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## POPULAR SOVEREIGNTY AND ITS LIMITS: LESSONS FOR A CONSTITUTIONAL CONVENTION IN CALIFORNIA

*Joseph R. Grodin\**

*California's pressing structural problems require changes to the California Constitution that may be difficult to accomplish through the current constitution's three stated means of reform. In response, coalition reform groups, such as Repair California, have proposed amending the constitution to authorize the calling of a constitutional convention through an initiative measure. This Article focuses on the state, constitutional, and procedural issues that may arise from such a change. Through an analysis of the relevant California Supreme Court decisions since 1911, this Article concludes that there is indeed a principled basis for sustaining the constitutional validity of an initiative measure amending the constitution to permit a constitutional convention called by the people, for authorizing a different method of selecting convention delegates, and for allowing such an initiative to limit the convention's scope to certain specified subjects.*

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## I. INTRODUCTION

Whether a constitutional convention is a good idea for California as a way to try and resolve the pressing structural problems that confront the state is, no doubt, a debatable question. There are legitimate concerns about the time and resources required, about the recommendations that would be forthcoming, and about each of the recommendation's individual acceptability to the electorate. There are also powerful arguments supporting the position that nothing short of a constitutional convention is likely to bring about the needed changes. This Article focuses on the state constitutional, procedural issues that are likely to arise from any proposal for a convention that departs from the format prescribed by the current California Constitution. I take for my model the propositions that were advanced in 2010 by coalition reform group Repair California<sup>1</sup> but that did not qualify for placement on the ballot.

The California Constitution provides in article XVIII three methods by which the constitution may be changed: (1) it can be amended through a popular initiative, i.e., an initiative measure placed on the ballot through petitions carrying the requisite number of signatures; (2) it can be amended or revised through a legislative initiative, i.e., a measure placed on the ballot through a two-thirds vote of each house of the legislature; or (3) it can be revised through a constitutional convention.<sup>2</sup>

The popular-initiative amendment process is potentially available for narrowly targeted changes, but any "structural" changes, such as those presented in many of the proposals that have been advanced, are likely to be considered "revisions" rather than "amendments" and thus not amenable to that procedure.<sup>3</sup> The legislative initiative process is potentially available for revisions as well as amendments, and would be well suited to the sorts of

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1. See *About the Convention*, REPAIR CAL., [http://www.repaircalifornia.org/about\\_california\\_convention.php](http://www.repaircalifornia.org/about_california_convention.php) (last visited Feb. 21, 2011).

2. CAL. CONST. art. XVIII. California's procedure for constitutional change through initiative is virtually unique. See generally TIP H. ALLEN, JR. & COLEMAN B. RANSON, JR., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE (1962) (summarizing the many state procedures for constitutional revision and amendment).

3. See JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 23 (1993).

structural changes that have been proposed, especially through the medium of a “Constitution Revision Commission,” which has been used in the past to make recommendations to the legislature for placement on the ballot.<sup>4</sup> However, in the present state of political disarray, the likelihood of two-thirds of each house of the legislature agreeing to place any even mildly controversial proposal on the ballot appears slim. That leaves the convention alternative.

Article XVIII, section 2 provides as follows:

The Legislature by roll call vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.<sup>5</sup>

So, the possibility exists that the legislature could propose a convention pursuant to article XVIII, section 2. But the proponents of the Repair California initiatives were concerned about the following potential problems: (1) the probability of two-thirds of the members of each house of the legislature agreeing to a call for a convention is small, smaller even than the probability of the legislature agreeing to propose specific constitutional revisions; (2) the prescribed method for selection of delegates through popular election would not be acceptable to those (presumably numerous) citizens who would likely view it as a means of replicating the existing and unpopular legislative bodies; and (3) no call for a convention is likely to succeed, unless the convention’s subject matter can be limited in advance.<sup>6</sup>

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4. See generally Eugene G. Lee, *The Revision of California’s Constitution*, 3 CPS BRIEF 3, 4–6 (1991), available at [http://www.repaircalifornia.org/Docs/california\\_history.pdf](http://www.repaircalifornia.org/Docs/california_history.pdf) (providing background following passage of ACR 188, which requires in part the presentation of alternative proposals for constitutional revision).

5. CAL. CONST. art. XVIII, § 2.

6. See, e.g., Mike Aldax, *State Seeking Conventional Wisdom on Constitution*, S.F. EXAMINER, Nov. 27, 2009, available at <http://www.sfexaminer.com/local/State-seeking-conventional-wisdom-on-constitution-76349807.html>; Hendrik Hertzberg, *The States We’re In*, NEW YORKER, Aug. 24 2009, available at [http://www.newyorker.com/talk/comment/2009/08/24/090824taco\\_talk\\_hertzberg](http://www.newyorker.com/talk/comment/2009/08/24/090824taco_talk_hertzberg); Elise Viebeck, *Failed Convention Post-Mortem*, CAL. WATCHDOG (Mar. 18, 2010), <http://www.calwatchdog.com/2010/03/18/new-failed-convention-post-mortem>.

Acting on these premises, Repair California and its supporters advanced an initiative measure to amend article XVIII by adding provisions to authorize calling a constitutional convention through an initiative measure. Further, that initiative measure would have both prescribed a procedure for selection of delegates and limited the subject matter the delegates could consider—with the limitation being enforceable through judicial writ. A companion initiative measure, contingent upon passage of the first, would have called for a convention pursuant to that authorization.<sup>7</sup>

The doctrine of popular sovereignty supported the legal theory behind this proposal. That doctrine finds expression in article II, section 1 of the state constitution: “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”<sup>8</sup> The threshold questions, which apply both to the legitimacy of bypassing the legislature and to the designation of a different method for selecting delegates, are whether “the people,” having once chosen a particular procedure for altering or amending their form of government, are forever limited by that choice, or whether they may adopt a different procedure, and if so, how? Since the constitution says nothing about limiting or not limiting a convention’s subject matter, the question of whether a call for a convention may effectively provide for limitations is of a different order, and will be considered last.

## II. MAY THE INITIATIVE PROCESS BE USED TO MODIFY THE CALIFORNIA CONSTITUTION TO PROVIDE THAT A CONSTITUTIONAL CONVENTION CAN BE CALLED THROUGH USE OF THE INITIATIVE WITHOUT LEGISLATIVE ACTION?

Surprisingly, there is a dearth of relevant judicial authority on this question. In several cases state courts have upheld, in the absence of express constitutional authority, the validity of wholesale constitutional revisions adopted by the voters upon submission by the state legislature. In these cases, the courts relied on the theory of popular sovereignty to conclude that the convention procedure was not necessarily the exclusive procedure by which the state

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7. See *Constitutional Convention Ballot Measures Fact Sheet*, REPAIR CAL., [http://www.repaircalifornia.org/Docs/repair\\_california\\_fact\\_sheet.pdf](http://www.repaircalifornia.org/Docs/repair_california_fact_sheet.pdf) (last visited Feb. 25, 2011).

8. CAL. CONST. art. II, § 1.

constitution could be changed, and that ultimate ratification of the legislative proposals by the people was sufficient.<sup>9</sup>

These cases have been subject to criticism, both in judicial opinion<sup>10</sup> and in scholarly writing,<sup>11</sup> and it appears from dicta in its early decision in *Livermore v. Waite*<sup>12</sup> that the California Supreme Court might have sided with the naysayers on the issue that those cases addressed. The legislature sought to place on the ballot a constitutional amendment to what was then article XX, section 1 of the state constitution. The purpose was to change the seat of government from Sacramento to San Jose, but by its terms the amendment would not become effective unless the state received a “donation” of \$1 million and ten acres of land in San Jose, and elected state officials approved the new site.<sup>13</sup> In a taxpayer action to restrain the secretary of state from taking steps to submit the proposal to the electors, the trial court granted an injunction, and the Supreme Court affirmed.<sup>14</sup>

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9. *Wheeler v. Board of Trs.*, 37 S.E.2d 322 (Ga. 1946) (holding that a legislative submission of proposed new constitution to the people for ratification was a permissible method of revising the constitution, and any constitutional defect cured by a vote of the people is in the exercise of their sovereignty); *Smith v. Cenarrusa*, 475 P.2d 11 (Idaho 1970); *Gatewood v. Matthews*, 403 S.W.2d 716 (Ky. Ct. App. 1966) (discussing the submission of a draft constitution to the electorate as being merely an exercise of the people’s inherent right to change their government, and that the constitutionally prescribed procedures for adopting a new constitution need not be followed).

10. *State v. Manley*, 441 So.2d 864 (Ala. 1983) (rejecting the reasoning in these cases and insisting on strict adherence to constitutionally prescribed procedures).

11. Michael G. Colantuono, Comment, *The Revision of State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473 (1987); Recent Case, *Adoption and Amendment of Constitutions: Legislature May Disregard Prescribed Procedure as Long as the Proposed Constitution Is Submitted for Popular Ratification: Gatewood v. Matthews*, 81 HARV. L. REV. 693 (1968). There exists a wealth of debate over the notion of sovereignty and the validity of extra-textual change under the U.S. Constitution. See, e.g., Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994) (arguing people retain an unenumerated right to alter the U.S. Constitution by means other than those prescribed by article V); Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535 (1995) (criticizing Amar’s theory and positing that constitutional change is legitimate only when it represents the will of the people as a whole acting in their sovereign capacity); James W. Torke, *Assessing the Ackerman and Amar Theses: Notes on Extratextual Constitutional Change*, 4 WIDENER J. PUB. L. 229 (1994). Because there exists in the federal system characteristics of dual sovereignty—the states and the people—the issues are not precisely the same.

12. 36 P. 424 (Cal. 1894).

13. *Id.* at 424–25.

14. *Id.* at 425–28.

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The actual holding in *Livermore* was quite narrow. The constitution at that time permitted an amendment to be placed on the ballot by a two-thirds vote of each house of the legislature, and were it not for the conditions the legislature attached, there would have been no problem. But, the court said:

The Legislature was not authorized by the framers of the constitution, nor do the terms of that instrument permit it to propose any amendment that will not, upon its adoption by the people, become an effective part of the constitution, nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition . . . Such a proposition is legislative in character, rather than [constitutional].<sup>15</sup>

The court's opinion in *Livermore*, however, contains rather expansive dicta:

Article 18 of the constitution provides two methods by which changes may be effected in that instrument, one by a convention of delegates chosen by the people for the express purpose of revising the entire instrument, and the other through the adoption of by the people of propositions for specific amendments that have been previously submitted to it by two-thirds of the members of each branch of the legislature. It can be neither revised nor amended except in the manner prescribed by itself, and the power which it has conferred upon the legislature in reference to proposed amendments, as well as to calling a convention, must be strictly pursued. Under the first of these methods, the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States . . . . The power of the Legislature to initiate any change in the existing organic law is, however, of greatly less extent and, being a delegated power, is to be strictly

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15. *Id.* at 427.

construed under the limitations by which it has been conferred.<sup>16</sup>

While *Livermore* spoke in terms of limits on legislative authority, similar reasoning underlaid the California court's subsequent decision in *McFadden v. Jordan*,<sup>17</sup> to the effect that the initiative process cannot be used to adopt a constitutional revision, as distinguished from an amendment.<sup>18</sup> The proposed initiative in that case, addressing multifarious subjects, was deemed to constitute a revision and was therefore not an appropriate subject for the initiative power.

But all of these cases involved attempts to obtain voter approval for constitutional changes submitted contrary to constitutionally prescribed procedures. To the extent that courts have insisted on compliance with such procedures, the courts have implemented the citizens' original (and sovereign) intent. That is quite different, however, from saying that the prescribed procedures may not be changed, as was proposed in the draft initiative to allow the initiative to be used to call for a constitutional convention.

But then the question remains whether the initiative process may properly be used to make such a change or whether such a change can only be made through a revision either propounded by the legislature or adopted by a constitutional convention proposed by the legislature. In *Amador Valley Joint Union High School District v. State Board of Equalization*,<sup>19</sup> the court, while upholding Proposition 13's sweeping tax reforms as merely an amendment, acknowledged that "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision."<sup>20</sup> Proposition 13 did not reach that level because the measure's qualitative effects on the distribution of powers between state and local government, and on local government, were neither substantial nor novel.<sup>21</sup>

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16. *Id.* at 425.

17. 196 P.2d 787 (Cal. 1948).

18. *Id.* at 789.

19. 583 P.2d 1281 (Cal. 1978).

20. *Id.* at 1286.

21. *See id.* at 1284–89 (explaining that the analysis for determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature and then outlining the reasons why Proposition 13 fails to meet that standard).



In *Raven v. Deukmejian*,<sup>22</sup> the court, for the first (and only) time, struck down an initiative as constituting a revision on “qualitative” grounds. There, it held that a measure that would have required California courts, in applying state constitutional provisions in criminal proceedings, to adhere to interpretations of similar provisions in the U.S. Constitution would make such a fundamental change in the role of the judiciary and in the rights of criminal defendants as to constitute a revision rather than an amendment.<sup>23</sup> Two years later, in *Legislature of California v. Eu*,<sup>24</sup> the court upheld use of the initiative to establish term limits for legislators and to limit amounts that could be spent on legislative staffs.<sup>25</sup> This was an amendment because it left the legislative branch substantially unchanged; the test, the court said, is whether it appears “*necessarily or inevitably . . . from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution.*”<sup>26</sup> Most recently, in *Strauss v. Horton*,<sup>27</sup> the court upheld Proposition 8, which modified the constitution to declare marriage an institution involving a man and a woman, contrary to the court’s own prior decision declaring same-sex couples’ right to marry to be a fundamental right protected by both the privacy and equal protection provisions of the California Constitution.<sup>28</sup> Such a change, the court said, constitutes an amendment rather than a revision: as a quantitative matter, Proposition 8 “adds but a single, simple section to the Constitution,”<sup>29</sup> and as a qualitative matter, “the act of limiting access to the designation of marriage to opposite-sex couples does not have a substantial, or indeed even a minimal effect *on the governmental plan or framework of California* that existed prior to the amendment.”<sup>30</sup>

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22. 801 P.2d 1077 (Cal. 1990).

23. *See id.* at 1079–90 (holding that, for the first time in California’s history, Proposition 115 substantially alters the preexisting constitutional scheme to the extent that it directly contradicts well-established jurisprudential principles).

24. 816 P.2d 1309 (Cal. 1991).

25. *See id.*

26. *Id.* at 1319.

27. 207 P.3d 48 (Cal. 2009).

28. *Id.* at 59, 122.

29. *Id.* at 62.

30. *Id.*

So, would a measure authorizing use of the initiative to call for a constitutional convention have a substantial effect on the governmental plan or framework of California? Arguably, it would by making it easier to bring about such a convention. And if that argument is correct, then there would be no way to achieve the sought-after result short of persuading two-thirds of each house of the legislature either to propose such a change or to propose a constitutional convention at which such a change could be adopted.

But if that argument is correct, what about the 1962 modification—achieved through the initiative process—which, for the first time, gave the legislature the authority to propose constitutional revisions without the necessity of calling a convention?<sup>31</sup> Did that not have a substantial effect on the governmental plan or framework of the state? And more fundamentally, what about the 1911 initiative, which introduced direct democracy into state governance?<sup>32</sup> It is difficult to imagine a more substantial change in government structure than the people asserting the power to bypass the legislature’s lawmaking ability (the initiative) and blocking the implementation of laws adopted by the legislature (the referendum). Yet, it appears that no question was raised as to the people’s power to make those changes through the ballot, rather than through a constitutional convention, which, then as now, the legislature was unlikely to propose. And if that is the case, then both of these changes should have been regarded as invalid. But it does not appear that such an objection was ever raised, and certainly not in court. How do we explain these constitutional phenomena?

One possible explanation is that in these ancient times, before the enlightenment of *Raven*, it was assumed that only a completely new constitution would qualify as a revision, leaving all other changes possible through amendment.<sup>33</sup> But while the *Livermore* court did mention a “revision of the entire constitution”<sup>34</sup> as its only

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31. See GRODIN ET AL., *supra* note 3, at 302.

32. *Id.* at 17–18.

33. The 1849 constitution used the phrase “entire constitution” in relation to “revision,” but the 1879 constitution eliminated the word “entire.” Whether that change is of significance is debatable. See Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1219 n.343 (1998).

34. *Livermore v. Waite*, 36 P. 424, 426 (Cal. 1894).

example of what would fall in the revision category, it said that the term “amendment implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.”<sup>35</sup> Thus, it seems unlikely that the court thought a legislatively proposed amendment could be used for anything short of adopting a completely revised document or that it would have regarded the wholesale transfer of power from the legislature to the people through direct democracy as constituting a mere “improvement” within the lines of the original document.

Moreover, whatever the proper line of distinction between a revision and an amendment prior to *Raven* was, does the “modern” test mean that the 1911 and 1962 changes should now be held invalid because they both involved substantial changes to the governmental plan or framework? Or is it, because of some implicit limitation period on the assertion of constitutional objections, simply too late to raise that question?<sup>36</sup>

Perhaps the better answer is that both the 1911 and 1962 amendments lay within the people’s power to facilitate and extend the expression of their own sovereignty. In one case they did so by providing for direct popular control over lawmaking and in the other by making it easier to effect constitutional change. Such processes by which those changes were made either lay outside the traditional distinction between amendment and revision or constituted amendments rather than revisions because they did not affect the distribution of powers among the branches.

In any event, the court’s apparent openness since *Raven* to use the initiative to make constitutional change, as well as the precedents established by the unchallenged changes from 1911 and 1962, tend to support the view that an initiative measure to facilitate the holding of a constitutional convention would pass constitutional muster.

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35. *Id.*

36. Manheim & Howard, *supra* note 33, at 1234–35 (“[B]ecause the device adopted in 1911 did not lay ‘within the lines of the original instrument,’ . . . it seems to have been a revision. As such, the initiative process was likely improperly adopted. . . . [But] is there not a point at which it becomes legitimate through acceptance, history, and usage?”).

III. ASSUMING THE INITIATIVE PROCESS CAN BE USED TO  
CHANGE THE CONSTITUTION TO AUTHORIZE USE OF AN  
INITIATIVE TO CALL FOR A CONSTITUTIONAL CONVENTION,  
CAN IT ALSO AUTHORIZE SUCH AN INITIATIVE TO  
PROVIDE FOR THE SELECTION OF CONVENTION DELEGATES BY A  
DIFFERENT METHOD THAN THAT SPECIFIED IN THE  
CURRENT CONSTITUTION?

Is there a difference of constitutional dimension between changing the constitution to make it easier to call for a constitutional convention and changing it to provide for the selection of delegates in a different manner? Allowing for the selection of delegates in a different manner opens the door to manipulation of the results, to the detriment of minority interests deserving of protection against majority dominance. This might have been the case, for example, if the proponents of the measure held invalid in *Raven* had sought to further their goal by calling for a constitutional convention with delegates chosen from among prosecutors throughout the state. But any plan for the selection of delegates would have to comply with federal equal protection principles, as well as the requirements of the federal Voting Rights Act.<sup>37</sup> Moreover, the California Supreme Court's decision in *Strauss* seems to have rejected the argument that the California Constitution contains provisions that are so embedded that they cannot be altered by initiative. It would certainly be preferable, for both legal and policy reasons, that any initiative authorizing modifications in the delegate-selection procedure provide for a method that is broadly representative of the electorate.<sup>38</sup> Subject to that qualification, the answer to the question posed in the heading to this part would seem to be yes.

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37. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

38. See *Constitutional Convention Ballot Measures Fact Sheet*, *supra* note 7. The Repair California proposal for authorizing a convention call would have required “fair methods for selecting or electing delegates.” *Id.* The proposal for the convention call prescribed a rather elaborate procedure.

IV. ON THE SAME ASSUMPTION, CAN THE INITIATIVE AUTHORIZING USE OF AN INITIATIVE TO CALL FOR A CONSTITUTIONAL CONVENTION ALSO AUTHORIZE SUCH AN INITIATIVE TO PROVIDE THAT THE CONVENTION WILL BE LIMITED TO, OR NOT EXTEND TO, CERTAIN SPECIFIED SUBJECTS?

There is language in *Livermore* that would suggest the answer is no: “[T]he entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States.”<sup>39</sup> But *Livermore* was decided before the 1911 direct-democracy amendments; this statement was pure dicta—the court did not consider the possibility that the call for the convention would itself place a limit on the scope of issues to be considered. Furthermore, there is a substantial body of authority, as well as reasoning, to support an affirmative response.<sup>40</sup>

At the time *Livermore* was decided, there was virtually no authority on or experience with limited constitutional conventions. One leading treatise published in 1867 argued that limitations are valid even if imposed by the legislature.<sup>41</sup> W. Dodd, writing in 1910, expressed a contrary view of legislative authority.<sup>42</sup> Roger Hoar proclaimed in his 1917 treatise on the basis of popular sovereignty that while the legislature could not impose limitations, the people could do so.<sup>43</sup> During the twentieth century, however, a consensus emerged:

The prevailing view . . . treats a convention as the agent of the people who have called it. Thus, where the people must vote to approve the calling of a convention . . . the people are seen to have given their implicit approval to limitations

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39. *Livermore*, 36 P. at 426.

40. The authorities are gathered in Francis H. Heller, *Limiting a Constitutional Convention: The State Precedents*, 3 CARDOZO L. REV. 562 (1982) and more recently in ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 392–97 (2009). See also Henry D. Levine, Note, *Limited Federal Constitutional Conventions: Implications of the State Experience*, 11 HARV. J. ON LEGIS. 127, 134 (1973) (discussing substantive limitations for conventions among numerous states).

41. See JOHN ALEXANDER JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS: THEIR HISTORY, POWERS, AND MODES OF PROCEEDING* 365 (1887).

42. See WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 79–80 (1910).

43. See ROGER SHERMAN HOAR, *CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS* 91, 108, 122–23 (1917).

on the convention's power contained in the enabling legislation that put the question of calling a convention to the people.<sup>44</sup>

As noted by the leading contemporary authority on state constitutions, Professor Robert Williams, the majority of state judicial rulings tend to confirm this point,<sup>45</sup> as does actual practice: “[A]bout 15 percent of all state constitutional conventions were substantially limited, and the proportion increased since World War II.”<sup>46</sup>

But, the skeptics will legitimately inquire, what about the runaway convention, whose delegates ignore the limitations that have been imposed and seek to submit to the electorate provisions that lay outside those limits, perhaps in violation of an oath they took upon becoming a delegate? The answer lies in external legal constraints: the governing constitutional provision, or the call for the convention, may preclude submission to the voters of extra-agenda proposals, and both election officials and courts may be directed to enforce that preclusion. Courts that have considered the question have been willing to enforce limitations by ordering extra-agenda proposals off the ballot.<sup>47</sup>

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44. A. E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1182 (1974).

45. WILLIAMS, *supra* note 40, at 394. See *Staples v. Gilmer*, 33 S.E.2d 49, 52 (Va. 1945) (“If [the people] vote in favor of such a convention, they and not the legislature will limit the work of the convention and its scope.”); see also *Cummings v. Beeler*, 223 S.W.2d 913, 917, 921 (Tenn. 1949) (agreeing with the holding in *Staples v. Gilmer*); cf. *Gaines v. O’Connell*, 204 S.W.2d 425, 431–32 (Ky. 1947) (upholding the legislature’s requirement, not otherwise contained in the state Constitution, that the people ratify the convention results). *But cf.* Opinion of the Justices, 81 So. 2d 678, 679–83 (Ala. 1955) (interpreting in a 4–3 Alabama Supreme Court opinion Alabama’s constitution to preclude limits). As Professor Williams observes, the Alabama court’s opinion is based on questionable reasoning and is, in any event, amenable to a constitutional amendment that would provide for the option of a limited constitutional convention. WILLIAMS, *supra* note 40, at 395. While these cases involved conventions called by legislative action with ratification by popular vote, the governing principle, popular sovereignty, would clearly apply a fortiori to a convention called directly by popular vote. *Id.*

46. WILLIAMS, *supra* note 40, at 392 (citing Levine, *supra* note 40, at 133 n.32). Some state constitutions—for example, those in Kansas, North Carolina, and Tennessee—expressly provide for calling a constitutional convention with a limited agenda. The Alaska Constitution, on the other hand, expressly precludes limits on the powers of the convention, and the Montana Constitution specifies that a convention called through the use of the initiative must be unlimited. *Id.* at 392–93.

47. See *Livermore v. Waite*, 36 P. 424, 425–28 (Cal. 1894). When the question is raised after the voters have already ratified the extra-agenda proposals, courts are split on whether relief may be granted. Compare *Snow v. City of Memphis*, 527 S.W.2d 55 (Tenn. 1975) (entertaining

## V. CONCLUSION

There is a principled basis for sustaining the validity of an initiative measure that would (1) amend the state constitution to permit the people to call a constitutional convention through a ballot measure and (2) authorize such a convention call both to specify a procedure for selecting delegates different from that specified in the current constitution and to specify limits on the convention's agenda, subject to judicial enforcement. Whether sufficient consensus exists, or can be developed, to adopt such an initiative measure and to adopt the delegates' recommendations is, of course, an entirely different question.

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postelection challenge), *with* *Malinou v. Powers*, 333 A.2d. 420, 422 (R.I. 1975) (declaring postelection challenge moot).