, supra note 60, at 22.
68 Id. at 31-33.
69 Id. at 32.
70 Id. at 22.
71 Id. (quoting Wood, supra note 1, at viii).
72 Id. at 31, 40-41.
73 Id. at 21.
74 Id. at 19, 31, 41.
Linde describes five categories of measures he believes this standard disqualifies from the initiative process.\footnote{The five categories are:}

1. Initiatives that refer to any group of individuals in pejorative or stigmatizing terms or, conversely, in terms that exalt one group over other members of the community. . . .

2. Initiatives that avoid emotional, ideological, or sectarian labels but are by their terms directed against identifiable racial, ethnic, linguistic, religious, or other social groups. . . .

3. Initiatives that do not name any targeted group, but that are proposed in a historical and political context in which the responsible state officials and judges have no doubt that the initiative asks voters to choose sides for and against such an identifiable group and that it is so understood by the public. . . .

4. Initiatives which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups. . . .

5. Initiatives to place affirmative legislation into the constitution itself, where the measure neither can be amended by the legislature nor tested by judges to stay within limits imposed by the state’s constitution.

\footnote{Id. at 41-43 (emphasis deleted).}

\footnote{\textit{May}}, \textit{supra} note 63, at 164.

\footnote{\textit{GA. CONST.} of 1777, art. LXIII, \textit{reprinted in} 2 \textit{SOURCES}, \textit{supra} note 6, at 443, 449.}

\footnote{Oregon adopted the first of the contemporary initiative procedures in 1902. \textit{May}}, \textit{supra} note 63, at 164.

\footnote{Georgia’s system was somewhat more indirect than the modern forms. Article 63 required popular petitions from a majority of the voters in a majority of the counties to initiate \textit{any} amendment, but the revision itself was to be accomplished in convention, called by the legislature to address the issues raised in the petitions. \textit{May} notes that this system was never used in Georgia. \textit{Id.}}
Despite all of the Federalist's discussion about the values of republicanism, Madison and Hamilton were careful to emphasize the expansive standard imposed by the Guaranty Clause and its non-interference with existing state governments.

Madison, for example, stressed that the Clause guaranteed to the states "the existing republican forms" of government then in place, and permitted them "to substitute other republican forms" at will.\(^79\) The then-existing forms were rich in their diversity, ranging from Rhode Island and Connecticut's retention of their colonial charters to Georgia's early form of the constitutional initiative and to Pennsylvania's "radical" constitution in which "the people 'out-of-doors' retained all their original power of legislation."\(^80\)

Hamilton expressly recognized "the right of the people to alter or abolish the established Constitution" as a "fundamental principle of republican government."\(^81\) He addressed the Guaranty Clause in the context of the effect that a turn to despotism in one state might have on the liberties of the people of another.\(^82\) Countering the charge that the Clause could give rise to "an officious interference [by the federal government] in the domestic concerns of the members," he insisted:

It could be no impediment to reforms of the State constitutions by a majority of the people in a legal and

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\(^79\) \textit{The Federalist} No. 43, at 309, 312 (James Madison) (Benjamin Fletcher Wright ed., 1961).

\(^80\) \textit{Wood}, supra note 1, at 366.

\(^81\) \textit{The Federalist} No. 78, at 489, 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961). Professor Amar, bringing principles of popular sovereignty to an argument for majoritarian control of federal constitutional change, draws on Hamilton's invocation here of language of the Declaration of Independence when he asserts that "the transcendent achievement of the founding generation [was] the channeling of the theretofore supra-legal right of revolution into precise and peaceful legal procedures—in particular, a majority vote in a specially convened ratification convention." Akhil R. Amar, \textit{Philadelphia Revisited: Amending the Constitution Outside Article V}, 55 U. CHI. L. REV. 1043, 1053 (1988); \textit{see id.} at 1052 & n.26.

\(^82\) \textit{The Federalist} No. 21, at 186, 187-88 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).
peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence. . . . Where the whole power of the government is in the hands of the people, there is the less pretense for the use of violent remedies in partial or occasional distempers of the State. . . . A guaranty by the national authority would be as much levelled against the usurpations of rulers as against the ferment and outrages of faction and sedition in the community. 83

If the general proposition that the norm of "a Republican Form of Government" restrains democratic choices as to particular methods of democratically effecting state constitutional change is historically doubtful, then the revised proposition, that the norm may be used to strike specific uses of a democratic process, is even less tenable. First, there is no hint that anyone, proponent or opponent of the Guaranty Clause, ever contemplated that it would be used in the manner suggested by Judge Linde. Although this is hardly conclusive, it is at least relevant to the question whether the Clause itself was thought to be a check on "unbridled 'interest' and 'passion,'" 84 at least outside the context of violent rebellion. In addition to their system of institutional checks, the Federalists contained this danger, where it was thought to be most acute, by prohibiting specific outcomes, including bills of attainder, ex post facto laws, and laws impairing contracts. 85

The real problem, however, comes when one attempts to use the general dangers that led the Federalists to prefer republican forms as norms for invalidating specific democratic expressions. Judge Linde asserts: "The contours of 'passion' and 'interest' are no harder to draw than those of other constitutional tests." 86 As for passion, "[t]he most obvious (though not all) collective passions appeal to a communal judgment of inclusion and exclusion based on nationality, race, or religious convictions—to

83 Id.
84 Linde, supra note 60, at 32.
85 U.S. CONST. art. I, § 10.
86 Linde, supra note 60, at 34.
*ad hominem* preconceptions like those condemned as ‘invidious’ in equal protection doctrine.\(^{87}\)

This focus on motive, however, is dangerous for several reasons. First, because one person’s "passion" is another’s "reasoned judgment," a focus on motive may miss much that a more objective test, which focuses on the *effect* of excluding a group, would capture. Judge Linde believes that the anti-gay Measure 9 represents the type of collective passion the Framers feared most.\(^{88}\) In fact, there is considerable evidence that what the Framers feared most were factional efforts to redistribute wealth,\(^{89}\) an area Judge Linde might consider among "ordinary choices of public policy."\(^{90}\) As for inclusion of gay and lesbian people as full participants in the political community, if Justice White’s opinion in *Bowers v. Hardwick*\(^{91}\) is not totally inaccurate in its historical analysis, Measure 9 may be precisely the type of majoritarian expression of morality the Framers would have applauded.

Second, a more serious problem is that the motive test captures too much. Among Judge Linde’s categories of measures to be disqualified under the Guaranty Clause are those "which appeal to majority emotions to impose values that offend the conscience of other groups in the community without being directed against those groups."\(^{92}\) This exclusion encompasses "[p]roposals to suppress teaching about evolution, to replace school

\(^{87}\) Id. at 35 (footnote omitted).

\(^{88}\) Id. at 36-37, 41, 42 n.83.

\(^{89}\) See, e.g., THE FEDERALIST No. 10 at 129, 131, 136 (James Madison) (Benjamin Fletcher Wright ed., 1961) ("But the most common and durable source of factions has been the various and unequal distribution of property"; problem of factions and "rage for paper money, for an abolition of debts, for an equal division of property"). The "republican remedy for the diseases most incident to republican government" was to be found in the large, and properly structured, Federal Union, not in the remaking of state governments. *Id.*

\(^{90}\) Linde, *supra* note 60, at 41.

\(^{91}\) 478 U.S. 186, 192-94 (1986) ("[A]ncient roots" of proscription against homosexual sodomy and lack of textual support for claim of liberty interest negate contention that criminal statute prohibiting such conduct is unconstitutional).

\(^{92}\) Linde, *supra* note 60, at 42.
prayers with minutes of silence, to enact a death penalty, and perhaps also Prohibition, abortion laws, and similarly ideological measures that sometimes sweep the country.  

"Professor Friesen notes that the exclusion may also include issues like doctor-assisted suicide and euthanasia.  

We certainly would have to add such a divisive and value-laden issue as a state equal rights amendment, no matter that group it is intended to benefit.

In other words, the Guaranty Clause would bar initiative amendments on almost any issue thought by some group to be fundamentally important; and its impact on the development of rights would be enormous. For examples, the campaigns for equal rights for women and against the poll tax both began in the states, and the initiative process was an early tool for their success.  

The deliberative process of state legislatures, thought to be the essential ingredient for avoiding the pitfalls of popular interest and passion, has not only resulted in the abuse of rights far greater than those effected by the initiative, but has also been an impediment to the development of rights.

Furthermore, most, if not all, of the specific examples Judge Linde identifies as problem areas can be addressed through other, developed, federal constitutional values. Principal among these

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93 Id.  
94 Friesen, supra note 61, at 52-53.  
95 Thomas E. Cronin, Direct Democracy, the Politics of Initiative, Referendum, and Recall 199 (1989).  
96 Examples abound, but to take one, especially important area of exclusion, Janice May observes: "The handful of antiracial propositions adopted by the initiative pales in significance when compared with segregation, racial gerrymandering, disenfranchisement, and other discriminatory laws enacted by state legislatures in the not-so-distant past." May, supra note 63, at 179.  

Regarding "direct democracy" in general, Thomas E. Cronin adds: "On balance, the voters at large are no more prone to be small-minded, racist, or sexist than are legislators or courts." CRONIN, supra note 95, at 198.  

97 The four historical examples cited by Judge Linde in his text, supra note 60, at 35-36, 38-39, all were remedied by federal norms other than the Guaranty Clause. In more general terms, Linde identifies five categories of initiative measures he would invalidate under the Clause. Id. at 41-43. The first three categories fall within the proscriptions of generally established Equal Protection doctrine. Linde's fourth category would go well beyond existing federal norms, invalidating initiatives supportive of equal rights as well as those denying them.
areas is the Equal Protection Clause, whose application by the Supreme Court has often left much to be desired, but which provides a basis from which to begin.

Judge Linde’s late twentieth-century application of Madisonian fear of popular passions really reflects a concern over an outcome, the subjugation of one group by another, rather than a concern with the process by which that subjugation becomes the organic law of the state. Although it may be true that California’s or Nebraska’s legislatures would not produce such a proposal

His fifth category invalidates "[i]nitatives to place affirmative legislation into the constitution itself," and reaches far beyond the rights issues discussed here. *Id.* at 42 (emphasis deleted).

For a review of three theories of equal protection that may be used to invalidate initiative measures targeted against equal rights for gay and lesbian people, see Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 *Harv. L. Rev.* 1905 (1993) (describing theories of suspect classification, illegitimate government purpose, and denial of the fundamental right of equal protection in political processes, and suggesting First Amendment theories as well). These theories also apply to measures targeting other groups.

Judge Linde notes the applicability of the Clause to many of his concerns, but complains that it is "more difficult" to invalidate an initiative measure on equal protection grounds than on Guaranty Clause grounds. *Linde*, *supra* note 60, at 39 & n.80. His complaint, of course, is well taken, because his Guaranty Clause theory permits judicial negation not only of measures that tend to subjugate or exclude groups, but also ones that advance equality and other rights-oriented values.

One of Judge Linde’s examples of legislation for which "the motivating passion is obvious," *Linde*, *supra* note 60, at 35, is California’s Alien Land Law, which prohibited aliens who were ineligible for American citizenship from acquiring, owning, occupying, leasing, or transferring agricultural land, under penalty of escheat. The Supreme Court found that this statute, as applied to the property of a citizen in his minority, for which the consideration had been paid by the child’s ineligible alien parent, violated the child’s right to equal protection of the laws. *Oyama v. California*, 332 U.S. 633 (1948). The statute had been enacted by the California legislature. *See Linde, supra*, at 35 n.69.

Another example of legislation for which "the motivating passion is obvious," *Linde, supra* note 60, at 35, is the Nebraska statute making it a misdemeanor to teach any subject in a language other than English in any school in the state or to teach a foreign language to any student who had not passed the eighth grade. The Supreme Court found this statute violated the liberty interests of teachers and parents, secured by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923). This statute, too, had been enacted by the state
today, Judge Linde's own examples show that was not true yesterday. When those legislatures earlier erred, other constitutional doctrines were available to remedy their acts of group passion. The difficulty with Judge Linde's proposal is ultimately the same as that of the state judicial control models that focus on process. In the hands of the argument's proponents, the judicial outcomes they produce are benign. In the hands of others, they are destructive of rights.

E. Two Stories About Popular Sovereignty, State Judicial Activism, and Equality

The concern over majoritarian control of the state constitutional amendment process is misdirected. This misdirection is not, as some have argued, because majoritarian control really has not harmed individual rights that much, although this conclusion is supported by the Pennsylvania experience. Rather, the misdirection exists because the restriction of popular legislature. See Linde, supra, at 35 n.69.

101 In one study of outcomes of the amendment process, Albert Sturm found "relatively little change" in state bills of rights from mid-century through 1981, and that most of the change was protective of rights. Albert L. Sturm, The Development of American State Constitutions, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57, 87-88 (1982). Janice May, in a more detailed analysis focusing on outcomes of the initiative amendment process, found that in the area of rights, the process went both ways, but, compared to other subject areas, was used relatively infrequently to affect civil rights and liberties. May, supra note 63, at 163-84. Although the recent trend has been more negative for rights, id. at 169, May concludes that, on balance, the constitutional initiative "is no better and no worse than other democratic procedures and institutions in the United States." Id. at 180. But see Donald E. Wilkes, Jr., First Things Last: Amendomania and State Bills of Rights, 54 MISS. L.J. 223 (1984).

102 See infra text accompanying notes 316-44. Of course, an initiative process is very different from the legislature-dominated process that is the rule in Pennsylvania, and the generally favorable results reported by May, were shaped in part by counter-majoritarian controls. See May, supra note 63, at 179-80. Nonetheless, I believe the core of my argument applies to all types of state amendment processes. In some times and places, the control mechanism of the federal equality principle may be more frequently needed in response to one type of process than another.
participation in the discourse over rights is ultimately destructive to the rights that are sought to be secured. Two stories about state constitutional amendments will help illustrate this point.

On November 3, 1992, Colorado amended its constitution to prohibit, at all levels of state and local government, the enactment or enforcement of any law or policy that prohibits discrimination on the basis of sexual orientation. The amendment, which has been the subject of intense national debate, was accomplished through Colorado's initiative procedure. This is the procedure that Judge Linde would subject to Guaranty Clause scrutiny, and, in this instance, the procedure produced the exact result he predicted. The Colorado amendment would have the effect of establishing a state policy that promotes the unfavorable treatment of gays and lesbians because of their sexual orientation.

On February 5, 1968, New Mexico amended its constitution to permit the legislature to provide for absentee voting and to

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103 COLO. CONST. art. II, § 30b. Enforcement of Amendment 2 has been preliminarily enjoined by the state courts because it would "den[y] gay men, lesbians, and bisexuals the opportunity to participate equally in the political process," in violation of the Equal Protection Clause. Evans v. Romer, 854 P.2d 1270, 1285 (Colo.), cert. denied, 62 U.S.L.W. 3320 (U.S. Nov. 1, 1993) (No. 93-453).

104 COLO. CONST. art. V, § 1.

105 See supra text accompanying notes 86-93.

106 The amendment provides:
No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation.

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

107 Language expressly granting this legislative power was added to Article VII, Section 1 of the New Mexico Constitution. The New Mexico Supreme Court had previously ruled that Article VII, Section 1 prohibited such legislation. State ex rel. West v. Thomas, 305 P.2d 376 (N.M. 1956); Chase v.
remove language, long invalidated by the Federal Constitution,\textsuperscript{108} denying women the right to vote.\textsuperscript{109} The amendment was effected by a writ of mandamus issued by the New Mexico Supreme Court,\textsuperscript{110} which declared invalid, on federal equal protection grounds, one of the state constitution's hyper-majority requirements for the proposal and ratification of amendments relating to the elective franchise.\textsuperscript{111} Those requirements had caused eleven attempts to allow absentee voting to fail, despite the generally overwhelming support of the electorate.\textsuperscript{112}

I do not know whether the court's order directing that the amendment be certified as having been ratified, despite its failure to satisfy the state constitutional rule, generated much debate, but I would imagine that most of the notice it received was favorable. The mandamus action was prosecuted by the New Mexico

\textsuperscript{108}U.S. Const. amend. XIX (ratified Aug. 18, 1920).

\textsuperscript{109}Article VII, Section 1 of the New Mexico Constitution, as adopted by the voters in 1911, at the time of admission to the Union, provided for male suffrage. Women were permitted to vote in local school elections, unless prohibited by local option.


\textsuperscript{111}Article XIX, Section 1 of the New Mexico Constitution, relating to amendments, established a special rule for altering the right to vote. Proposed amendments to Article VII, Section 1 (and Section 3), required approval by three-fourths of the members of each legislative chamber, and ratification by three-fourths of the electors voting statewide \textit{and} two-thirds of those voting in each county. The same rule applied to proposed amendments to Article XII, Sections 8 and 10, relating to public education. The court held unconstitutional the requirement that two-thirds of the electors voting in each county approve an amendment because, given the wide disparities in population, the value of a vote cast in one county was far greater than that of a vote cast in another. \textit{State Canvassing Bd.}, 437 P.2d at 149.

\textsuperscript{112}Id. at 147.
Attorney General. The defendant state agency was represented by special counsel, appointed by the court (because its usual counsel, the Attorney General, was on the other side), who essentially adopted the position urged by the Attorney General. The decision, by a unanimous court, approved an immensely popular measure easing access to the ballot and deleting offensive language of gender bias from the state’s basic charter.

Like many, I consider the action of the people of Colorado in adopting an official policy of tolerating invidious discrimination against a specified minority deeply offensive. As suggested in the discussion of Judge Linde’s analysis of the Guaranty Clause, I also believe it violates equal protection. Moreover, I agree with the great majority of New Mexico voters that expanding the franchise through a system of absentee balloting is an idea whose time came long ago and is still with us. I also agree that language excluding women from the community’s political life, even if unenforceable, has no place in a state constitution. That said, however, as a matter of constitutionalism, as a matter of how we govern ourselves, I find New Mexico’s amendment process far more troublesome than the process in Colorado and, ultimately, one more dangerous to human rights.

113 Id. at 148.
114 Id.
115 See supra notes 58-100 and accompanying text.
116 The Colorado courts, so far, agree, and have enjoined implementation of Amendment 2 on federal equal protection grounds. Evans v. Romer, 854 P.2d. 1270 (Colo.) (affirming order granting preliminary injunction barring implementation of Amendment 2), cert. denied, 62 U.S.L.W. 3320 (U.S. Nov. 1, 1993) (No. 93-453).
117 Certainly, we the people suffer frailty in our understanding of, and dedication to, human dignity and equality. We need Holocaust memorials and museums, museums of African-American history that confront the reality of slavery, and similar institutions, "lest we forget." In a sense, the Federal Constitution itself is such a memorial, where its original, artful language of slavery remains in the text today. But that text also reveals the promise of the Thirteenth, Fourteenth, and Fifteenth Amendments, and teaches us not only of our past but of our possible future. The New Mexico Constitution of 1911 carried only half the lesson.
The New Mexico Supreme Court's opinion made no effort to explain the original decision to make the constitution's franchise provisions "unamendable."\(^{118}\) The court viewed the earlier decision not as a presumptive expression of a constitutional value,\(^{119}\) but rather as a "problem."\(^{120}\) In addition to erecting the hurdles that troubled the court, Article VII, Section 3 of the New Mexico Constitution also prohibits discrimination in the elective franchise based on the "inability to speak, read or write the English or Spanish languages." Looking beyond the reported decision to the New Mexico Constitution itself, one discovers an explanation for the original Framers' decision to make Article XII, Sections 8 and 10, immune to majoritarian whim as well, since each section addresses the rights of Spanish-speaking children in public education.\(^{121}\)

\(^{118}\) Article VII, Section 1, had come to be referred to as "the unamendable section." *State Canvassing Bd.*, 437 P.2d at 147 (quoting NEW MEXICO LEGISLATIVE COUNCIL SERVICE, THE UNAMENDABLE SECTION (1965)).

\(^{119}\) The only reference the court makes to the purpose of Section 1 is the statement, "it is amply evident that the constitutional provision here being considered was quite definitely placed in the constitution to preserve certain rights in a minority group." *State Canvassing Bd.*, 437 P.2d at 151. The court added:

> It has now been made clear that when this is done there is no political equality under the Fourteenth Amendment as that term applies to the Fifteenth, Seventeenth, and Nineteenth Amendments to our United States Constitution. Neither can there be political equality under the Fourteenth Amendment to exercise the right of elective franchise provided for in Art. VII of the New Mexico Constitution, so long as Art. VII, Sec. 3, and Art. XIX, Sec. 1, contain the restriction here under attack.

*Id.* (citation omitted).

\(^{120}\) *State Canvassing Bd.*, 437 P.2d at 147. Of course, the court itself had created the problem.

\(^{121}\) Article XII, Section 8 of the New Mexico Constitution provides:

> The legislature shall provide for the training of teachers in the normal schools or otherwise so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools and educational institutions of the state, and shall provide proper means and methods to facilitate the teaching of the English language and other branches of learning to such pupils and students.
In other words, the deal struck in New Mexico in 1911 was intended to protect the rights of a distinct minority, whose participation in the constitution-making enterprise may have been critical to the Territory's accession to membership in the Union. If the lambs are to agree to lie down with the lions, because winter promises to be cold and sharing their destinies in the peaceable kingdom will be mutually beneficial, their compact perhaps should include a rule that one will not dine on the other. And the lions ought not be surprised if the lambs insist on a second rule as well, which states that when spring comes, the first rule is not to be repealed without the consent of both parties.

The New Mexico Supreme Court, at the behest of the State Attorney General, needlessly amended the state constitution by fiat, in an uncontested proceeding, on dubious grounds, and with barely a backhanded reference to the rights intended to be secured by the "problem" the court was addressing. Although the new text did not directly affect the antidiscrimination provisions

N.M. Const. art. XII, § 8. Article XII, Section 10 provides:
Children of Spanish descent in the state of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the state, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the state, and the legislature shall provide penalties for the violation of this section. This section shall never be amended except upon a vote of the people of this state, in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

N.M. Const. art. XII, § 10.


123 There is a world of difference between the permanent exclusion from effective participation in all legislative decisions, addressed in the reapportionment cases, and unequal weight of votes on proposed amendment to a single, constitutional rule crafted to promote political equality. But cf. Shaw v. Reno, 113 S. Ct. 2816 (1993) (race-based gerrymandering of electoral districts for purpose of increasing African-American representation subject to strict scrutiny under Equal Protection Clause).
that protected the state’s Spanish-speaking minority, the rule announced certainly put them at risk.

The cavalier approach to constitutionalism that underlies the New Mexico Supreme Court’s decision presents both substantive and procedural problems. Substantively, the court substituted its own view of political equality\(^\text{124}\) for the more inclusive view that had been adopted by its people as a constitutional value of the greatest importance. Procedurally, the means by which it imposed its view ensured that the voices of those affected were not to be heard.\(^\text{125}\)

If an amendment process is to result in trashing minority rights, it somehow seems preferable that it do so openly, not because the injury is thereby made less severe,\(^\text{126}\) but because its threat is more evident and the battle more clearly drawn. The

\(^\text{124}\) The court’s view, admittedly, was arguably consistent with the reapportionment cases but, in the absence of contested litigation, certainly cannot be said to be mandated by them. The seemingly collusive nature of the litigation precluded both the possibility of a hearing on the merits in the New Mexico court and a ruling on the federal issue by the United States Supreme Court.

\(^\text{125}\) This is not to suggest, of course, that state courts should ignore the Supremacy Clause. Professor Hart notes: "In the scheme of the Constitution, [state courts] are the primary guarantors of [federal] constitutional rights, and in many cases they may be the ultimate ones." Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

The state courts of Colorado are performing their duty, and have enjoined implementation of Amendment 2 on federal equal protection grounds. Unlike *State Canvassing Board*, however, the Colorado courts are acting in contested litigation. The governor, the state attorney general, and the state itself are defendants, and the attorney general is vigorously defending the amendment. Evans v. Romer, 854 P.2d 1270 (Colo.), *cert. denied*, 62 U.S.L.W. 3320 (U.S. Nov. 1, 1993) (No. 93-453); *see also* Dirk Johnson, *Colorado’s Anti-gay Measure Set Back*, N.Y. TIMES, July 20, 1993, at A1 (reporting attorney general’s intent to continue litigation).

\(^\text{126}\) The stigmatic injury of exclusion effected through an initiative process may be greater than that caused by a judicial ruling, at least in the short term. The former signals the direct judgment of rejection by one’s political community, whereas the latter may come sugar-coated. Furthermore, to the extent the initiative process has generated intense debate, its outcome will be experienced personally and immediately by the participants. Judicial decrees usually come quietly, at least to all but the immediate parties.
people of Colorado amended their compact in the open. The injury of exclusion comes from the outcome of the amendment process, not from the process itself. Amendment Two would bar gays and lesbians from effective participation in future, specified legislative debates that would affect their interests, but not from any constitutional debates over whether and why that should be. In Colorado, therefore, the future amendment process is not closed, and more voices are certain to be heard. Although the injury is severe, it is also plain to see, and it may be addressed by reopening the majoritarian process or by subjecting the present result to scrutiny under federal equality norms.

IV. POPULAR SOVEREIGNTY, RIGHTS, AND THE DIALOGUES OF FEDERALISM

A. Judicial Dialogues

The varied processes of dialogue in constitutional interpretation are the subject of extensive comment. Professor Tribe speaks of the unique capacity and commitment [of an independent judiciary] to engage in constitutional discourse—to explain and justify its conclusions about governmental authority in a dialogue with those who read the same Constitution even if they reach a different view. This is a commitment that only a dialogue-engaging institution, insulated from day-to-day political accountability but correspondingly burdened with oversight by professional

127 As measures such as the Colorado initiative are urged upon voters around the country, and as the national debate over exclusion of gays and lesbians from military service has intensified, there is evidence that new voices, urging reconciliation, are emerging in ways and in places not previously imagined. See, e.g., Dirk Johnson, Gay Rights Debate Prompts New Wave of "Coming Out" N.Y. TIMES, June 30, 1993, at A1, A10.

128 Both avenues are being pursued. See S. Con. Res. 2, Colo. 1993 (proposing a constitutional amendment to repeal Article II, Section 30b of the Colorado Constitution).
peers and vigilant lay critics, can be expected to 

maintain. 129 This dialogue occurs primarily with members of the political branches, whose members also are "sworn to uphold the Constitution," 130 and promotes both the legitimacy and the efficacy of judicial review. A more familiar dialogue, perhaps, takes place among the courts in the development of constitutional doctrine. Professor Martin H. Redish, for example, argues that "the primary reason for urging Supreme Court review of state decisions that interpret federal law incorporated by reference is to further the interests of interactive cooperative federalism by encouraging a direct dialogue between the highest courts of the two sovereigns." 131

Advancing a theory of "dialectical federalism," the late Professor Robert M. Cover and Professor T. Alexander Aleinikoff argued that the Warren Court's approach to criminal justice reform through expanded federal habeas corpus review of state convictions had invited a dialogue between federal and state courts on the development of federal constitutional requirements. 132 The Court encouraged this dialogue by "shunn[ing] the more direct but intrusive controls of liability rules and equity," 133 thereby creating space within which the lower "courts were required both to speak and listen as equals." 134 In Cover and Aleinikoff's model, when "neither system can claim total sovereignty," 135 the "dialectical federalism" that emerges from "open-ended dialogue . . . becomes the driving force for the articulation of rights." 136

The first sets of dialogues, between federal courts and the political branches on the one hand, and between federal and state

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129 Tribe, supra note 55, § 1.8, at 15.
130 Id.
133 Id. at 1036.
134 Id.
135 Id. at 1048.
136 Id. (citation omitted).
courts on the other, concentrate on the development of federal constitutional doctrine. Although state law and interests may be significant, the utility of the dialogue lies in its ability to formulate, or to legitimate, the supreme doctrine of the national constitution.

More recently, Professor Paul Kahn has called for a dialogue of a very different kind—a dialogue that recognizes and values the multiplicity of interpretative sources within a single, American constitutionalism.137 Responding to the impoverishment of "the meaning of the constitutional order" that results from "a single view of the possibilities of law,"138 Professor Kahn calls on state courts to join in an interpretative enterprise which recognizes that "constitutionalism is not a single set of truths, but an ongoing debate about the meaning of the rule of law in a democratic political order."139

B. Other Voices, but in Other Rooms

Although Professor Kahn takes a vital step in moving American constitutionalism from the single pole of the Federal Constitution, his search for diversity of voices is still largely limited to the judiciary.140 Republican theory looks to an entirely different set of participants. For example, Professor Cass Sunstein underscores the inclusiveness of republicanism's debates in his

138 Id. at 1155. Professor Kahn traces the "single vision" problem to the homogenization of the federal judiciary during the administrations of Presidents Reagan and Bush. Id. at 1154. Professor Judith Resnik notes a similar lack of vision, also traceable to a failure of diversity in judicial personnel, specifically in the gender area. Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991).
139 Kahn, supra note 137, at 1147-48. Professor Kahn believes this requires abandonment of the doctrine of "unique state sources," which is based on erroneous assumptions about differences among the states, anyway. Id. at 1148-50. This is a rather controversial assertion, and total abandonment of the doctrine is not required for the diversity purposes Professor Kahn seeks to advance.
140 Id. at 1158.
treatment of its equality and universalism principles.\textsuperscript{141} Thus, we now look to individuals as political actors in the quest for agreement through deliberations.

Republican theory, however, is addressed more to the processes and outcomes of legislative deliberations than to the framing of fundamental constitutional values, and on the process side, participatory popular democracy is not the theory's path of preference. Professor Akhil Reed Amar makes both leaps in his call to modernize the national Constitution through participatory, majoritarian processes.\textsuperscript{142} Although his proposal is not likely to be realized, Amar's call for recognition of popular sovereignty as a federal, constitutional principle,\textsuperscript{143} carries the iconoclast's gift of revealing old truths in new light.

If we reexamine old truths, we already have an avenue, largely overlooked in this context, of popular participation in the debate over fundamental, constitutional values. Majoritarian control of the state constitutional amendment processes is not a problem, but a solution. It is a component of our existing federal structure whose importance to the national constitutional dialogue has been either ignored or denied. This is because our received truth is that national constitutional values are too important, or too fragile, to be touched by mortal hands or mortal votes. Discussion of the sources of this received truth must await another day.\textsuperscript{144}

\textsuperscript{141} Cass R. Sunstein, \textit{Beyond the Republican Revival}, 97 \textit{Yale L.J.} 1539, 1552-54 (1988).
\textsuperscript{142} Amar, \textit{supra} note 81.
\textsuperscript{143} Professor Amar argues that the amendment avenues provided by Article V of the Federal Constitution are exclusive only with reference to the authority of the governmental agents recognized by Article V, and do not limit the power of the sovereign people themselves. \textit{Id.} at 1054-55. As for the sovereign, a majority of the people may amend the Constitution as they see fit, unfettered by Article V. \textit{Id.} at 1060. Furthermore, the relevant majority is a majority of the people of the nation, not of the states or any number of states, since by ratification of the 1787 Constitution the people of the states relocated sovereignty to the people of the United States. \textit{Id.} at 1062.
\textsuperscript{144} This Article is part of a larger inquiry into the dialogues of federalism and their impact on the processes of constitutional revision. When the Supreme Court issued its decision in \textit{Luther v. Borden}, 48 U.S. (7 How.) 1 (1849), it effectively encouraged state courts to adopt the federal model of judicial review
but, in the meantime, we may contemplate how popular sovereignty, exercised through state constitutional amendment processes, can usefully engage and inform the discourse over national constitutional rights.

C. May the People Approach the Bench?

The initiative amendment proposals restricting gay and lesbian rights in Colorado and Oregon, and their outcomes, illustrate the potential value of viewing majoritarian state amendment processes as components of the national constitutional dialogue. The people of Oregon rejected Proposition 9, leading Judge Linde to complain that the measure's opponents, in their victory, would claim "the Oregon system had worked again." Well, yes, it did, for Oregon, and, at least as importantly, it showed that the Oregon system can contribute to the national dialogue over the meaning of equality. Oregon voters have sent a message to the United States Supreme Court and to all other participants in the federal "rights" dialogue, if those participants are prepared to recognize the people as legitimate interlocutors.

But what about Colorado? The voters in that state seek admission to the dialogue, too. At one level, the electoral majority has reaffirmed the Supreme Court majority's view regarding the status of homosexuality in American culture as set out in Bowers v. Hardwick. But, like the judicial discourse before it, the

as a means of supervising constitutional change in the states.

145 See supra notes 103-06 and accompanying text (discussing the Colorado Amendment).

146 Linde, supra note 60, at 19.

147 478 U.S. 186 (1986). The issue in Bowers, as stated by the majority, was "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy," id. at 190, and the Court had no difficulty concluding it did not. This, of course, is very different from the issue raised by the Colorado amendment, which attaches political penalties to status. Thus, as a statement of constitutional doctrine, Bowers cannot control the outcome of the challenge to the amendment. By framing the doctrinal question so narrowly, and focusing on the "ancient roots" of the condemnation of the conduct, however, the more interesting question is whether Bowers, as discourse, may be said to have invited the amendment.
electoral voices from Colorado are discordant, and they have provoked further discussion. As a consequence, these voices have refocused public attention on the judicial discourse: Is this what Bowers means? Do we, the people, need to reconsider Bowers? Do you, the Court of the dialogue, need to reconsider Bowers?

The outcome of the initiative process also has brought the Colorado judiciary into the dialogue. The judiciary's contribution, at least to date, advances the gay and lesbian community's claim to a right of equal participation in political processes. Because, in this instance, judicial review required resort to the federal equality principle, the Supreme Court will be formally invited to reenter the dialogue. When it does, the Court will have the benefit of the Colorado courts' contribution.

If the present conclusion regarding the dialogue which has been sparked by the Oregon and Colorado initiatives—a product of the people's discordant voices—is less than wholly satisfactory, it is not unlike much of the judicial discourse on rights. In a sense, a dialogue regarding rights ought to be discomforting, involving as it does a self-examination to rediscover the fundamental values of "we the people." If our self-image of a tolerant people is marred by the discord we find, that invites us to rethink, and perhaps rebuild, our notions of equality and inclusion. Regardless of the outcome, however, to bring the people formally into the rights dialogue is to move them from observers to responsible agents, and to make them co-guardians of rights.

In order for the value of popular sovereignty, as exercised through the state constitutional amendment processes, to be fully realized in the dialogues of a unitary American constitutionalism, we must accept the proposition that the people can be trusted to talk about rights. Of course, before the received wisdom of a judicial guardianship of state constitutions dominated practice in Pennsylvania and other states, there was a time when we did trust...
the people. An examination of the record from that time in Pennsylvania suggests that the earlier trust was well placed.149

V. ALL POWER IS INHERENT IN THE PEOPLE: THE ROOTS OF CONSTITUTIONALISM IN PENNSYLVANIA

A. William Penn's Legacy

Samuel Eliot Morison tells us "[n]o colony or state of the Union so well fits Emerson's dictum, 'An institution is the lengthened shadow of one man,' as Pennsylvania."150 William Penn's government, established under a charter granted in 1681 by Charles II, was once described as "perhaps, the wisest and freest . . . then known either in this country or any other."151 A more recent view underscores that "William Penn was not establishing a democracy. He and his landed aristocracy would command and the people would obey."152 Wherever one places him in liberty's Pantheon, however, the government Penn helped craft left the Commonwealth a tradition of constitutionalism in which self-governance and respect for individual rights both had firm foundations.

Penn's constitutional bequest comprised a succession of documents, beginning with the 1681 Concessions to the Province of Pennsylvania and 1682 Frame of Government, and ending with

149 The historical review in this Article will focus on how individual rights have fared under the regime of active exercise of popular sovereignty in Pennsylvania. Janice C. May has surveyed the national data on state constitutional amendments affecting rights. May, supra note 33; see supra note 101. Her studies support both the proposition that majoritarian processes are to be trusted and its corollary regarding the value of the equality principle in our federal system.


151 THOMAS R. WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA xvii (1907).

the 1701 Charter of Privileges. Religious tolerance was the centerpiece of Penn's "holy experiment," and liberty of conscience was accorded considerable attention. Article I of the 1701 Charter of Privileges assured this to all "who shall confess and acknowledge One almighty God, the Creator, Upholder and Ruler of the World; and profess him or themselves obliged to live quietly under the Civil Government." Public service, however, was limited to Christians and, faithful to English law, was closed entirely to Roman Catholics. Pennsylvania was, nonetheless, "the most tolerant colony in the New World," and it attracted a "bewildering variety of religious sects and churches" that was instrumental in establishing religious liberty as a fundamental value in the Commonwealth. Furthermore, liberty and the relative ease of land acquisition together made a powerful call "to the downtrodden peoples of Europe" generally, and it was estimated that nearly a third of Pennsylvania's pre-revolutionary, European population was non-English.

The charter guarantees of liberty were not limited to religion, and many of the traditional protections of English law that eventually were incorporated into state declarations of rights and the Federal Bill of Rights found expression in Penn's instruments. Uniquely, however, a flicker of racial equality

153 8 SOURCES, supra note 6, at 250, 253, 273. It also included a 1683 Frame of Government, id. at 263, and a 1696 Frame of Government, id. at 268 (the "Markham" frame). The 1682 Frame was crafted in England with the participation of prospective purchasers, prominent Quakers, and others, and included a Preface, Charter of Liberty, and Laws Agreed Upon in England. Id. at 253.

154 Id. at 273. Similar provisions were made in earlier instruments. See, e.g., Number 35 of Laws Agreed Upon in England. Id. at 261.

155 Id. at 274.

156 SELSAM, supra note 17, at 4 n.2 (citations omitted).


158 SELSAM, supra note 17, at 4.

may be seen in several of the early attempts to address the interests and rights of Native Americans. This vision of peaceful coexistence took root in the City of Brotherly Love and in eastern Pennsylvania, but became a principal point of contention for the westerners in the Revolutionary Era.

B. Sovereignty to the People Out-of-Doors

The American Revolution was as much a struggle over "who would rule at home" as one for a home that was independent, and the demise of the Penn's charter government was in many respects more a product of the former than the latter. But the two were inextricably intertwined. Pennsylvania marked the period leading to the revolution with intense regional, religious and class strife, which led to shifting and sometimes seemingly incomprehensible loyalties and alliances.

Two elements of the charter government became particularly important to its downfall. First, although it was "remarkably democratic" in principle, "in practice the Pennsylvania government

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160 See Concessions to the Province of Pennsylvania §§ 12-15, reprinted in 8 Sources, supra note 6, at 250, 251.


162 The two principal parties during the pre-revolutionary era were known as the Quaker Party, though not all adherents were religious Quakers, and the Presbyterian Party, a similarly inapt label for much of its following. Despite William Penn's own background, the Quakers became the antiproprietary party and controlled the Assembly. The Presbyterian Party included Episcopalians, the German Reformed, and Lutherans and controlled the executive functions of the government. SelSams, supra note 17, at 6-7 & n.11.

The differences between groups were sufficiently great, and the strategies for addressing them so uncertain, that opposing factions took turns petitioning the Privy Council for relief. Concern over failure to defend the western frontier led to a petition to disqualify Quakers from sitting in the Assembly. Id. at 26-27. Later, Western unrest and its political alignment with proprietary interests led the Assembly to petition for more closely supervised, Royal colony status. Douglass, supra note 161, at 225-27.
was scarcely less aristocratic than those of the royal colonies. By
two expedients—a high property qualification in Philadelphia and
the underrepresentation of western counties—the Assembly
succeeded in making itself independent of potentially radical
constituencies." The lack of Western representation was
underscored in the second concern, the perceived failure of the
legislature to provide adequately for the defense of the territory.
The charter Assembly's pacifist policies were founded on
arguments of religious and political liberty and of geopolitics, but contributed to its dissolution.

The divisions were exacerbated as other colonies moved
toward general rebellion against England. Although the Assembly
became more conciliatory, it maintained its opposition to
independence. By May of 1776, the process of asserting
independence, by crafting new constitutions and dissolving ties
with Great Britain, already was well underway in several colonies. The Pennsylvania Assembly, however, refused to support or join
these moves. This failure to support the other colonies created an
opportunity for concerted action by opponents of the charter
government in Pennsylvania and proponents of independence in the
other colonies.

What Gordon Wood has called the "real declaration of
independence" from Great Britain was issued by the Second
Continental Congress on May 15, 1776. On May 10, the Congress
had urged the colonies "where no government sufficient to the
exigencies of their affairs have been hitherto established, to adopt
such government as shall . . . best conduce to the happiness and
safety of the their constituents in particular, and America in
general." Five days later, it added a preamble calling for the total
suppression of any authority exercised under the British crown,

163 DOUGLASS, supra note 161, at 215, 216.
164 FROST, supra note 157, at 34-35.
165 See generally BRANNING, supra note 4, at 11-12; SELSAM, supra note 17, at 112-14; WOOD, supra note 1, at 132-33.
166 WOOD, supra note 1, at 132.
and governance conducted in its stead "under the authority of the people of the colonies."\textsuperscript{167}

The second Declaration of Independence, issued July 4, 1776, was a call for solidarity throughout the colonies and an appeal to potential allies in Great Britain and elsewhere. The first was intended primarily to influence the people of Pennsylvania, and it created an occasion of apparent authority which enabled the revolutionaries of the Commonwealth to wrest power from the charter government.\textsuperscript{168} On the day the Preamble was adopted, May 15, Pennsylvania Whigs accepted Congress' invitation and began a series of gatherings of "the people out-of-doors" which culminated in the call for the constitutional convention that framed Pennsylvania's "radical" constitution of 1776.\textsuperscript{169} The charter Assembly ceased to meet as an effective legislature, and the convention itself took over its powers.\textsuperscript{170}

The 1776 constitution created a structure of government that was intended to retain for the people themselves a large part of the legislative power. A unicameral Assembly, procedurally limited in its lawmaking function, served almost as an "upper house," with the people as the lower.\textsuperscript{171} The unicameral legislature itself was not at all radical to Pennsylvania, however, since that had been the model in the charter government since 1701.\textsuperscript{172} What was different was the weak, plural executive with no veto authority, limited terms for representatives, a requirement that laws be considered in two successive sessions of the Assembly before enactment, expanded franchise, and reapportionment.

The two-session procedure for lawmaking\textsuperscript{173} was intended as a popular check on legislative power. In theory, bills approved in


\textsuperscript{168} \textit{See} Branning, \textit{supra} note 4, at 11-12; Wood \textit{supra} note 1, at 133.

\textsuperscript{169} Selsam, \textit{supra} note 17, at 116-29, 136-42.

\textsuperscript{170} Robert L. Brunhouse, \textit{The Counter-Revolution in Pennsylvania 1776-1790}, at 13 (1942); see also Selsam, \textit{supra} note 17, at 129-35.

\textsuperscript{171} Wood, \textit{supra} note 1, at 366.

\textsuperscript{172} Charter of Privileges for Pennsylvania (1701), \textit{reprinted in} 8 Sources, \textit{supra} note 6, at 273.

\textsuperscript{173} Pa. Const. of 1776, ch. II (Frame of Gov't), § 15, \textit{reprinted in} 8 Sources, \textit{supra} note 6, at 281.
one session were to be available for public debate before the next, but the newspapers, handbills and broadsides that were the primary means of dissemination, had very limited circulation outside of Philadelphia. Mass meetings were a second means of communication, but these, too, occurred primarily in Philadelphia. Public debate aside, the 1776 constitution's provision for emergency legislation permitted laws to be enacted in a single session during periods of single-party dominance.

The proclamation of the 1776 constitution was followed almost immediately by attempts to amend it, with a different group of "people out-of-doors" leading the call. The constitution provided a single, and cumbersome, amendment process, through a convention called by two-thirds of the membership of a special review body known as the Council of Censors. The Council was to be convened only at seven-year intervals, and its seats were allocated to the state's political subdivisions equally, rather than on the basis of population. The Republicans' 1784 experience of defeat in the first Council, after holding an initial majority of that

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174 BRUNHOUSE, supra note 170, at 5-6, 14.
175 See id. at 14. In 1784, a committee of the Council of Censors, charged under Section 47 with inquiring into violations of the constitution, reported that "a multitude" of laws had been passed in a single session, including 31 of the 39 acts of the preceding assembly, and that need for rapid action seemed to have existed in not more than two or three instances. THE PROCEEDINGS RELATIVE TO THE CALLING OF THE CONVENTIONS OF 1776 AND 1790, at 83, 95 (Harrisburg, Pa., John S. Wiestling 1825) [hereinafter 1776 AND 1790 PROCEEDINGS]. Eight members dissented. Although they agreed that many laws had been enacted in a single session, "for which there may not now appear any necessity," they asserted that the Assembly alone was competent to determine necessity. Id. at 99.
176 In part because of the recurring discord over the new Constitution, Congress never reaped the anticipated benefit—the turning of the state's enormous resources to the war effort—of its support for the Pennsylvania revolutionaries. The state's new leaders had little interest in the war itself, but "merely wanted to govern themselves. Their position was precarious and every nerve had to be strained to maintain it. No risk could be taken by sending large forces against the British." SELSAM, supra note 17, at 254.
177 PA. CONST. of 1776, ch. II (Frame of Gov't), § 47, reprinted in 8 SOURCES, supra note 6, at 285.
body, led them to avoid it when they regained power later in the decade.

After achieving success in the state convention called in 1787 to ratify the new Federal Constitution, the Republican majority in the 1789 Assembly called a state constitutional convention to be held in Philadelphia in November of that year. Adopting a tactic used by the Constitutionalists in 1779 to block a convention call, the Republicans produced over ten thousand signatures on petitions supporting their position, and claimed only "'slender opposition'" had surfaced. Fearing, however, that their actual margin of support was itself perilously slender, they refused to put the question whether to call a convention to a popular vote.\(^{178}\)

The 1790 constitution\(^{179}\) more closely resembled the Federal Constitution than Pennsylvania's revolutionary one, with a bicameral legislature and a strong, single governor with veto authority. However, the 1790 constitution-making procedure itself closely resembled that of 1776.\(^{180}\) After completing its draft in late February 1790, the convention adjourned until August to give the people an opportunity to examine and debate its work. The public response was positive, and the convention made only minor modifications in the draft before formally proclaiming its adoption on September 2. The old Assembly ceased to function the next day.\(^{181}\)

The amendment procedure established by the 1776 constitution was limited to a convention call by the Council of Censors, and was never successfully invoked. Given the difficulties experienced by the conservatives in their efforts to effect change, it might have been reasonable to expect them to create a simpler mechanism for revision when they controlled the convention that promulgated the 1790 constitution. A proposal concerning future amendments was

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\(^{178}\) Brunhouse, supra note 170, at 223-24.

\(^{179}\) 8 Sources, supra note 6, at 286.

\(^{180}\) The procedure was established by the Act calling the convention, which, in accordance with Section 15 of the 1776 constitution, was considered in two sessions of the Assembly. 1776 and 1790 Proceedings, supra note 175, at 129, 133.

\(^{181}\) Brunhouse, supra note 170, at 226-27; 8 Sources, supra note 6, at 286.
offered, but not adopted, and the 1790 convention simply eliminated the Council and made no textual provision for amendment. However, it did simplify and strengthen the language of popular sovereignty in the Declaration of Rights. Certainly, if "all power is inherent in the people," and "they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper," it might be thought that any text purporting to instruct the people on the manner of amendment would be superfluous.

In any event, Pennsylvania's early path to constitutional change was now well-worn, and when the popular movements of the Jeffersonians and the Jacksonians successively swept the country, the Democratic-Republican heirs of 1776 were soon "out-of-doors" again. Revision was a major issue in the gubernatorial election of 1805, but flooding the legislature with petitions for a convention quickly became a principal tactic. In 1825 the General Assembly submitted the question whether to call a convention to the electorate, but did not provide for a second vote on the constitution that was to be framed by that convention, and the referendum was defeated.

The Assembly was confronted with a "veritable flood of petitions" during its 1832-33 session, and a people's convention gathered in Harrisburg to reinforce the demand for a real convention. When the General Assembly responded again, in 1835, the convention process it invoked had two significant innovations over that of 1790. First, as in 1825, the question whether to call a convention was submitted to the voters; second, the convention's product was itself submitted to the electorate for

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182 1776 AND 1790 PROCEEDINGS, supra note 175, at 216.
183 PA. CONST. of 1790, art. IX, § 2, reprinted in 8 SOURCES, supra note 6, at 292.
184 This is not to suggest that the omission of any provision for amendment was itself viewed as an additional assertion of popular sovereignty. Walter Dodd observed that the process of effecting future amendments was not given a great deal of consideration in the early period of state constitution-making. DODD, supra note 78, at 27.
185 BRANNING, supra note 4, at 21-22.
186 Id. at 22.
These modifications dramatically increased formal, popular participation in the process, and moved the "people out-of-doors" inside to the ballot box.¹⁸⁸

VI. AMENDING THE CONSTITUTION BY THE "RULES THAT ARE LAID DOWN"¹⁸⁹

A. The Rule of the Text

Pennsylvania’s 1838 constitution finally created a textual procedure for enacting amendments, a procedure closely controlled by the legislature.¹⁹⁰ The details are important, and will be discussed at greater length below, but the procedure adopted in 1838 basically required that a proposed amendment be approved by two successive General Assemblies and then ratified by the voters. The provision has been carried into subsequent constitutions without major change,¹⁹¹ and, except for the 1967

¹⁸⁷ Act of Apr. 14, 1835, No. 151, 1834-35 Pa. Laws 270 (authorizing vote to ascertain "the sense of the citizens" whether a convention of elected delegates ought to be called for purpose of submitting proposed amendments to a vote of the people); Act of Mar. 29, 1836, No. 70, 1835-36 Pa. Laws 214 (calling the convention and providing for ratification election). The convention met in 1837 and 1838, and framed a constitution that was ratified by a vote of 113,971 to 112,759. 8 SOURCES, supra note 6, at 296.

¹⁸⁸ Of course, the 1776 and 1790 conventions each had provided an opportunity for formal, public participation in the constitution-making process through the election of convention delegates. But the voice of the people in the two critical questions, first, whether to alter the basic law at all, and second, whether to accept the convention’s decisions on the substance of the alterations, was exercised "out-of-doors."

By contrast, formal participation was provided at three critical stages of creating the 1838 constitution: whether to convene, selection of delegates, and approval of the convention’s work. This basic approach was followed again in framing the 1874 and 1968 constitutions.

¹⁸⁹ 1 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 55 (Harrisburg, Pa., Benjamin Singerly, State Printer 1873) [hereinafter DEBATES].

¹⁹⁰ PA. CONST. of 1838, art. X, reprinted in 8 SOURCES, supra note 6, at 296, 304.

¹⁹¹ PA. CONST. of 1874, art. XVIII, reprinted in 8 SOURCES, supra note 6, at 310, 330; PA. CONST. art. XI, § 1.
addition of a fast-track option for responding to "major emergenc[ies]," has been the only textually-sanctioned method of amending the Pennsylvania Constitution since the abolition of the Council of Censors.

Although the Democrats had been successful in gaining the call of the 1837 Convention, they were two votes shy of a controlling majority, against a coalition of Whigs and Antimasons, in the convention itself. "The result was a compromise, but only after a very lively debate over points of difference." The outcome of the debate over the amendment process reflected the convention’s division. For example, the two-assembly limitation was adopted, but a more stringent proposal to require a two-thirds super-majority in the second assembly was rejected. The prohibition against submitting proposed amendments to the people more often than once every five years was accepted, but a proposal to require a ten-year waiting period was defeated.

The convention, however, also carried forward the 1776 and 1790 declarations of the people’s "unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper," and the textual amendment procedure adopted must be considered in the light of that

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192 The "major emergency" option may be invoked by a single session of the Assembly, with the agreement of two-thirds of the membership of each house (rather than a simple majority) "if the safety or welfare of the Commonwealth requires prompt amendment." The proposal must be "promptly" published, and submitted to the electorate not less than one month after being approved by the legislature. Pa. Const. art. XI, § 1, para. (a).
194 Branning, supra note 4, at 22.
195 Id. (citation omitted).
196 12 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania, to Propose Amendments to the Constitution 78-84 (Harrisburg, Pa., Packer, Barrett, and Parke 1837) [hereinafter Proceedings and Debates].
197 Id. at 307-11.
198 Id. at 228-35.
199 Pa. Const. of 1838, art. IX, § 2, reprinted in 8 Sources, supra note 6, at 303.
fundamental right. Certainly, the textual route cannot encompass the full extent of the people's right to reform, because that procedure requires two acts of successive assemblies, precisely defining and limiting any amendment, before the people have an opportunity to act on it themselves. If the legislature's language is not to the people's liking, they can only reject it, not modify it. If the legislature fails to pass the language twice, the people can do nothing.

Despite the adoption of a textually sanctioned amendment process, the convention procedure continues to be utilized for major revisions. After 1834, the convention procedure was next invoked in 1872, resulting in the 1874 constitution. The core of the current text, known as the constitution of 1968, is a hybrid product of the textually sanctioned process and a convention. Since 1968, that "core" has itself been amended twenty times by the Article XI procedure.

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200 Sources, supra note 6, at 310.
201 The designation of the 1873 text as the "Constitution of 1874" and the current text as the "Constitution of 1968" was made by statute, 1 Pa. Cons. Stat. § 906 (1975).
202 The framing of the 1968 constitution, described by Robert Woodside, was accomplished by means of a series of eight amendments, each addressing one or more articles of the 1874 constitution, which were adopted in 1966 and 1967, and by a limited constitutional convention. The eight amendments went through the "normal" process of legislative approval, but with substantial outside assistance in their preparation. The limited convention, in its turn, submitted its draft to the electorate as five separate proposals. Robert E. Woodside, Pennsylvania Constitutional Law 579-81 (1985).
203 Woodside describes 17 amendments adopted between 1971 and 1984. Id. at 555-60 (acknowledging assistance of William H. Nast, Jr., Visiting Associate Professor of Law, Widener University School of Law, and former Counsel to the Joint State Government Commission, in furnishing the information reported). Three additional amendments have been adopted: amendment to Article VII, Section 14, allowing absentee voting by persons unable to attend polling places because of observance of a religious holiday, or by county employees because of election day duties, adopted November 5, 1985; amendment to Article VIII, Section 2(c), extending certain tax exemptions for veterans to unmarried surviving spouses, adopted November 5, 1985; amendment to Article V, Section 18, relating to judicial discipline, described infra notes 264-65 and accompanying text. adopted May 18, 1993.
Two distinct routes, therefore, are available to effect change in the Commonwealth's organic law. First, there is the "normal" amendment process sanctioned by the constitution itself. Second, there is "extraordinary," extra-constitutional, convention process. Both of these processes, and the judicial supervision to which they have been subjected, merit examination.

The origins of the 1838 amendment process are somewhat obscure. The procedure's basic approach bears a striking resemblance to the limitations imposed on the enactment of normal legislation by the 1776 constitution.\(^{204}\) Both processes require consideration by two successive assemblies and provide an opportunity for the people to examine the matter and express themselves in the interim.\(^{205}\) But the logic of the 1776 provision

\(^{204}\) A review of the convention debates over the amendment process did not uncover any mention of the 1776 legislative process as a model. However, among the examples of other state amendment procedures discussed was that of Maryland. See, e.g., 12 PROCEEDINGS AND DEBATES, supra note 196, at 59, 249, 250, 255, 308, 310. The Maryland provision, Article LIX of the 1776 constitution, reprinted in 4 SOURCES, supra note 6, at 372, 383, is quite similar to the Pennsylvania provision adopted in 1838, with its requirement that the amendment be considered by two successive legislatures. As Walter Dodd has said, "[t]his arrangement represented a decided step in advance in popular control over amendments . . . and for a time was considered to give a sufficient popular participation in the adoption of constitutional amendments." DODD, supra note 78, at 122. However, the Maryland provision did not require ratification by the electorate. Commenting on the borrowing of this approach by Connecticut, but with the addition, as in Pennsylvania, of a popular vote, Dodd notes that the need for the second Assembly's consideration of the measure had ended, a "fact . . . not appreciated by the Connecticut convention." Id. at 125-26.

\(^{205}\) PA. CONST. of 1776, ch. II (Frame of Gov't), § 15 provided:

To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles. 

*Id.*
was precisely reversed in 1838. The provision in the revolutionary constitution was a mechanism for preserving popular sovereignty, making it more difficult for the Assembly to enact laws contrary to the will of the people. Insofar as it displaces other avenues of change, however, the 1838 requirement for constitutional amendments restrains popular sovereignty by erecting barriers to the people's opportunities to alter or amend their government. 206

An 1874 change in the constitutional structure of the legislature, from a system of annual assemblies and annual elections to a biennial system, 207 has had the apparently unintended effect of making the amendment procedure an even more severe restraint on popular sovereignty today than it was in 1838. There is a certain irony here, because it was the perceived abuses of legislative power that led to the call of the 1872-73 Convention, and those perceived abuses provided the principal focus of the convention's work. 208 Nonetheless, the biennial organization of the General Assembly means that an amendment which could have been debated and adopted in less than twelve months in the nineteenth century now requires a practical minimum of two years, and more likely three to four years, to make its way through the process.

In addition, the biennial system is heavily skewed in favor of the most powerful interest groups. 209 The current Article XI amendment process not only affects the time required to conclude the process, but also the nature of the debate during the process.

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206 Argument was offered at the convention regarding the need to avoid undue restrictions on the right of the people to amend, primarily in opposition to limiting the frequency of amendment proposals, but also with reference to the two-assembly plus ratification requirement, as well as in general. See, e.g., 12 PROCEEDINGS AND DEBATES, supra note 196, at 230-32 (remarks of Delegate Earle). "[T]he real difficulty will be found, not in the proposing of too many alterations, but in the omission to propose those which ought to be made." Id. at 232.

207 PA. CONST. of 1874, art. II, § 4, reprinted in 8 SOURCES, supra note 6, at 310, 312.

208 See BRANNING, supra note 4, at 37.

209 This contrasts with the republicanism argument advanced by Judge Linde which favors legislatively controlled processes over the popular initiative. See Linde, supra note 60.
Legislators' interest in a proposed amendment the first time it is considered is diminished by the remoteness of its consequences. If public interest in the matter is sufficiently high to attract legislative attention, despite the remoteness factor, legislators are at liberty to follow the lead of the most vocal elements; if the wind changes, so can their votes.\(^{210}\) Thus, legislative attention is most easily diverted just when it is most critical, at the time the language of the proposed amendment is determined. For the proponents of the amendment, the task of sustaining a level of interest sufficient to overcome the normal inertia of the legislative process over a much longer period of time required by the amendment process is a daunting one.

Of course, the two-assembly procedure also restricts the legislature because it is required to consider a matter twice, with most members standing for reelection in the interim. The legislature is further restricted by the proviso that "no amendment or amendments shall be submitted to the people oftener than once in five years."\(^{211}\) However, as an alternative to a convention or an initiative process, the 1838 procedure clearly shifts power to the legislature, which controls both the subject and the substance of amendments. As will be seen, the procedure also represents a shift of power from the people to the judiciary, by way of judicial interpretation of the limiting provisions.

During the 1873 convention, several proposals to modify the 1838 amendment procedure were offered, but a similar deadlock prevailed. The Committee on Future Amendments proposed submitting to the people, every twenty years, the question whether to call a constitutional convention.\(^{212}\) Another proposal would have required a two-thirds vote of the membership of each house of the assembly in order to place the convention question before

\(^{210}\) This will not be true in the rare instance in which public sentiment not only shifts before the next election, but shifts so profoundly that it determines the election outcome.

\(^{211}\) Pa. Const. of 1838, art. X, reprinted in 8 Sources, supra note 6, at 305. The same limit is in Article XI, Section 1 of the 1968 constitution, but without the phrase, "to the people." The judicial construction of this provision is discussed infra at notes 244-69 and accompanying text.

\(^{212}\) 5 Debates, supra note 189, at 6; 6 id. at 164.
the people. The Committee proposed the deletion of the five-year interval between submission of proposed amendments to the people. A compromise proposal would have reduced the five-year limit to three years. All of these proposals were rejected. Other modifications also were discussed, but, in the end, the 1873 convention adopted the 1838 package virtually intact. The convention merely increased the publication requirements from one newspaper per county to two where available, and it required that the publication of the proposal, following its approval by the first assembly to consider it, be made before the next "general" election rather than the next "election."

The 1837-38 and 1872-73 convention debates show, quite unsurprisingly, that delegates had broadly divergent concerns on the amendment issue. Some delegates were wary of amendments altogether, expressing solicitude for minority rights or, alternatively, for societal stability. Others worried that providing access to the amendment process through the legislature would be exploited by special interests. Occasionally, the popular sovereignty spirit of 1776 was invoked, but less often than the image of havoc to be wrought by unsupervised popular access to any amendment process. Delegate George Woodward, a former justice and chief justice of the Pennsylvania Supreme Court, expressed the latter concern frankly when he spoke against the 1873 proposal to hold a referendum once every twenty years to determine whether to call a convention:

Well, sir, I would not agitate the question before the people. The people will always vote for a Convention. I believe they have voted for every Convention that has ever been proposed, and for every constitutional amendment that has ever been proposed, and I have no doubt that they will continue to do so. One of the qualities of the American people is discontent with their

213 5 id. at 12.
214 Id. at 9.
215 Id. at 10.
216 Id. at 15.
217 6 id. at 162.
218 5 id. at 14.
condition. Nobody is satisfied in this country; everybody is reaching for some undiscovered good all the while; and the people in their aggregate capacity are just like the individual. They are always stretching for something new in the hope of getting a great good.\footnote{Id. at 8.}

Delegate Woodward’s argument carried the day. His appeal to history, though, was misplaced. The state’s first referendum on whether to call a convention had been defeated in 1825.\footnote{See supra note 185 and accompanying text.} His prophesy was worse. After the 1874 constitution was adopted, all six referenda on convention calls prior to 1967 were defeated.\footnote{BRANNING, supra note 4, at 128, 132, 141 and 144 (describing the convention calls rejected by the electorate in 1891, 1921, 1923, 1935 and 1953); WOODSIDE, supra note 202, at 579 (noting the sixth rejection in 1963).}

In all, Pennsylvania voters have rejected seven of ten convention calls in the last two centuries.

\textbf{B. The Rule of the Judiciary}

The textual provisions for future amendments—which, with the exception of the fast-track emergency option added in 1967,\footnote{PA. CONST. art. XI, § 1(a), (b).} have remained largely unchanged since first inserted in the 1838 constitution—offer multiple opportunities for judicial intervention. A glance at the current text reveals the intricate detail of the normal, legislatively-initiated amendment process:

\textbf{ARTICLE XI}

\textbf{AMENDMENTS}

Section 1. Amendments to this Constitution may be proposed in the Senate or House of Representatives; and if the same shall be agreed to by a majority of the members elected to each House, such proposed amendment or amendments shall be entered on their journals with the yeas and nays taken thereon, and the Secretary of the Commonwealth shall cause the same to be published three months before the next general
election, in at least two newspapers in every county in which such newspapers shall be published; and if, in the General Assembly next afterwards chosen, such proposed amendment or amendments shall be agreed to by a majority of the members elected to each House, the Secretary of the Commonwealth shall cause the same again to be published in the manner aforesaid; and such proposed amendment or amendments shall be submitted to the qualified electors of the State in such manner, and at such time at least three months after being so agreed to by the two Houses, as the General Assembly shall prescribe; and, if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the Constitution; but no amendment or amendments shall be submitted oftener than once in five years. When two or more amendments shall be submitted they shall be voted upon separately.\footnote{223}

\footnote{223} \textsc{Pa. Const.} art. XI, § 1. The remaining two paragraphs create the "emergency" option and, although not directly related to our discussion, are laden with similar detail:

(a) In the event a major emergency threatens or is about to threaten the Commonwealth and if the safety or welfare of the Commonwealth requires prompt amendment of this Constitution, such amendments to this Constitution may be proposed in the Senate or House of Representatives at any regular or special session of the General Assembly, and if agreed to by at least two-thirds of the members elected to each House, a proposed amendment shall be entered on the journal of each House with the yeas and nays taken thereon and the official in charge of statewide elections shall promptly publish such proposed amendment in at least two newspapers in every county in which such newspapers are published. Such amendment shall then be submitted to the qualified electors of the Commonwealth in such manner, and at such time, at least one month after being agreed to by both Houses as the General Assembly prescribes.

(b) If an emergency amendment is approved by a majority of the qualified electors voting thereon, it shall become part of this Constitution. When two or more emergency amendments are submitted they shall be voted on separately.

\textit{Id.}
The Pennsylvania Supreme Court has focused principally on two of the text's procedural requirements: the publication provision and the five-year time restriction. The court also has given significant consideration to the constitutional convention process. Unfortunately, the court's decisions have been confused and contradictory, and reveal its failure to develop a coherent jurisprudence of popular sovereignty. The general trend, however, has been to invite increased, though unpredictable, judicial intervention in the amendment process.

1. "Cause to be Published"

When the Pennsylvania Supreme Court first addressed the publication issue in 1900, it concluded that the textual requirement that a proposed amendment be published "three months before the next general election" after its first legislative approval was "merely a directory provision, where strict compliance with a time limit is not essential." By way of obiter dictum in Tausig v. 225

224 The court has addressed other issues, such as whether an amendment may be submitted to the electorate only at a general election, Commonwealth v. King, 122 A. 279 (Pa. 1923) (submission in off-year election allowed), and whether the governor's veto power extends to the legislature's proposal of an amendment, Commonwealth v. Griest, 46 A. 505 (Pa. 1900) (it does not), but the publication requirement and the five-year rule together account for the larger part of the court's pronouncements on the textual amendment process.

225 Griest, 46 A. at 511. The principal issue in Griest was whether the legislature's action proposing an amendment was subject to the Governor's veto power, a question the court answered in the negative. Id. at 510. The publication issue arose because the Secretary of the Commonwealth refused to direct publication of a proposed amendment after the Governor attempted to veto the initial legislative proposal. By the time the appeal of the ensuing mandamus proceeding had been decided, "the next general election" following that legislative action had passed. The court ruled that the "general election" that mattered was the one in which a new General Assembly would be chosen, which had not occurred. Id. at 511-12. The ruling that the time specification was "merely a directory provision" was an alternative rationale for the court's holding that mandamus was the appropriate remedy. Id. at 511.
Lawrence,\(^\text{226}\) decided in 1938, the court began a retreat which culminated, in 1992, not only in the reversal of its initial position but in judicial expansion of the publication requirement as well.

In Kremer v. Grant\(^\text{227}\) for the first time the court allowed the publication requirement to be used to keep a proposed amendment from the ballot. The amendment in question would have made significant modifications in Article V, which governs the judiciary. Specifically, the amendment would have mandated a system of financial disclosure by judges and other personnel of the judicial branch, extensively revamped the judicial discipline process, and formalized the supreme court's role in the state budget process.\(^\text{228}\) Submission of the proposal to the electorate was challenged on a number of grounds, but the supreme court limited its review to the asserted deficiencies in the publication of notice. These deficiencies included the Commonwealth Secretary's failure to send the first notices to newspapers until four days before publication was due, the initial use of some free distribution "shopping publications" instead of paid circulation newspapers, late publication by the newspapers, and the failure of the

\(^{226}\) 197 A. 235 (Pa. 1938). Tausig criticized the "dictum" in Griest and added, "[n]othing short of a literal compliance with [the publication] mandate will suffice." \textit{Id.} at 238. The \textit{holding} of Tausig, however, was simply that the Secretary was required to \textit{transmit} advertisements of the amendment proposal to newspapers "within sufficient time to enable them to be published at a date three months or more in advance of the election, with directions that they be so published." \textit{Id.} at 239. The court was careful to note that the fact that the advertisements are not actually \textit{published} within the designated time "does not affect the validity of the submission," \textit{id.}, and it tolerated deviations from the time requirement that arguably were significant.

Thus, although Griest's pronouncement of the "directory" nature of the requirement actually provided a basis, albeit an alternative one, for that court's holding that mandamus lay, see \textit{supra} note 225, the Tausig language criticizing it as "dictum" was, itself, dicta.


newspapers to print explanations of the bracketing and underlining in the text of the proposal.\textsuperscript{229}

Although the defects in \textit{Kremer} appear to have been basically on the order of those \textit{tolerated in Tausig}, the \textit{Kremer} court made \textit{Tausig}'s dicta its holding, and affirmed an order of the commonwealth court that enjoined the Secretary from proceeding with the ratification process.\textsuperscript{230} Curiously, the court insisted throughout most of its opinion that, because it merely was reviewing a preliminary injunction, its task was limited to determining whether the injunction was justified upon "\textit{any apparently reasonable grounds}."\textsuperscript{231} However, after purportedly deciding the case under a minimal standard of review for \textit{preliminary} relief, the court directed the lower court to make its preliminary injunction \textit{permanent}.\textsuperscript{232}

More disturbingly, in the process of converting \textit{Tausig}'s dicta into holding, the \textit{Kremer} court silently, but effectively, overruled the real holding of \textit{Tausig}. That holding was that the publication provision simply obligated the Secretary to transmit notices, with instructions, to newspapers "within sufficient time" to be timely published.\textsuperscript{233} The Secretary had no responsibility to ensure that timely publication actually occur.\textsuperscript{234} In \textit{Kremer}, however, the

\textsuperscript{229} \textit{Kremer}, 606 A.2d at 437. Most of the deficiencies occurred in the first publication of the proposal, which followed its initial approval by the General Assembly. However, a few occurred in the publication preceding the election in which the amendment was to have been on the ballot.

\textsuperscript{230} \textit{Id.} at 439.

\textsuperscript{231} \textit{Id.} at 436 (quoting Robert v. School Dist. of Scranton, 341 A.2d 475, 478 (Pa. 1975)).

\textsuperscript{232} \textit{Id.} at 439. The opinion of the supreme court was issued March 12, 1992, long \textit{after} the May 21, 1991 election was held. Because that was the election in which the amendment was to have been submitted to the voters, any pretense that the relief granted by the commonwealth court was temporary was, in any event, just that. The supreme court earlier had refused to stay the lower court's order pending the Commonwealth's appeal. \textit{Id.} at 435-36.

\textsuperscript{233} \textit{Tausig v. Lawrence}, 197 A. 235, 239 (Pa. 1938).

\textsuperscript{234} \textit{Id.; see discussion supra} note 226. Although the distinction between transmittal and actual publication of the notice may not be the only plausible interpretation of the textual directive that "the Secretary of the Commonwealth 'shall cause' the advertisement to be published," it has the distinct advantage of recognizing the reality of the Secretary's inability to exercise complete control
newspapers' failure to publish precisely in the manner and at the times directed by the Secretary became critical when it was transmuted into evidence of the Secretary's dereliction of duty.\textsuperscript{235} The supreme court accomplished this transmutation by reading a new mandate into the constitutional text: "What is required is that the Secretary transmit the required notices to two newspapers in each county of the state \textit{in ample time} to permit their insertion at a date three months or more in advance of the election."\textsuperscript{236}

If "in ample time to permit . . . insertion" is the constitutional standard for the Secretary's duty to transmit notice, and strict compliance\textsuperscript{237} is to be ensured by judicial oversight, then the outcome of the inquiry necessarily will turn more on what the newspapers did than on the Secretary's actions. Thus, applying the new mandate, the supreme court declared that the failure of most newspapers to publish within the prescribed time evidenced the Secretary's failure to comply.\textsuperscript{238} That focus is precisely the one disavowed in \textit{Tausig}.

The "ample time" mandate was not the first judicially crafted appendage to the constitution's publication requirement. In \textit{Commonwealth v. Beamish},\textsuperscript{239} the Pennsylvania Supreme Court directed that notice be published \textit{three} times, once each month prior to the election. The court argued that "[n]o method of amendment can be tolerated which does not provide the electorate adequate opportunity to be fully advised of proposed changes."\textsuperscript{240}

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\textsuperscript{235} "Four days [to effect publication], two of which are a weekend, are simply not enough time as is evidenced by the fact that only 6 newspapers were able to advertise" as directed by the Secretary. \textit{Kremer}, 606 A.2d at 438. The court as easily might have reversed the argument, and concluded that because six newspapers \textit{did} advertise, the others \textit{could} have done so, and the Secretary's duty to transmit was adequately discharged.

\textsuperscript{236} \textit{Id}.

\textsuperscript{237} \textit{Id}.

\textsuperscript{238} \textit{Id}.

\textsuperscript{239} \textit{Commonwealth ex rel. Schnader v. Beamish}, 164 A. 615 (Pa. 1932) (Frazier, C.J., supplemental opinion).

\textsuperscript{240} \textit{Id}. at 617. \textit{Beamish} was an appeal from the dismissal of a mandamus petition filed by the Pennsylvania Newspaper Publishers' Association and the state attorney general, requesting that the Secretary be required to advertise.
On the authority of *Beamish*, the Pennsylvania Attorney General issued a formal opinion advising the governor that the requirement of Article XI was satisfied by publishing notice once each month during the three months preceding the relevant election. The Attorney General reasoned that unless the *Beamish* court had added a requirement not in the text of the constitution, it had interpreted "three months" to mean three distinct time periods (i.e. three calendar months) during which publication was required, rather than a fixed number of days (the total in three successive months) required to elapse between a single publication and the election in question.

Sixty years after *Beamish*, when another Commonwealth Secretary attempted to defend the publication schedule for the proposed amendment challenged in *Kremer*, he relied on the *Beamish* decision, as it had been explained by the attorney general's opinion. The *Kremer* court, however, dismissed the defense summarily, without even mentioning its own opinion in *Beamish*. "To the extent that the Secretary, or his staff, relied on any authority other than the Constitution itself and our decisions interpreting that document, . . . he was in error."  

2. "Once in Five Years"

The five-year limitation is amenable to several conflicting interpretations. At the extremes, these may be reduced to two: either the limitation broadly prohibits use of the Article XI process at all "oftener than once in five years," creating a five-

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242 Id. at 115-16.
244 Pa. Const. art. XI. The corresponding provision in the 1874 constitution was in Article XVIII.
year moratorium each time any amendment, whatever its subject, is submitted to the people or, more narrowly, the limitation prohibits only the resubmission of particular amendments, ones previously offered and rejected, for five years following their rejection. After adopting a version of the first interpretation in 1924,245 and adhering to it in 1925,246 the Pennsylvania Supreme Court reversed itself in 1937 and adopted a version of the second interpretation.247

At one level, these conflicting decisions present an interesting study of the art of constitutional exegesis. The two principal decisions purported to be compelled by the plain meaning of the same language of the 1874 constitution.248 The first decision, Armstrong v. King, found additional, unambiguous support for its holding in the debates of the conventions that framed the 1838 and 1874 constitutions.249 The Armstrong court refused to give effect

248 The Armstrong court stated:

It is clear that unless we wholly ignore the words "but no amendment or amendments shall be submitted oftener than once in five years," . . . we must either construe the language exactly as it is written, namely, as prohibiting the submission of any amendments "oftener than once in five years," or we must interpret it as referring to the amendments specified in the preceding part of the article, which would result in precluding only the resubmission of amendments once defeated by the people. We cannot take this latter alternative, however, because the language used will not permit us to do so.

Armstrong, 126 A. at 264. The Margiotti court stated:

What the Convention adopted, and what the electors of the Commonwealth accepted, is the Constitution as it is written, and its clear meaning cannot be distorted to fit the views of . . . particular delegates. It must be assumed that the people who voted upon the Constitution gave to the words employed their common and ordinary significance.

Margiotti, 193 A. at 48-49.

249 Armstrong, 126 A. at 263-64. The Armstrong court's reading of the fairly extensive debates regarding the amendment process at the two conventions seems plainly correct. Those debates reveal deep divisions among the delegates regarding the desirability of ready access to the amendatory processes. Some
to the history of legislative submissions that would have been invalid under the court’s reading of the text.\textsuperscript{250} Twelve years later, in \textit{Margiotti v. Lawrence},\textsuperscript{251} the court dismissed the debates as expressing "merely the personal opinion of individual members of the Convention."\textsuperscript{252} However, the court believed that the practice of the legislature in submitting amendments at less than five-year intervals "should have a persuasive influence on this court."\textsuperscript{253}

The imprecision of the interpretative art illustrated by these conflicting approaches bears importantly on the doctrine of popular sovereignty. If the amendment process is seen as a check on judicial power, any imprecision in judicial interpretive methods, when applied to "ordinary" constitutional text, may be inconvenient but is never fatal, because the people can correct the error. When applied to constitutional text that relates to the amendment process itself, however, judicial error can destroy or curtail the means of its correction. Thus, to preserve the check on judicial interpretation, opportunities for judicial interference with the amendment processes must be strictly limited. Ironically, although \textit{Margiotti} appears to open the amendment process, by overruling \textit{Armstrong}'s seemingly rigid interpretation of the five-year rule, its actual effect may be precisely the opposite.

delegates sought to close almost every avenue, whereas others insisted on the right of the people to alter or amend at will. However, a review of the 1838 debates, for example, indicates no suggestion of doubt, on either side, but that the five-year rule would operate as a complete moratorium on use of the amendment process provided in the text. \textit{See} 12 \textit{PROCEEDINGS AND DEBATES}, \textit{supra} note 196, at 307-11.

\textsuperscript{250} The legislature had submitted "untimely" proposals in 1911, 1913, 1918, and 1923. \textit{Armstrong}, 606 A.2d. at 265.

\textsuperscript{251} 193 A. 46 (Pa. 1937).

\textsuperscript{252} \textit{Id.} at 48. \textit{Armstrong} considered both the original 1838 debates over adoption of the text and the 1873 debates on its readoption, and found the views expressed in the two conventions were consistent. \textit{Armstrong}, 126 A. at 264-65. \textit{Margiotti}, however, refers only to the 1873 Convention.

\textsuperscript{253} \textit{Margiotti}, 193 A. at 49. The court was careful to note that such effect should be given to the legislature’s interpretation only if the text itself was ambiguous, which the court did not concede to be the case.
Armstrong's redeeming quality, aside from its faithfulness to the framers' understanding, was its recognition of the five-year rule for what it is, a rigid limitation that hinders orderly change. Once this was made clear, the opportunities for future, unanticipated judicial incursions into the amendment process, via interpretation, were reduced. Additionally, by referring to the five-year rule as what it is, the Armstrong court underscored the problematic nature of the provision and, in effect, invited discussion of the need to revise the provision.

The Armstrong opinion also included important dicta regarding the nature of the constitutional amendment process that mitigated the seemingly harsh effect of its holding. Returning to the mandatory-directory distinction elaborated in Griest, the court instructed:

The Constitution is, of course, the paramount law, and must be construed in that light; but, after all, it is an instrument prepared by human beings, and contains within itself the proof of their frailties, as we are frequently advised by the arguments presented on the many questions arising under it.

Drawn by this observation to reaffirm a "wiser rule of reasonable construction," the court believed that a challenge to an asserted procedural irregularity in the amendment process could be maintained only during the time preceding the vote of the people. "A fair approval of an amendment, twice duly passed by the legislature, is, in effect, though not technically, a judgment

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254 Of course, the rule of Armstrong could be invoked any time the legislature submitted a proposal during the moratorium period created by an earlier submission. Furthermore, Armstrong did not eliminate all opportunity for future interpretation of the five-year limitation, because the court identified only those amendment submissions that were approved by the electorate as moratorium triggers, Armstrong, 126 A. at 265, while the constitutional text appears to make any submission a trigger, regardless of the outcome of the ratification election.

255 See supra note 225 and accompanying text.

256 Armstrong, 126 A. at 266.

257 Id. at 267.

258 Id. at 265-69.
of the electorate, and a collateral attack upon it should not be allowed."\(^{259}\)

The implications of *Margiotti* are very different. Although the *Margiotti* court accorded a measure of deference to the legislature’s interpretation of the five-year limitation,\(^{260}\) and it declined to apply the limitation as a strict "‘time-lock’,"\(^{261}\) the court’s decision prepares the way for future judicial inquiry into the question whether a *specific* amendment has been submitted at the wrong time. In the court’s view, the limitation forbids the resubmission of a specific amendment, "*or one substantially related*" to it, within five years of its rejection by the electorate.\(^{262}\)

Such an open-ended interpretation is an invitation to future litigation, because it leaves numerous questions unresolved concerning when a proposed amendment is "substantially related" to a prior, rejected proposal: When it revises the same section of the constitution; or the same sentence? When it has a similar effect, with different language; or the opposite effect? Only the court will be able to say, with authority, what its criterion for the invalidity of a submission means. Just as the broad mandate of *Kremer* invites judicial intrusion into the amendment *procedure* to determine whether publication instructions have been sent to newspapers too late,\(^{263}\) *Margiotti* invites judicial inquiry into a proposed amendment’s *substance*, to determine whether it has been submitted too early.

Together, *Kremer* and *Margiotti* establish a theory of judicial oversight of the Article XI amendment process that gives the supreme court the authority to veto almost any proposal the General Assembly might submit. Although the *Margiotti* strand of the theory has not yet been used to invalidate a submission, *Kremer*, of course, had that effect.

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\(^{259}\) *Id.* at 267.


\(^{261}\) *Id.* at 47 (citing Armstrong v. King, 126 A. 263 (1924)).

\(^{262}\) *Id.* (emphasis added).

The message *Kremer* sent to the legislature has not been constructive. The General Assembly responded to the *Kremer* litigation as rapidly as the Article XI process appeared to permit, by approving a new amendment, but one which was significantly less comprehensive than the one struck from the ballot. During the course of the House debate on the approval of the submission the second time, the problem of complying with the court's various mandates was one of the principal issues. Particular concern with the Commonwealth Secretary's ability to meet the *Kremer* rule for publication in time to place the issue on ballot in the May 18, 1993, primary election was raised. Members argued that the best way to avoid any judicial interference would be to move the submission to the November ballot. Some members counter-argued that any change in the bill proposing the amendment would itself invite the courts to strike the measure.

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264 The amendment was approved in the second year of the 1991-1992 session of the General Assembly, Joint Resolution No. 1992-1, and the first year of the 1993-1994 session, Joint Resolution No. 1993-1, printer no. 2 (passed Feb. 3, 1993), and was submitted to the voters in the first statewide election held after the 1993-94 Assembly was chosen. This is about as fast as the process can be completed under Article XI, unless the "emergency" provision is invoked.

265 The revised amendment, approved by the electorate May 18, 1993, does not address financial disclosure or the budget process. Although it restructures the system of judicial discipline, it represents a "compromise" between the former provisions of Article V, Section 18, and the proposal killed by *Kremer*. The Pennsylvania Supreme Court retains substantially greater control under the revised amendment than it would have under the earlier proposal, but less control than it enjoyed under the former provisions of Section 18. Compare Joint Resolution No. 1991-1, 1991 Pa. Laws 449 (injunction prohibiting placement on ballot affirmed by Kremer v. Grant, 606 A.2d 433 (Pa. 1992)) with Joint Resolution No.1, printer no. 2 (passed Feb. 3, 1993) (changing the composition of the Judicial Conduct Board).

266 See 177 PA. LEGIS. J., HOUSE 53-59.

267 Id. at 53-57 (remarks of Reps. Caltagirone and Piccola).

268 Id. at 54, 58 (remarks of Reps. Kukovich, Daley, and Mundy). An amendment that would have moved the submission to the November election was not adopted. Id. at 58-59.
A measure of the House's general frustration with the problem of judicial interference was revealed in a parliamentary inquiry of whether the Assembly could later move the submission to the November election if the attempt to place the submission on the May ballot failed. The Speaker responded: "The Parliamentarian's response is that the issue is substantially arcane and he does not have an opinion at this moment. He will do some research and we will report to the gentleman at our earliest convenience. We do not know the answer."\textsuperscript{269} In other words, the rules governing the constitutional amendment process have become moving hurdles for the legislature, largely beyond its comprehension or control.

3. Whose Constitution Is This?

Legislative frustration with the confusion sown by the court is less troublesome if there is a rule that recognizes the people as the ultimate authority in the constitutional amendment process. A form of the rule of popular sovereignty was once recognized in Pennsylvania, and \textit{Armstrong}'s dicta regarding the necessity of mounting procedural challenges to proposed amendments before they are adopted by the electorate was drawn from that rule.\textsuperscript{270} The rule was enunciated in decisions concerning the original, sole means of amending the constitution, the convention process. Unfortunately, the court's most recent pronouncements on the convention process have cast doubt on the vitality of the popular sovereignty rule in the Commonwealth today.\textsuperscript{271}

The constitution of 1874 has been referred to as "partially revolutionary."\textsuperscript{272} The Act of the legislature calling the convention that framed it expressly withheld the authority to propose amendments that would alter any of the language in the Declaration of Rights or that would establish courts with exclusive equity jurisdiction.\textsuperscript{273} The Act also provided that one-third of the

\textsuperscript{269} Id. at 57. No answer to the inquiry is recorded in the Journal prior to House approval of the bill.

\textsuperscript{270} Armstrong v. King, 126 A. 263, 266-69 (Pa. 1924).

\textsuperscript{271} See infra text accompanying notes 303-12.

\textsuperscript{272} WHITE, \textit{supra} note 151, at xvii.

membership of the convention could require the body to submit any part of its final proposals to the electorate as a separate issue. The Act authorized the convention to establish the time and manner of submitting its proposals, but it provided for the ratification election to be conducted "as the general elections of this commonwealth are now by law conducted."

In several respects, the convention disregarded the legislature's attempts to limit its authority. Subsequently, two cases that addressed this conflict reached the state supreme court. The first, Wells v. Bain, was decided before the election to ratify the proposed new constitution was held. The second, Woods's Appeal, was decided after the election. Together, these decisions represent a studied effort to grapple with the relationship between popular sovereignty and the constitutional amendment process.

Wells addressed two of the convention's actions: its attempt to remove oversight of the ratification election in Philadelphia from the control of the regular election officials in that city, and its refusal to submit the proposed judiciary article to a separate vote, despite the contention that the requisite one-third of its members had so demanded. To determine the validity of these actions, the court examined the convention's power.

First, the right of the people, recited in the Declaration of Rights, to "alter, reform or abolish their government" as they saw fit was not at issue. That was because "the people," in this instance, meant "the whole—those who constitute the entire state, male and female citizens, infants and adults," not a "mere majority

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274 Id.
275 Id. § 5.
276 Id. § 6.
277 75 Pa. 39 (1874).
278 75 Pa. 59 (1874).
279 The convention's interest in relieving the Philadelphia election officials of supervisory authority over the ratification election was hardly surprising. Election fraud was one of the critical substantive concerns of the convention, second only to legislative corruption. BRANNING, supra note 4, at 87.
280 PA. CONST. of 1838, art. IX, § 2.
of those persons who are qualified as electors." A related right of the people, to assemble and petition for redress of grievances, was implicated, but invocation of that right relies on the "instrumental process" of law, effected through the people's chosen representatives. The primordial right of revolution remains when "unfaithful" representatives fail to respond, or when "the government becomes tyrannical."

Because the convention was not a "revolutionary body," it was bound by the legislative enactment that had created it. The electorate had authorized, but had not mandated, the legislature to call the convention. When the electorate subsequently selected its delegates, it did so under the terms of the call issued by the legislature. Lacking, therefore, a delegation of plenary power to act for the people, the convention was limited to the powers fixed by the legislature's terms, which were expressed in the law. In the court's view, that law not only failed to grant the convention the authority to displace the election officials of Philadelphia, but negated it, leaving the convention's ordinance on the subject "illegal and void." The refusal to submit the judiciary Article to a separate vote, however, stood "on a very different footing," because "[t]he convention was clothed with express power to act upon the question of submitting the amendments in whole or in part."

That being so,

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281 Wells, 75 Pa. at 46. This dictum carries extraordinary implications in its suggestion of the participation of women and children, rich and poor, in the ultimate political life of the community to a degree never before, and never since, recognized in the Commonwealth. Whether it reflects a theory of equality spun from the then fresh debate over the Fourteenth Amendment, or was meant to reduce, ad absurdum, the right of revolution, need not be resolved here.

282 Id. at 47. When electors possessing "the qualifications sanctioned by the people in order to represent them" choose the representatives, they act with authority conferred on them by the people as a whole. Id. The court does not explain how women, children, and other disenfranchised members of "the people" confer this power on the electorate.

283 Id. at 47.

284 Id. at 47-55.

285 Id. at 55.
it must be presumed that the body's decision as a whole was rightly made, and either that the request was not made by a full one-third of all the members or, if made by one-third, it was not in a regular or orderly way. It would be a violent presumption to suppose that the body would wilfully disregard their own oaths as well as a full and orderly request.\footnote{286}{Id. at 55-56.}

Most importantly, even if the convention committed such a wrong, "no appeal is given to the judiciary, and the error can be corrected only by the people themselves, by rejecting the work of the convention."\footnote{287}{Id. at 56.}

Thus, in \textit{Wells}, the issues for the court became seemingly straightforward questions of power. If the convention attempted to act beyond its authority, as it did in the first instance, then it was the duty of the court to restrain it. But when the convention had acted within the scope of its power, at least on "[m]ere errors of procedure," the convention's decisions, were final, and subject to correction only by the electorate.\footnote{288}{Id.}

After \textit{Wells} had focused on the power of the convention, the court in \textit{Woods's Appeal}\footnote{289}{75 Pa. 59 (1874).} ostensibly focused on the power of the people. This case challenged the entire convention process, the method of selecting delegates, and several specific acts of the convention, including the proposed amendments to the Declaration of Rights. The lower court dismissed the case, and the appeal was not heard by the supreme court until after the ratification election had been held.

Although the case consumes over fifteen pages of the Pennsylvania Reports, its holding comprises precisely one sentence: "The change made by the people in their political institutions, by the adoption of the proposed Constitution since [the decree of dismissal entered by the lower court], forbids an inquiry into the merits of this case."\footnote{290}{Id. at 68-69.} Most of the other ink is devoted
to a lengthy transcription of the trial judge’s opinion and the supreme court’s extensive dicta refuting that opinion.

The trial court had reviewed the broad recognition of the convention as an institution in the United States, and held that it was a legitimate mechanism for the exercise of the "right [of] the people to change their constitutions, except where especially prohibited in a constitution itself." The opinion then elaborated a theory of popular sovereignty under which the people could allow the convention to exercise its power wholly unrestrained by the legislature. Only the people themselves could limit the convention:

A convention to amend the constitution, without there is an express limitation as to the extent of their power, passed upon by the people in determining the question of amendment, has inherently, by the very nature of the case under the great principle peculiarly American, and quasi revolutionary in its character . . . , absolute power, so far as may be necessary to carry out the purpose for which they were called into existence, by the popular will.

The supreme court affirmed the lower court’s decree, but felt constrained to decry the "unsound and dangerous" doctrine thought to sustain the decree. The court explained that the right to alter, amend, or abolish government belongs to the people alone, rather than to a convention of their agents. Whatever authority the convention possesses is delegated authority, and the delegation is effected by law—"the highest form of a people’s will in a state of peaceful government." Until the frame of government is changed, the power to make law resides in the legislature. Therefore, unless prohibited by the existing constitution, the legislature, on behalf of the people, may regulate the convention, and the convention must obey.

Throughout its opinion, the supreme court expressed concern that a convention, acting on its proclaimed sovereignty, might

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291 Id. at 65.
292 Id. at 67.
293 Id. at 69.
294 Id. at 70-72.
295 Id. at 72.
usurp the people’s power by refusing to submit its work to a ratification election. Nothing of the sort, of course, was attempted or suggested in 1873, and it is difficult to read an assertion of such a power into the trial court’s opinion. 296

In its concluding sentence, however, the court more generally rejected any right of a convention, limited by law, to "infuse present life and vigor into its work before its adoption by the people." 297 The 1872-73 convention had attempted to "infuse present life and vigor" into its ordinance displacing the election officials in Philadelphia and already had been rebuffed on that point by the Wells court. To equate that act with a coup d’etat, however, is stretching the point.

Although drawn in the language of the rights of the people, the supreme court’s dicta actually addressed the division of authority between the legislature and a convention, and established a regime of legislative supremacy over the convention process. The court’s argument that this tilt does not "restrain the people," but gives effect to their right, "by the instrumentality of the law, to limit their delegates," 298 lacks practical force. The limitations that the legislature placed on the 1872-73 convention were established only after the electorate overwhelmingly had approved the calling of the convention, 299 and abuses of legislative power had been the principal impetus for the call. 300

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296 The trial court’s assertion of "absolute power" in the convention is immediately qualified by language limiting it to necessity, in the context of carrying out the will of the people. Id. at 67.

297 Id. at 75.

298 Id. at 71.

299 The Act submitting to the electorate the question whether to call a convention neither created nor foretold limits on the convention’s ultimate authority. Act of June 2, 1871, No. 262, 1871 Pa. Laws 282. The referendum held in accordance with that Act was approved by a vote of 328,000 to 70,000, a margin of more than four to one. BRANNING, supra note 4, at 56. The limitations were placed in the Act calling the convention, Act of Apr. 11, 1872, No. 44, 1872 Pa. Laws 53, and are described supra text accompanying notes 273-76. One might argue that the delegates evidenced more interest in ensuring the rights of the people when the delegates exceeded those limits, as interpreted by the court, than the legislature did when it created them.

300 BRANNING, supra note 4, at 55-56.
It is important, nevertheless, to differentiate the dicta of *Woods's Appeal* from its holding. Just as the dicta of *Armstrong* mitigated the effect of that case’s holding, the *Woods's Appeal* holding limited the legislative dominance of the amendment process suggested by *its* dicta. Each decision closed the window for judicial challenges to the amendment process at the moment the revision was ratified by the electorate. In this limited, but nonetheless important respect, the holding of *Woods's Appeal* and the dicta of *Armstrong* both endorse a practical application of the doctrine of popular sovereignty to the amendment process.

The Pennsylvania Supreme Court’s most recent pronouncements on the subject, however, appear to repudiate its jurisprudence of deference to the "judgment of the electorate." *Stander v. Kelley* was a challenge to Article V of the constitution of 1968. Article V was framed by a convention that, following the teaching of *Woods's Appeal*, had been strictly limited by the General Assembly. The new constitution was ratified by the electorate on April 23, 1968, before *Stander* was decided, and justiciability was a critical issue.

Affirming the lower court’s decree which dismissed the challenge, the supreme court was unable to agree upon an opinion explaining its decision. However, four justices expressly addressed justiciability, including the single dissenting justice, and all agreed that ratification by the electorate did not close the window for judicial review. Furthermore, although the three members of

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301 See supra text accompanying notes 255-59.
302 See supra text accompanying notes 289-90.
304 250 A.2d 474 (Pa. 1969) (plurality opinion).
305 Act of Mar. 15, 1967, No. 2, 1967 Pa. Laws 2. For example, Act 2 strictly limited the subject areas open to convention consideration and, within those areas, prohibited the making of certain specified proposals. It gave the convention three calendar months within which to complete its work. Id.
306 Stander, 250 A.2d at 475.
307 The Pennsylvania Supreme Court earlier had affirmed the trial court’s denial of a preliminary injunction striking the ratification question from the ballot on grounds that there was no clear abuse of discretion, or palpable legal error. Stander v. Kelley, 246 A.2d 649 (Pa. 1968).
308 Stander, 250 A.2d at 476-78; id. at 485 (Cohen, J., dissenting).
the court who joined in a concurring opinion were silent on that issue, their focus on the merits implies they agreed with the rest of the court on justiciability.309

Speaking for a three-member plurality, Chief Justice Bell briefly reviewed the precedent, including Woods's Appeal, and dismissed it.

Assuming these cases are apposite, if they hold as the Commonwealth contends, the foolishness of such a holding in the present era is obvious. If there is a palpable violation or violations of the existing Constitution, the Commonwealth contends that that question or issue is justiciable if decided by the Courts one week or one day prior to the election, but is not justiciable one day after the people have voted to approve or adopt the Amendment, no matter how clearly the provisions of the existing Constitution may have been violated. Furthermore, under the theory of the Commonwealth, a trial Court or an appellate Court could unintentionally or intentionally enable a palpable violation or violations of the Constitution of Pennsylvania, or of the Constitution of the United States, to become Constitutional and nonjusticiable, if, . . . for any reason whatsoever it failed to render a decision before the question was approved by the vote of the people.310

Relying on United States Supreme Court decisions holding that amendments to state constitutions are subject to review for compliance with the Federal Constitution, despite their ratification, the Chief Justice concluded that "[i]t is a traditional and inherent power of the Courts to decide all questions of Constitutionality," and ratification of an amendment does not render constitutional claims of its invalidity nonjusticiable.311

To the extent that the Chief Justice's view of the matter is limited to judicial review under federal constitutional norms, it is perfectly unexceptional and, indeed, reflects the mandate of the

309 Id. at 485-87 (Roberts, J., concurring).
310 Id. at 477 (plurality opinion).
311 Id. at 478.
Supremacy Clause. To the extent that it purports to require judicial review of a new constitution, ratified by the people, under the norms of the former state constitution, the decision is a remarkably thoughtless rejection of nearly two centuries of constitutional practice in the Commonwealth.

The plurality view of the matter is plainly intended to embrace review under state norms, as well as federal ones, because many, if not most of the specific claims made regarding Article V were based on the 1874 constitution. All claims were found to be without merit, and the plurality's analysis of justiciability is therefore only the dicta of three justices. It is dangerous, however, because all members of the Stander court appear to have agreed that ratification created no bar to their reaching the merits. The opinion of the Chief Justice went so far as to invite new litigation on the constitutionality of individual provisions of Article V.312

4. "The Judgment of the People"

The complexity of the amendment process in Pennsylvania and the repeated and conflicting constructions of it offered by the supreme court have reduced the role of the people almost to that of a passive bystander. This has resulted in the practical negation of the people's "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper,"313 at least by peaceful means.

The court, primarily but not exclusively in its most recent cases, has ensured that two existing institutions—the court itself and the General Assembly—maintain control of the processes of constitutional change. The republican notion of the constitutional convention as a readily available mechanism for determining and effecting the supreme will of the people314 has given way to a rigid regime of legislative oversight. The Article XI process, totally dependent upon the legislature for its initiation, has been subjected to seemingly random, and certainly unpredictable, judicial veto. The "judgment of the people," once said to be final

312 Id. at 483.
313 PA. CONST. art. I, § 2.
314 See WOOD, supra note 1, at 319.
at the point of ratification, has been declared revisable by the court.

If the history of the Commonwealth disclosed an inclination of the people to call upon the amendment process to abuse minority rights, and a correlative inclination of the guardian institutions to defend those rights, we might want to say, "the system works," or, perhaps more to the point, "the system is necessary." But that is not the history of Pennsylvania, and the better response to it would be to return the constitution to the people.

VII. The Paradox Practiced: Amending Rights in Pennsylvania

The text of the Declaration of Rights has never been the central focus of a constitutional convention in Pennsylvania. In 1776, Selsam notes, "[t]he drafting of the Declaration of Rights should not have caused the members of the Convention much thought," because models were readily available. He specifies three declarations of the Continental Congresses, including the Declaration of Independence, and the Virginia Declaration of Rights, but could have mentioned the expressions of rights in the instruments of Penn's charter government as well. The revolutionary constitution marked a break with past governors and modes of governing, but not with the principle that government is accountable for the fundamental rights of the people. Thus, and quite remarkably, the 1776 Declaration of Rights expressly recognized rights of conscientious objectors. Given the violent disagreements over the defense policies of the Quaker Assembly, a punitive approach by the convention might have been expected.

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315 See Armstrong v. King, 126 A. 263, 267 (Pa. 1924) (discussing "judgment of the electorate").
316 SELSAM, supra note 17, at 177.
317 Id. at 177-78.
318 See supra notes 129-39 and accompanying text.
319 PA. CONST. of 1776, ch. I (Decl. of Rights), § 8.
320 SELSAM, supra note 17, at 179.
After 1776, the three conventions that addressed the Declaration reaffirmed its fundamental place in the Constitution, and both strengthened the Declaration and expanded its scope.\textsuperscript{321} Even the 1873-74 convention, which refused to accept the General Assembly's directive to leave the Declaration untouched, strengthened it—in part at the Assembly's expense.\textsuperscript{322}

Although the 1967-68 convention stayed within the bounds set for it by the Assembly, which precluded it from considering the Declaration,\textsuperscript{323} the nonconvention component of the hybrid amendment process that framed the current text made changes. Principal among these was the addition of a new section 26, prohibiting the Commonwealth and its political subdivisions from "deny[ing] to any person the enjoyment of any civil right, [or] discriminat[ing] against any person in the exercise of any civil right."\textsuperscript{324}

\textsuperscript{321} Compare the following provisions contained in previous Pennsylvania constitutions: the 1776 Declaration of Rights; Article IX of the 1790 constitution; Article IX of the 1838 constitution; and Article I of the 1874 constitution. The major changes came in 1790 when the Declaration was rewritten, relocating several "rights" provisions from the 1776 Frame of Government to the Declaration and adding new provisions.

\textsuperscript{322} The 1874 constitution added the prohibition on civil or military interference with the right of suffrage, PA. CONST. of 1874, art. I, § 5; somewhat strengthened the protection of the press, id. § 7; required that the "just compensation" for private property taken for public use be "made or secured" prior to the taking, id. § 10; and prohibited the legislature from "making irrevocable any grant of special privileges or immunities," id. § 17. These provisions have been carried forward into the corresponding sections of Article I of the 1968 constitution.

\textsuperscript{323} Act of Mar. 15, 1967, No. 2, § 7(a), 1967 Pa. Laws 2, 7. The convention would have been permitted to consider the amendments to the Declaration proposed by the "normal" process and submitted to the electorate in the same election as the referendum on the convention call itself, had those amendments not been approved. See supra note 202 and accompanying text. Unlike the 1873 referendum, see supra note 299, the 1967 referendum on the convention call expressly alerted the electorate to the Assembly-imposed limits on the proposed convention's authority. Act of Mar. 15, 1967, No. 2, § 1, 1967 Pa. Laws 2, 2.

\textsuperscript{324} PA. CONST. art. I, § 26 (adopted May 16, 1967). This provision is described by Williams, see supra note 61, at 361-69. The other amendments to the Declaration adopted in 1967 reworded the prohibition against special criminal tribunals, Article I, Section 15, eliminated the former language of
In a broader sense, of course, rights have been the focus of every convention, because the institutions and processes of self-governance, as well as relationships among and between interest groups and the body politic—all subjects of the basic constitutional texts—themselves relate to rights. Among these structural subjects of constitutional text, the extension of the electoral franchise is the closest analog of a statement of individual rights in the Declaration. It was in the this area that Pennsylvania’s general momentum for broadening rights through the convention process was marred by its most dramatic reversal, the express denial of the franchise to African Americans inserted in the 1838 constitution. By the time this reversal was corrected, in 1874, it had been repudiated by the Civil War and had been negated by the adoption of the Fifteenth Amendment to the United States Constitution.

The convention process in nineteenth century Pennsylvania proved no more capable of addressing the demands of women for inclusion in the political community. The Quaker view of religious liberty, acknowledging that women have the "same spiritual gifts as men" and the same eligibility for the ministry, had carried a hint of gender equality in the colonial period. However, in

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Article I, Section 19 regarding descent of estates in cases of suicide or death by casualty, and repealed the declaration of the right to emigrate in the former Article I, Section 25. According to the Pennsylvania Bar Association, which drafted the resolution proposing these changes, the changes were intended to eliminate or simplify obsolete language. PENNSYLVANIA BAR ASSOCIATION, PENNSYLVANIA CONSTITUTIONAL REVISION: 1966 HANDBOOK 16 (1966) (comment of William A. Schnader).

325 PA. CONST. of 1838, art. III, § 1. Neither the 1776 nor the 1790 constitution contained a racial restriction on the franchise. The debates of the 1837-38 convention suggest that, despite the prior absence of a constitutional restriction, African Americans in Pennsylvania, free or not, in fact were not permitted to vote. See, e.g., 2 DEBATES, supra note 189, at 477. The fervor with which the debate on this issue repeatedly arose during the convention suggests that, whatever the prior practice, by 1838 there was reason for the proponents of the restriction to believe that, without it, African-American suffrage might soon have been recognized in Pennsylvania. See, e.g., id. at 472-79, 540-43, 545-46, 548-49, 561; 9 id. at 320-93; 10 id. at 110-34.

326 See PA. CONST. of 1874, art. VIII, § 1.

327 FROST, supra note 157, at 15.
contrast to the rather consistent progression of religious liberty throughout the Commonwealth's history, this contribution to rights theory went nowhere. Women's suffrage was proposed to the 1873-74 Constitutional Convention, and soundly rejected. The 1874 constitution did open public offices in the education system to women, but equal suffrage did not make its way into the state constitution until 1933, more than a decade after the 19th Amendment made it the supreme law of the land.

Use of the Assembly-initiated amendment process to modify the Declaration of Rights is a much more recent phenomenon. With the exception of its part in the hybrid process that created the 1968 constitution, the Article XI procedure, including its prior forms in the 1838 and 1874 constitutions, was never used to amend the Declaration of Rights before 1971. Since 1971, however, it has been used for that purpose five times, with mixed results. Two new rights have been added to the Declaration and three have been modified. In at least two of the latter instances, the modifications were intended to limit or negate rights previously recognized, though their practical effect has not been great.

Both of the new declarations were added in 1971. Section 27 states that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." Section 28 is Pennsylvania's Equal Rights Amendment, which provides: "Equality of rights . . . shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."

The three modifications all have involved rights related to judicial processes. Article I, Section 6, which preserves the right to trial by jury, was amended in 1971 to authorize the General Assembly to allow "not less than five-sixths of the jury" to render

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328 See BRANNING, supra note 4, at 94-96.
329 PA. CONST. of 1874, art. X, § 3, reprinted in 8 SOURCES, supra note 6, at 326.
330 PA. CONST. of 1874, art. VII, § 1 (amended Nov. 7, 1933).
verdicts in civil cases. The prohibition in Article I, Section 10 against initiating criminal proceedings for indictable offenses by information was all but repealed, in 1973, by an amendment permitting any court of common pleas to override it, subject to approval of the supreme court. Finally, the single use of an amendment process in Pennsylvania to overrule a state court decision regarding rights came in 1984 when Article I, Section 9 was modified to permit use of suppressed, voluntary admissions or confessions for impeachment purposes in criminal prosecutions.

It is obviously impossible to make a clear statement of the "net" effect of the Article XI process, because to "weigh" the rights of women, ensured by Article I, Section 28, against those of defendants in criminal proceedings, arguably diminished by the amendments to Article I, Section 9 and 10, would be meaningless. However, particularly if Article I, Section 26, is included in the

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333 Adopted May 18, 1971. The General Assembly has used this authority, enacting Section 5104(b) of Title 42 of the Pennsylvania Consolidated Statutes.

334 Adopted Nov. 6, 1973.

335 Another such use is now being attempted in the General Assembly. Senate Bill 218 (1993) proposes amending Article I, Section 9 by substituting the Confrontation Clause language of the Sixth Amendment to the United States Constitution ("be confronted with the witnesses against him") for the current "meet the witnesses face to face," and permitting the legislature to provide by statute "for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television." S.B. 218, § 1, 177th Gen. Ass. (1993).

Senate Bill 218 is intended to overrule Commonwealth v. Ludwig, 594 A.2d 281 (Pa. 1991), which held that Article I, Section 9 does not permit use, in criminal trials, of testimony by alleged child victims through closed circuit television. In deciding Ludwig, the Pennsylvania Supreme Court expressly declined to follow the lead of the United States Supreme Court in Maryland v. Craig, 497 U.S. 836 (1990), construing the Sixth Amendment to allow such use in certain cases. Ludwig, 594 A.2d at 281 n.1. This proposed amendment has not received its first approval in the General Assembly. It was passed by the Senate April 26, 1993. 1993 Senate Journal (Apr. 26, 1993).

336 Adopted Nov. 6, 1984. This was in response to Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975).
comparison, it seems fair to say that efforts to expand rights have been effected in general, open-textured terms, while the terms of the contractions have been specific and limited.

The contractions also would seem to have been limited in their practical effects on rights. In the case of civil juries, replacement of a rule of unanimity with one of super-majority arguably affects rights of civil litigants who command resources inferior to those of their adversaries. Because these are the parties more likely to lose in litigation, they presumably have somewhat more to gain, at least in settlement potential, from a system that permits a single holdout juror to force a new trial. This effect, however, would seem likely to be a rather marginal one, arising only in those cases in which a super-majority of jurors agree, but unanimity cannot be reached.

The practical consequences of the amendments affecting criminal procedure may be even more marginal. In the legislative debates over the proposal to allow, by local option, informations to be substituted for indictments, it was argued that grand juries are controlled by prosecutors and offer little or no protection for individuals. Although the argument did not go unchallenged, there probably are few defense attorneys who would contest the assertion that indicting grand juries tend to be a "rubber stamp" in the hands of the prosecutor.

Regarding the use of suppressed, voluntary admissions for impeachment purposes, Professor Ledewitz has argued that the modification of Article I, Section 9 was "unnecessary because Tripplett had already become a dead letter, waiting to be

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337 The current text of Article I, Section 26 is the product of the Article XI process, but in the context of the larger, "hybrid" revision process that framed the 1968 constitution. See supra note 202 and accompanying text.


339 The same argument could be made with respect to any category of civil litigation in which one identifiable interest is more likely to prevail.


341 Id. at 1713 (Rep. LaMarca); id. at 1713-14 (Rep. Williams).

342 Id. at 1713 (Reps. Wise and Doyle).
overruled." Although this does not mean the amendment has no effect—at a minimum, placing the new rule in the constitution prohibits the supreme court from later resurrecting its prior rule—it renders the practical consequences rather insubstantial.

In sum, taking the effects of the convention process and the Assembly-initiated process together, is seems more than fair to say that the rights proclaimed by the Declaration have been well guarded by the people. Given the pattern of preservation and expansion, from 1776 to the modern version of the Declaration, the people of the Commonwealth have proven to be solicitous of individual rights.

VIII. RIGHTS AND THE RESTORATION OF POPULAR SOVEREIGNTY

The recognition of individual rights became the keystone of Pennsylvania’s tradition of constitutionalism when William Penn established his first government and has held that place ever since. The political disputes that resulted in the creation of the


344 Professor Ledewitz also observed that the meaning of the amendment is unclear, and that it may not produce the intended result. Id. at 9. The superior court has since construed the amendment to permit the use, for impeachment purposes, of voluntary statements taken in violation of the Fifth Amendment, Commonwealth v. Baxter, 532 A.2d. 1177 (Pa. Super. Ct. 1987), appeal denied, 541 A.2d 743 (Pa. 1988), or the Sixth Amendment, see Commonwealth v. Batson, 578 A.2d 1330 (Pa. Super. Ct. 1990).

Because Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975), involved statements taken in violation of the Fifth Amendment, Batson gives the amendment broader application than simply overruling the holding of Triplett. The Triplett court, however, deliberately expressed an opinion that was itself far broader than the case before it required, stating that "any statement of a defendant declared inadmissible for any reason by a suppression court cannot be used for the purpose of impeaching the credibility of a defendant who elects to testify on his own behalf at trial." Id. at 64. Thus, if the amendment was intended to overturn this dictum, as well as the holding, Batson is faithful to that intent. The problem with this interpretation, as Ledewitz points out, supra note 343, at 9, is that it makes an entire clause of the amendment superfluous.
revolutionary constitution of 1776, its displacement in 1790, and the subsequent revisions of 1838 and 1874, were all marked by intense factionalism.345 If individual rights are at risk when the people take control of their constitution, the eras in which these constitutions were framed were those when the Declaration of Rights was most in jeopardy in Pennsylvania. At each of these turns, the Declaration emerged stronger than before.

The most dramatic failures of shifting political majorities in Pennsylvania to value rights occurred in 1838 and 1874 when, respectively, African Americans were expressly excluded from, and women were denied inclusion in, the political community. The first of these failures occurred before equality had been established as a national norm, and the second occurred before that norm had been extended to women. These acts of exclusion reveal the fragility of Pennsylvania’s earlier tradition of respect for diversity, and, similar to the recent Colorado amendment restricting political participation by gay and lesbian people, they demonstrate the necessity of guarding the national norm.

Although the Declaration of Rights has flourished, the most basic political right, the right of the people to control the processes of constitutional change, has suffered severe erosion. The place of popular sovereignty in the Commonwealth remains secure in its theory—proclaimed eloquently in Article I, Section 2 of the Declaration—but the most elementary forms of its practice, revision through the nonrevolutionary means of Article XI and the convention process, have passed largely to the control of the people’s servants, their legislators and judges. For this loss to be reversed, a minimum of two constitutional changes must be made. One requires textual revision, and must come through the Article XI or the convention process. The other can be accomplished by textual revision, but also is within the power of the Pennsylvania Supreme Court to effect.

345 See generally notes 161-88 and accompanying text (noting factionalism during periods leading to the framing of the constitutions of 1776, 1790, and 1838).
First, the dual Assembly procedure for legislatively initiated amendments should be abolished. Not only would this remove a major hurdle to legislative responses to expressions of the will of the people, but it should enhance the deliberative process as well. Elimination of the second round of Assembly approval would make the consequences of the deliberations less remote. This, in turn, would underscore both the significance of the legislature's action and its accountability.

Second, the dangers inherent in judicial oversight of the Article XI and the convention processes must be recognized. The unpredictable hurdles of judicially created standards have no place in a procedure that is intended, among other things, to provide the single most effective check on judicial power. Judicial oversight of procedural matters should be undertaken only in cases of extraordinary necessity. Other public officers, principally the Commonwealth Secretary and the members of the Assembly, are responsible for ensuring the integrity of the amendment process. Absent a demonstration of clear abuse of discretion by those officers, the courts have no legitimate role superintending them.

Where the courts do have a role, and a critical one, is in ensuring that the substantive outcome of the amendment process comports with the norms of the Federal Constitution. This is especially important when the outcome assertedly diminishes the right of an identifiable minority to full participation in future...

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346 A variation on this recommendation was offered in 1964 by the Governor's Commission on Constitutional Revision, which had an important role in the hybrid revision process that resulted in the 1968 constitution. The Commission's proposal, drafted by the Pennsylvania Bar Association, would have created a two-tiered approach to legislative proposals for amendments. First, proposals agreed to by at least two-thirds of the membership of each house would have been placed on the ballot upon approval of a single session of the legislature. Second, proposals agreed to by a majority in each house, but less than two-thirds, would have required approval in two successive sessions, but without the current requirement that there be an intervening election of a new General Assembly. REPORT OF THE GOVERNOR'S COMMISSION ON CONSTITUTIONAL REVISION 84-85 (1964).
political processes.\textsuperscript{347} In federal constitutional challenges, of course, the courts' authority is plenary. Recognizing the significance of an act of the popular sovereign, however, the reviewing court should take particular care to see that all views are adequately represented in the litigation.

Appropriate limits on legislative authority in the constitutional convention process also should be recognized. Just as the amendment process generally is a check on the judiciary, the convention process specifically is also a check on the General Assembly. The convention is an instrument of popular sovereignty, independent of the Assembly and, in its authority to offer recommendations to the people, superior to it. Any legislative effort to dictate outcome, by limiting the power of a convention to examine any part of the constitution, is therefore suspect.

This does not mean that all such limits are necessarily invalid. As a practical matter, as demonstrated in the 1968 revision

\textsuperscript{347} The Colorado courts are performing this role by reviewing the substance of Amendment 2 for compliance with the Equal Protection Clause. See supra note 103 and accompanying text. Other provisions of the Federal Constitution may also be implicated by amendments to state constitutions, but these generally will have different implications. When a state provision wrongly excludes a group from participation in the political life of the community, see Evans v. Romer, 854 P.2d 1270 (Colo.), \textit{cert. denied}, 62 U.S.L.W. 3320 (U.S. Nov. 1, 1993) (No. 93-453), it is constitutionally infirm, and its command or prohibition may not be given effect.

When a state constitution affords less protection than the federal, that is a different matter. A state amendment to a declaration of freedom of conscience, for example, providing that "nothing in this section shall be construed to prohibit prayer in public schools," is not "unconstitutional." It is simply a declaration that the state constitution does not grant the same protection as the First Amendment. Consequently, any challenge to prayer in public schools in that state necessarily would be brought under the latter and not the former. An amendment purporting to \textit{require} prayer in public schools, on the other hand, would be unconstitutional, and its implementation could be enjoined. I emphasize the equality principle because the problem of majoritarian exclusion of minorities from the political process is an historically recurring one in Pennsylvania and elsewhere. The Colorado experience and Judge Linde's concerns, see supra notes 58-100 and accompanying text, tend to support the assertion that this continues to be the single most significant problem arising under state constitutional amendments today.
process, some limits may be a prerequisite for popular assent to the calling of a convention.\textsuperscript{348} When limits are imposed on a convention, however, they can be said to represent the will of the people only if they have been specified on the ballot in the referendum on the call. Then, once the convention’s work is ratified in a subsequent referendum, the "judgment of the people" on the question whether the convention exceeded its authority is final.\textsuperscript{349}

The proposals I have described represent minimum conditions for returning control of the processes of revising the Pennsylvania Constitution to the sovereign people. At least one other, the periodic submission to the electorate of the question whether to call a convention, is desirable.\textsuperscript{350} Because the convention is the only means by which the people can control the \textit{structure} of their self governance, and not simply the personnel who operate it, to make one of the institutions of that structure, the General Assembly, solely responsible for determining whether to let the people decide to call a convention creates a potential conflict of

\begin{quotation}
\textsuperscript{348} Since the adoption of the 1790 constitution, the Pennsylvania electorate has rejected seven of the ten convention calls proposed by the General Assembly, \textit{see supra} notes 220-21 and accompanying text, suggesting that it holds "deeply conservative views" about the state constitution that parallel those Professor Amar, \textit{supra} note 81, at 1096, attributes to the American people regarding the national Constitution. Under a theory of the popular sovereign’s control of the amendment process, of course, the electorate has the right to insist that a convention of its delegates not tamper with specific provisions of its basic law.

\textsuperscript{349} Prior to the referendum, alleged departures by the convention from the limits imposed by the referendum calling it should be reviewed by the courts only under the abuse of discretion standard.

\textsuperscript{350} The 1964 Governor’s Commission on Constitutional Revision recommended a very different approach to periodic review—study and recommendations to be made at least every fifteen years by a commission created by the legislature. \textit{See REPORT OF THE GOVERNOR’S COMMISSION ON CONSTITUTIONAL REVISION, supra} note 346, at 84. This would have \textit{strengthened} the legislature’s control of the revision process, by constitutionalizing an alternative—itself controlled by the legislature—to the convention. Of course, the legislature, or the governor, or anyone else for that matter, may convene an advisory commission at will anyway, but it will have no special, constitutional status.
\end{quotation}
interest. If the people regularly refuse the invitation to call themselves into convention, as Pennsylvanians have done in the past, there is no cause for complaint. It is, after all, the people's "right to alter, reform or abolish their government" that is at issue, not their servants.

A second change should be considered as well, the creation of a constitutional initiative process in Pennsylvania. Any proposal in this direction undoubtedly would be controversial, and its adoption would represent a major departure from the Commonwealth's historical approach to constitutional change. It is an issue, therefore, that is particularly appropriate for the convention process. A convention could review the other avenues to textual change as well, the Article XI process and the convention process.

If a convention is called, it also should address the structure of the institution responsible for nontextual constitutional change, the judiciary. This issue is well beyond the scope of this Article, but public interest in the state judiciary is perhaps at its highest level in modern times. This may present an historic opportunity to seriously reexamine Article V, including the method of selecting and retaining appellate judges.351

351 Several bills proposing amendments to Article V are pending in the General Assembly. Among them, Senate Bill 340 directly addresses judicial selection and retention. It was reported favorably by the Senate Judiciary Committee on June 8, 1993, but with substantial amendments. Although providing a system of merit selection and retention of appellate judges, and a local option for a similar process for courts of common pleas, the Committee version of the bill gives the General Assembly a dominant position in the selection process. Compare S.B. 340, printer no. 1436, 177th Gen. Ass. (1993) (amended by the Senate Judiciary Comm. (June 8, 1993)) with S.B. 340, printer no. 358, 177th Gen. Ass. (1993) (referred to the Senate Judiciary Comm. (Feb. 1, 1993)).

S.B. 396, printer no. 410, 177th Gen. Ass. (1993) (referred to Senate Judiciary Comm. (Feb. 5, 1993)), would take a different route, submitting to the electorate the question of calling a limited constitutional convention, one authorized to prepare proposals revising Article V, relating to the judiciary, and the Article XI amendment process. Although the convention method of revision seems clearly preferable, no action has been taken on S.B. 396. Because it would have placed the referendum on the November 1993 ballot, id. at 1, § 1(a), in its present form it is now a dead letter.
IX. CONCLUSION: CONSTITUTIONALISM AND THE DIALOGUES OF FEDERALISM

American political theory at the Revolution "drove an analytic wedge between the government and its People, relocating sovereignty from the former to the latter."\textsuperscript{352} The theory of popular sovereignty served the Revolution well. It animated the rhetoric of the undertaking, most notably in the Declaration of Independence, legitimated the conventions that framed new constitutions for the independent states, and eventually provided a theoretical basis for representative government in our federal system. Creating its own memorial, the practice of popular sovereignty, by the people out-of-doors, was instrumental in obtaining the Bill of Rights as part of the post-Revolutionary compact.

As a matter of federal constitutional law, the practice of popular sovereignty was deliberately curbed by the elaborate system of representative government, horizontal and vertical checks and balances, and limits on state authority created in the 1787 constitution.\textsuperscript{353} As for federal constitutional change, the Article V process so effectively insulates the text from majoritarian control that it is secondary to interpretation as the means of effecting revision.

State constitutions are much more conducive to the practice of popular sovereignty in the processes of constitutional change. Although not all state constitutions include a declaration of the people's "inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper," their relative ease of amendment is invitation enough. This fundamental difference between the Federal Constitution and state constitutions represents one of federalism's greatest contributions to the growth and protection of individual rights, and it is in jeopardy.


\textsuperscript{353} Professor Amar argues that these components reflect the theory of popular sovereignty in that they "enabled the American People to conquer government power by dividing it." \textit{Id.} at 1450. \textit{See generally id.} at 1439-51.
The states are the seedbeds of rights. Whether we focus on the values protected by the Bill of Rights, on concepts of equality, or on contemporary debates over the content of "liberty," in each instance the right in question, in some manner and form, was tried in the states before it was nationalized. Nearly all of the discourse regarding the place of "positive rights" in American constitutionalism is now taking place in the states. The people are full participants in the state discourse, often informally, but at times quite formally, through referenda, legislative initiatives, and, most importantly, the processes of amending their constitutions. In other words, in our federal system, rights originate with the people. The national end of the system, with its institutional stability and Supremacy Clause, can generalize and secure rights, but is ill-suited to giving them first flight.

In general terms, our federalism permits vigorous popular democracy to operate in the states because the Federal Constitution places checks on majoritarian excesses. At the same time, it depends on that popular democracy as the source of its most creative innovations. In matters of rights, the outcomes of the majoritarian processes also help inform the judiciary, state and federal, regarding the status of the living traditions that define our liberty.354

In order for the federal constitutional dialogue to work, its debate over rights must include the voices of people. One of the great contributions of state constitutions to our system is the place they provide for these voices. For the states to adopt, as Pennsylvania appears to be doing in one form and as Judge Linde advocates in another, any equivalent of the federal model of judicial dominance of constitutional change is to discard an irreplaceable component of federalism, a component that is generative of rights.

American constitutionalism is rooted equally in the cultures of our Revolution and its antecedent traditions. Its endurance through new cultures and traditions has depended upon its ability to assimilate both voices of change and voices of stability. The

354 See Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (discussing need for Court to remain faithful to country's living traditions).
Framers of the Pennsylvania and United States constitutions had their own fractious visions of the good society and the rights that they believed would ensure it. They debated, compromised, and devised texts to give effect to their visions. Many of their visions we may fairly be said to share today. But we would not choose their good society, and unless we, the people, debate and compromise our fractious visions, we cannot have our own, either.