Constitutions
Operating Instructions

State constitutions differ from the U.S. Constitution in many ways. Some are older—the Massachusetts Constitution, shown here, was written about a decade before the U.S. Constitution was adopted. Most state constitutions are longer, more detailed, and much easier to change than their federal counterpart.
Chapter Objectives

After reading this chapter, you will be able to

- Describe the role of state constitutions,
- Explain how state constitutions evolved in early American history,
- Discuss the role of bicameral legislatures in the first generation of state constitutions,
- Identify the ways state constitutions can be formally changed,
- Identify informal means of changing constitutions,
- Discuss why constitutions vary from state to state,
- Explain how state constitutions differ, and
- Relate the ways local governments may be subject to governing documents such as constitutions.

It’s pretty clear that, at least in theory, the president of the United States could be an atheist. It’s equally clear that, at least technically, the same nonbeliever could not become governor of Texas. How the heck can that be? How can someone who qualifies to hold the top job in the federal government be barred on religious grounds from being eligible to be the chief executive of the Lone Star State? The answer is pretty simple. It’s what the constitution says. Both of them.

Article VI of the U.S. Constitution states pretty plainly that “no religious test shall ever be required as a qualification to any office or public trust under the United States.” Believe what you want, or believe nothing at all, but as a federal official, your faith or lack thereof is a nonissue. At least, that is, in a legal sense. Politically speaking, good luck getting elected after publicly professing your agnosticism or longtime membership in the Church of the Flying Spaghetti Monster (that’s a real thing, by the way—it has its own Wikipedia page and everything). Still, while religious skepticism might cost a candidate votes, nonbelief in an office seeker is constitutionally kosher. You cannot be barred from running, and you cannot be removed from federal office, simply because you have an unpopular set of ideas about religion.

Article I, Section 4, of the Texas Constitution says something pretty similar to Article VI of the U.S. Constitution. Specifically: “No religious test shall ever be required as a qualification to any office, or public trust, in this state; nor shall anyone be excluded from holding office on account of his religious sentiments.” Well, that sounds pretty clear-cut, too. Ah, but there’s a catch. Section 4 concludes, “provided he acknowledges the existence of a Supreme Being.” That would seem to limit Texas officials to people who believe in God, or at least a god. That, admittedly, is a pretty big set of people in Texas, especially as he still technically qualifies as a gender-neutral pronoun, even if to modern eyes it smacks of being a bit on the male-centric side. While the rules of grammar make gender a nonissue, though, there’s no getting around that bit about belief in a supreme being. The bottom line: if you are a nonbeliever, then you are constitutionally unqualified to hold office in the state of Texas.

In reality, the U.S. Constitution almost certainly prevents Texas from requiring its officials to have some form of religious belief. And Texas knows it. This clause of the state constitution has never been enforced, and any attempt to do so would likely result in a fast legal challenge with a very high probability of success. The U.S. Supreme Court ruled decades ago that a state could not require any candidate for public office to profess a belief in God (Torcaso v. Watkins, 1961), and the legal bottom line is that if a state constitution is in conflict with the U.S. Constitution, the latter wins.

Outside of that limitation, though, state constitutions can say pretty much whatever citizens and their lawmakers want them to. They can expand or grant rights, protections, and freedoms not found in the U.S. Constitution. They can also restrict those rights to the...
bare minimum required. For example, there has been a long-running debate over whether and to what extent the Second Amendment to the Constitution of the United States grants individuals an unrestricted right to possess firearms. There’s no debate in Alabama, though, where the state’s constitution plainly states, “Every citizen has a fundamental right to bear arms in defense of himself or herself and the state.” Do the citizens of Alabama have a right to keep and bear arms? You bet. Indeed, it is a “fundamental right,” and Alabama’s constitution specifies that any attempt to restrict that right “shall be subject to strict scrutiny.” In other words, state and local officials are going to have a very high legal hurdle to jump if they want to regulate firearms ownership. In contrast, the California Constitution has no provision at all on the right (or lack thereof) to bear arms, and California has some of the most restrictive gun control laws in the nation. Do you have an unrestricted constitutional right to keep and bear arms in California? Heck, no. You get whatever the minimum guarantee is from the U.S. Constitution and not a bit more.

Many people are surprised to find out that their constitutional rights vary from state to state. True, your rights under the U.S. Constitution are (mostly) the same in every state. But that does not mean rights are uniform. It’s not just your right to own a gun; it’s everything from your free speech rights to your right to run for office. Even your right to participate in the political process can vary pretty drastically from state to state. Among other things, that’s because some states have some form of direct democracy, which allows citizens to make laws themselves rather than outsourcing the job to elected representatives. Citizens of Alabama do not have the ability to propose and vote on amendments to their state’s constitution, but in other states, including Nebraska, California, and Missouri, members of the electorate—those individuals who can vote—are free to take policy matters into their own hands. Ballot initiatives and referendums allow voters to amend the constitution or override the decisions of the state’s elected officials, or even remove the officials entirely, with ease.

Whether or not states allow for direct democracy is among the reasons that constitutions, and the rights and regulations they mandate, differ so much from state to state. What else explains the tremendous variation among state constitutions? A state constitution reflects that state’s particular historical experiences, its political culture, its geography, and its notions of what makes good government. We’ll look at these sorts of differences and their implications in this chapter.

Before getting to that, though, it is critical to understand the importance of state constitutions, which serve an underappreciated role not just in organizing state and local governance but also in determining individual rights and the operation of the entire federal system. Since the 1990s, the U.S. Supreme Court has made a number of decisions strengthening the role of states in the federal system, decisions that elevate the importance of state constitutions. The Court’s insistence on determining the boundaries of federalism and evaluating state laws and regulations—a form of activism sometimes referred to as judicial federalism—even gained former chief justice William Rehnquist the nickname “Governor Rehnquist.”

State supreme courts also are becoming more assertive. In 1977, Supreme Court justice William Brennan, a former justice of the New Jersey Supreme Court, wrote a now-famous article for the Harvard Law Review noting that state constitutions afford their citizens a layer of rights above and beyond those protected in the U.S. Constitution. He urged state courts to pay more attention to these rights and to assert themselves more forcefully. They have. State courts, for example, ruled same-sex couples had the same marriage rights as heterosexuals long before the U.S. Supreme Court’s landmark ruling in Obergefell v. Hodges (2015). This is just one example of assertive state supreme courts finding rights in state constitutions that are not under the protection of the U.S. Constitution. This means that the documents that reflect and determine what state and local governments can and cannot do have become even more important to an understanding of politics in the United States.

As you read through this chapter, keep in mind the following questions:

- What impact do state constitutions have on our lives?
- Why do state constitutions differ?
- How do constitutions determine what state and local governments can and cannot do?
What State Constitutions Do: It’s Probably Different from What You Think

Mention “the constitution” and chances are good that your listener will think instantly of the U.S. Constitution. The founders have gotten more than two centuries of good press for their work in 1787. Schoolchildren memorize “We the People of the United States, in order to form a more perfect Union . . .” and venerate the document’s wisdom. Yet the U.S. Constitution is only half the story. As residents of the United States, we live under a system of dual constitutionalism, in which the federal government and state governments are cosovereign powers. Both levels of government run in accordance with the rules laid out in their respective constitutions. Despite the important role state constitutions play in establishing our rights and organizing our local and state governments, most people know very little about them.

The U.S. Constitution and all state constitutions have some basic things in common. Constitutions at both state and federal levels lay down the roles, responsibilities, and institutional structure of government and establish the basic procedures for operating key government institutions. For example, like the U.S. Constitution, all state constitutions create three primary branches of government (legislative, executive, and judicial) and provide a general governmental framework for what each branch is supposed to do (or not do) and how it should go about doing it. Similar to the U.S. Constitution, all state constitutions contain something roughly equivalent to a bill of rights, with those rights firmly placed in the context of natural law, also known as higher law. Natural (or higher) law is a philosophy that certain rights are divine endowments rather than political creations. Natural law thus holds that basic rights and values, such as those guaranteed by the Bill of Rights, are not created by governments through law. If these rights were created by governments, after all, then governments could take them away. Instead, governments merely “discover” the rights that nature bestows on all people and restrain any interference with those rights. Constitutions and any subsequent constitutional amendments, or changes, thus do not create rights; they are there to make sure those natural rights are not taken from anyone.

Yet while federal and state constitutions share a good deal in terms of their functions and underlying legal philosophy, in many ways it is misleading to compare state constitutions with their better-known federal counterpart. Consider the important differences discussed below.

Powers Granted to Government

Perhaps the most important and surprising difference between the U.S. Constitution and state constitutions is the scope of the documents. The U.S. Constitution’s original purpose was to organize a federal government with sharply limited powers. In contrast, state governments have what is called plenary power, which means their powers are not limited to those laid down in the U.S. Constitution or their own state constitutions. As the Tenth Amendment to the U.S. Constitution makes clear, all powers not expressly delegated or forbidden to the federal government are reserved for the states. In other words, this is not a limited grant of power in the sense of laying out the specifics of what states have the authority to do or not do. It basically says that states can do whatever they want—they have complete or plenary power—as long as they do not contravene the U.S. Constitution.

That plenary power is vested in the lawmaking bodies of state government—that is, state legislatures. This does not mean that these legislatures can go around arbitrarily breaking the rules laid down by their own constitutions, which can be quite restrictive. What it means is they can act without express permission of the constitution; as long as their actions are not prohibited, they are good to go. Think of it like this: When passing a law, Congress must address the key question, “Is this allowed (by the U.S. Constitution)?” For state legislatures, the key question is, “Is this prohibited (by the state constitution)?” That’s the difference between limited and plenary powers in the federal system. State legislatures, through the U.S. Constitution and their own state constitutions, have these powers. Congress does not. State constitutions, in short, do not establish limited governments in the same way the U.S. Constitution establishes a limited federal government.3

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**Dual constitutionalism** A system of government in which people live under two sovereign powers. In the United States, these are the government of their state of residence and the federal government.

**Natural law or higher law** A set of moral and political rules based on divine law and binding on all people.

**Constitutional amendments** Proposals to change a constitution, typically enacted by a supermajority of the legislature or through a statewide referendum.

**Plenary power** Power that is not limited or constrained.
Permanence

The U.S. Constitution is widely seen as the document that created the United States—the embodiment of the founders’ wisdom. As such, it is held in the highest regard by politicians and the public alike. It has lasted more than two centuries and has been formally changed only 27 times. In contrast, state constitutions are amended and even replaced much more frequently. Most states have replaced their original constitutions at least once. California is currently on its second constitution. New York is on its fourth. Louisiana is on its eleventh. In fact, one political scientist has estimated that the average state constitution lasts for only about 70 years.\(^4\)

Length

The federal constitution is a relatively short document. At about 7,400 words, it is shorter than most chapters in this book. In contrast, state constitutions tend to be much longer—about 26,000 words on average. Some are much, much longer. New York’s constitution and California’s ruling document are each roughly 50,000 words long. The longest state constitution, Alabama’s, clocks in at 310,296 words, more than 40 times the length of the U.S. Constitution.\(^5\) This entire textbook is only about two-thirds as long as Alabama’s 300,000-plus-word constitution.

Specificity

Why are state constitutions so much longer than the federal constitution and so much more likely to change? Part of the answer has to do with how the functions of the federal constitution differ from those of state constitutions. The U.S. Constitution is primarily concerned with setting up the basic structures and procedures of government. State constitutions do these things too, but they often set forth procedures and address policies in much greater detail than the federal constitution does. Whereas the federal constitution creates a framework for government, state constitutions often get into policy details. South Dakota, for instance, is one of several states whose constitution once sanctioned the state prison to produce twine and cordage. Oklahoma’s constitution mandates that home economics be taught in school; Maryland’s regulates off-street parking in Baltimore. Political scientist Christopher Hammons has estimated that 39 percent of the total provisions in state constitutions are devoted to specific policy matters of this sort. In contrast, only 6 percent of the U.S. Constitution deals with such specific issues.\(^6\) Some political scientists think this narrow policy focus may help explain why states are more likely to replace their constitutions: if influential political constituencies start to part ways with the policy preferences embedded in a state constitution, they have an obvious incentive to tear up that constitution and write a new one more agreeable to their views.\(^7\)

Embrace of Democracy

The U.S. Constitution creates a system of representative democracy; it purposefully rejects direct democracy as a basis for governance. The founders went to great pains to check “the whimsies of the majority” by designing a system of checks and balances that deliberately keeps policymaking at arm’s length from the shifting winds of popular opinion. During the Progressive Era in the early 1900s, many states revamped their constitutions to do just the opposite. This was particularly true of the newer western and midwestern states, in which old-school politics was less entrenched and political cultures tended toward the moralistic or individualistic.

Progressive reformers believed that old constitutional arrangements were outmoded and that citizens should have the opportunity to participate directly in making laws. Moreover, they worried that state legislatures had been captured by wealthy special interests. In other words, they thought that representative democracy was working for the benefit of a few rather than for the benefit of all. Their solution was to give the people the ability to amend their constitutions and pass laws directly through the use of referendums and ballot initiatives. Thus, in about half the states, state constitutions champion direct democracy in a way that the U.S. Constitution purposefully does not.
Finances

Congress and the White House can run up as much national debt as they can persuade bond buyers to swallow. In contrast, 32 state constitutions require the legislative and executive branches to balance their budgets. Another 17 states have statutes that mandate balanced budgets. Only Vermont can choose to run up debt as the feds do. Even state constitutions that do not require a balanced budget take a much more proscriptive, or restrictive, view of budget matters than does the U.S. Constitution. California’s constitution, for instance, mandates that almost 40 percent of the state budget go toward education, a requirement that has constrained legislators’ options when the state has been faced with budget shortfalls.

Other state constitutions mandate a specific style and format for laws that allow the transfer of money to the executive branch. These are known as appropriations bills. Some state constitutions require supermajorities—two-thirds or three-fifths of the electorate—instead of simple majorities of the legislature to increase revenues or taxes. Sometimes constitutions get more specific still, prohibiting legislators from attaching riders (amendments or additions unrelated to the main bill) to appropriations bills and requiring a single subject for each bill. State constitutions can also shape state finances by explicitly requiring legislatures to make certain expenditures. For example, Article VI, Section 6(b), of the Kansas Constitution requires the legislature to “make suitable provision for finance of the educational interests of the state.” In 2016, the Kansas Supreme Court ruled that the state legislature’s school funding formula violated that provision, creating a political firestorm in a state that was already dealing with widening budget deficits.

The Evolution of State Constitutions

The first state constitutions were not technically constitutions at all. Rather, they were colonial charters awarded by the king of England. These charters typically were brief documents giving individuals or corporations the right to establish “plantations” over certain areas and govern the inhabitants therein. King James I of England granted the first charter in 1606. It created the Virginia Company of London, which in 1607 established the first English settlement in North America at Jamestown in what is now the state of Virginia.

As the colonies expanded, many of these charters were amended to give the colonists “the rights of Englishmen.” Just what those rights were was never entirely clear. Britain’s constitution was not (and is not) a written document. It is a tradition based on the Magna Carta of 1215 and on a shared understanding of what government should and should not do. From the start, some colonies took an expansive view of their rights and privileges. The Massachusetts Bay Colony, like other English settlements in North America, was organized as a corporation and was controlled by a
small group of stockholders. But whereas the charters of the other companies remained in England, within easy reach of the British courts, Puritan leader John Winthrop took his colony’s charter with him when he sailed for the New World in 1630. This made it difficult for the English government to seize and revoke the charter if the company misbehaved or operated illegally, which it soon did. The Puritans excluded non-churchgoers from local governments, punished people who violated their sense of morals, and generally behaved as an independent polity. This misbehavior eventually incurred the displeasure of King Charles II, who revoked the charter in 1691. Massachusetts then received a new royal charter that provided for a royal governor and a general assembly—a form of governance that lasted until the Revolutionary War, nearly a century later.9

When the colonies won their independence, it was clear that the colonial charters had to be replaced or at least modified. It was less clear what should replace them. Some colonial leaders believed that the Continental Congress should draft a model constitution that every state should adopt. Richard Henry Lee, a Virginia politician, explained the idea in a letter to John Adams in May 1776: “Would not a uniform plan of government, prepared for America by the Congress, and approved by the colonies, be a surer foundation of unceasing harmony to the whole?”30

Adams thought not. Although he liked the idea of uniform state constitutions in principle, he worried about what would happen in practice. He believed that effective government required a strong executive. The colonists’ experience dealing with royal governors, however, had created an aversion to executive power. Adams feared that the Continental Congress would create governments dominated by powerful unicameral legislatures or even do away with governors altogether and create a special committee of legislators to handle the everyday business of governing. This would violate what he saw as the wise precautionary principle of the separation of powers.

Ultimately, despite being a unicameral body itself, the Continental Congress rejected that particular idea. Instead, it passed a resolution that urged the 13 colonies to reorganize their authority solely “on the basis of the authority of the people.”31 This set the stage for the states to create their own varied blueprints for government.

After independence was declared and secured, the states convened special assemblies to draft new constitutions. Most adopted lightly modified versions of their old colonial charters. References to the king of England were deleted and bills of rights added. In most of the new states, power was concentrated in the legislative branch to diminish the possibility that tyrannical governors would appear in the political arena.

The First Generation of State Constitutions

This first generation of state constitutions created powerful bicameral legislatures—with a few exceptions. Georgia, Pennsylvania, and Vermont opted for unicameral legislatures. Governors and state judiciaries were clearly subordinate in most cases. In fact, legislatures often appointed both the governor and judges. No one envisioned that one day a state supreme court would have the power to overrule the acts of a legislature on the grounds that its laws were unconstitutional. Indeed, the states that did provide for constitutional review entrusted that function to special “councils of revision” or to “councils of censor.”

Nor did the early state constitutions embrace the now commonplace idea of “one person, one vote.” Every early state constitution except Vermont’s restricted voting access to white males who met certain minimum property requirements. Vermont gave the vote to every adult male. Supporters of a limited franchise defended these limitations as essential to the new republic. Without property qualifications, John Adams warned,

there will be no end to it. New claims will arise; women will demand a vote; lads from 12 to 21 will think their rights are not enough attended to; and every man who has not a farthing will demand an equal voice with any other, in all acts of the state. It tends to confound and destroy all distinctions, and prostrate all ranks to one common level.12

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Indeed, Adams wanted to restrict the franchise even further by setting still higher property requirements. In practice, the actual requirements necessary to achieve the right to vote varied widely. Some states, such as New Hampshire, let all white male taxpayers vote. This reflected the fact that New Hampshire was a state of small landowners with a fairly egalitarian political culture. However, even this fair state specified a higher threshold of property ownership that must be met should a man wish to hold office. In Virginia, a state with a more hierarchical political culture dominated by a small group of wealthy landowners and planters, the property qualifications were stiff. Only white males who owned at least 25 acres and a 12-foot-by-12-foot house, 50 acres unsettled, or a town lot with a 12-foot-by-12-foot house could vote. It is not entirely clear how many people met these qualifications. Most scholars believe that in the more democratic northern states 60 to 80 percent of white males could vote. Needless to say, women and nonwhites could not.

Over the course of the 19th century, the franchise was expanded gradually, although in a very uneven and often unjust fashion. A number of southern states, for example, rewrote their constitutions to allow minorities to vote only when such changes were forced on them as part of the price for their readmission to the Union after the Civil War. African American rights also were enshrined in the Fourteenth Amendment of the U.S. Constitution. Yet, despite these protections, gains for African Americans proved short-lived. In the last decade of the 1800s, African Americans’ ability to vote and to participate in all aspects of society were harshly limited by the passage of Jim Crow laws. These laws provided for the systematic separation of races, sharply restricted access to the franchise, and permitted the outright intimidation of African Americans.

Women fared only slightly better. Wyoming began to allow women to vote in 1869. By 1912, only 13 states had followed suit. It took the Nineteenth Amendment, ratified in 1920, to secure the right to vote, or suffrage, for all women nationwide.

The limitations on the franchise imposed by many early state constitutions did little to promote good governance. State legislatures quickly developed an impressive record of corruption and fiscal extravagance because some of the men who had the legal right to vote also had money to influence politicians, an easy task in many states. But the era of unlimited legislative power did not last very long. New territories entering the Union, such as Indiana and Mississippi, opted for elected governors, as did older states that began to revise or replace their constitutions in the 1820s. The intention was to create more balance among the branches of government and allow all voters (not just the rich ones) more of a voice in deciding who would run a state. By 1860, South Carolina was the only state with a governor selected by the legislature. In hindsight, the 19th century is recognized as a period of tumultuous constitutional change.

**Formal Constitutional Changes**

Every state constitution provides a method for making changes. Fourteen states actually require citizens to vote periodically on whether or not they want to convene a constitutional convention. Voters can decide if they want to amend or replace their state’s constitution.

In the early 19th century, suggesting such change could be an exciting—and dangerous—business. In 1841, a patrician attorney and renegade lawmaker by the name of Thomas Wilson Dorr convened an illegal constitutional convention with the intention of replacing Rhode Island’s colonial charter with a more modern and progressive constitution. The state’s aged document still limited the franchise to voters owning land valued at $134 or more at a time when other states had long since abandoned such requirements. Dorr’s supporters elected him “governor” the following year on a platform that proposed allowing all white males—even Catholic immigrants, a group viewed by the Protestant majority with great suspicion—to vote, which caused the sitting governor to order Dorr arrested and tried for treason. Thus began the Dorr War, or Dorr’s Rebellion. Dorr’s supporters then attempted to seize the arsenal in Providence but were repelled when their cannons failed to discharge. A month later, Dorr and his followers tried again. This time, a force of militiamen and free blacks from Providence repelled them. Still, Rhode Island’s establishment got the hint. A new, more liberal constitution was quickly enacted.

The amendment process has since become a bit more routinized in most states. Amending or replacing a state constitution is typically a two-step process. First, a constitutional amendment or a new constitution must be
The original American colonies were established for a wide variety of purposes. The Massachusetts Bay Colony, for example, started off as a haven for a persecuted religious sect. The Puritans were determined to create, in the words of Massachusetts's first governor, John Winthrop, “a city upon a hill” to serve as an example of a holy community for all people. Other colonies, such as Virginia, began as business ventures. Still others, including Pennsylvania, were both.

Pennsylvania’s first colonial charter reflected the colony’s dual purposes as a religious settlement and an investment. It illustrates how state charters were created to serve very particular goals—and how “rights” that Americans now take for granted, such as the right to self-governance, were by no means obvious to this country’s founders.

The colony started out as a business venture. In 1681, William Penn received a proprietary interest—the controlling share—in what is now the state of Pennsylvania as repayment for a debt that England’s King Charles II owed Penn’s father. Penn was already deeply involved in land speculation in North America. He and 11 other investors already owned East Jersey (present-day New Jersey). Soon after buying into Pennsylvania, they acquired a lease on Delaware.

Penn, however, wasn’t just a businessman. He was also a devout Quaker, a member of a peace-loving religious group that was often at odds with the official Church of England. Pennsylvania was to Penn “a holy experiment”—a unique chance to found a province dedicated to Quakerism’s vision of equality and religious freedom.

William Markham, Penn’s deputy, was sent in 1681 to establish a seat of government for Penn’s new colony. Penn also instructed his representative to construct a “City of Brotherly Love”—Philadelphia. One year later, Penn himself arrived in his fledgling colony. His first major action was to draw up a constitution, or charter, for the new colony, which he called the “Frame of Government.” His second major act was to establish friendly relations with the American Indians in the area—an unusual action that reflected his pacific religious beliefs.

In many ways, the Frame of Government echoed Quakerism’s progressive dogmas. Pennsylvania’s constitution guaranteed religious freedom to everyone who believed in God. It also set forth a humane penal code and encouraged the emancipation of slaves. In contrast, the early settlers of Massachusetts were interested not in individual religious freedom but in establishing a just Puritan society. As a result, the functions of local churches and town governments were intertwined in early Massachusetts. Indeed, the colony was governed as a virtual theocracy for its first 200 years.

However, the Pennsylvania model was not a uniform triumph of humane liberalism. Penn did use his charter to protect his business interests. The Frame of Government provided for an elected general assembly, but it also concentrated almost all power in the executive branch of government, which was controlled by Penn and the other proprietors.

It was not long before colonists began to chafe at some of the less progressive features of Penn’s early constitution. Penn was forced to return to Pennsylvania in 1701 and issue a new constitution, the Charter of Privileges, which granted more power to the provincial assembly. However, the conflict between proprietary and antiproprietary forces did not diminish until 1776. That year, noted revolutionary Benjamin Franklin led a convention to assemble and approve a new constitution for the state as it struggled for independence from Great Britain.

Changes to state constitutions are generally proposed in four primary ways: through legislative proposals, ballot initiatives or referendums, constitutional conventions, and constitutional commissions.

**Legislative Proposals**

Most attempts to change state constitutions begin with legislative proposals. Forty-nine state constitutions allow the state legislature to propose constitutional amendments to the electorate as a whole. This is how Alabama ended up enshrining strong gun rights in its constitution. The Alabama Right to Bear Arms was a legislatively referred constitutional amendment; in other words, the legislature put it on the ballot for an up-or-down vote by the electorate, who approved it with a wallop 72 percent in favor. While virtually all state legislatures can propose constitutional amendments to submit to voters for approval or disapproval,
what state legislatures actually have to do to make that happen varies quite a bit. In 17 states, a simple majority vote in both houses of the legislature is enough to send a constitutional amendment on to the voters for ratification. Most other states require a supermajority for legislative approval of a constitutional amendment. Some states set the bar even higher. The constitutions of 11 states—Delaware, Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin—require the legislature to vote for a constitutional amendment in two consecutive sessions before it can be ratified. In principle, some state legislatures also can propose completely new constitutions to voters. However, no state legislature has successfully proposed a wholesale constitutional change since Georgia did so in 1982.

**Ballot Initiatives and Referendums**

Twenty-four states give voters another way to propose constitutional amendments—through ballot initiatives or popular referendums. These ballot measures offer citizens a way to amend the constitution or enact new legislation without working through the legislature. South Dakota was the first state to provide voters with the option of ballot initiatives, in 1898, but it was only after Oregon embraced the initiative process in 1902 that the push for direct democracy really got under way. In the 16 years that followed, nearly two dozen states followed Oregon’s lead. The last of these states to approve ballot initiatives was Mississippi in 1992, some 70 years after that state’s supreme court tossed out its first ruling allowing initiatives.

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**Ratification** A vote of the entire electorate to approve a constitutional change, referendum, or ballot initiative.

**Ballot initiatives** Processes through which voters directly convey instructions to the legislature, approve a law, or amend the constitution.

**Referendums** Procedures that allow the electorate to accept or reject a law passed by the legislature.
How ballot measures work in practice varies widely from state to state, although there are some common elements to the process. In most states, citizens must first provide the text of their proposal to an oversight body, usually the secretary of state’s office or a legislative review committee. Then they need to gather enough signatures to place the proposal on the ballot. This threshold varies widely among states. Wyoming sets the bar high, requiring a number of signatures equal to 15 percent of the votes cast for governor in the most recent election. The bar is lower in Colorado, where proponents need only gather signatures equal to 5 percent of the votes tallied for secretary of state in the previous election. The signatures are then verified, again by the secretary of state or the attorney general. Proposals that pass each test make it onto the ballot at the next election.

Ballot measures typically combine the proposal and ratification stages of the amendment process. Once a proposed amendment is on the ballot, it usually requires a simple majority to pass and become part of the constitution, although some state constitutions require a supermajority. The practical result is laws without lawmakers; the initiative process is commonly employed by people who seek policy changes that, for whatever reason, are not being considered or undertaken by the legislature.

Constitutional Conventions

The most freewheeling approach to changing or replacing a state constitution is to convene a constitutional convention. Massachusetts, whose constitution was drafted
State legislators tend to be wary of constitutional conventions and rarely convene them. The reason for this caution is that, once convened, a constitutional convention theoretically can examine any and all aspects of state and local government.

Constitutional Revision Commissions

If constitutional conventions are for the bold and trusting, then constitutional revision commissions are often the cautious technocrat’s preferred route to constitutional change. A constitutional revision commission typically consists of a panel of citizens appointed by the governor, the state legislature, or both. The commission suggests, but cannot mandate, changes to the state constitution. Because their powers are largely advisory, the impact of revisions commissions is often pretty minimal. For example, Alabama’s legislature created a constitutional revision commission in 2011 and charged it with a multiyear effort to recommend piecemeal changes to that state’s bloated constitution. (See Figure 3-1.) Only a handful of recommendations originating from the commission were submitted to voters for approval, and even some of those were rejected.22 Yet, even today, supporters of the reforms championed by the revision commission continue pushing to streamline and modernize Alabama’s mammoth constitution.

Two states go even further in their enthusiasm for constitutional commissions. Florida’s constitution requires that a constitutional revision commission convene every 20 years. It also gives this commission a unique power—the right to present proposed changes directly to voters for their approval or rejection. Florida’s latest constitutional revision commission met in 2018 and considered proposals ranging from establishing...
Alabama’s State Constitution: The More Things Change, the More They Stay the Same

Since 1819, Alabama has adopted six different constitutions. The most recent was ratified in 1901 and consists of more than 310,000 words (that’s over 40 times longer than the U.S. Constitution). The bulk of this comes from the 926 (and counting) amendments that make it the world’s longest operating constitution. It was the product of a constitutional delegation comprising 155 white males who, like convention president John Knox, were mostly large planters. They wished to hold back the industrialization that had left Alabama in great debt. Knox, however, described the constitution’s primary purpose as “secur[ing] white supremacy.” African American voters were stripped of voting rights, and interracial marriage was forbidden (as recently as 2012, the state’s legislature was still working to strip racist language from the constitution). Civil rights advocate Booker T. Washington, among others, condemned the document.

Many of its original provisions are now defunct or have been retracted, but that doesn’t mean there are not still big problems with the constitution. Some provisions allow the continuing disfranchisement of many citizens, delay of economic development, and denial of governing powers to localities. Critics have accused the constitution of encouraging unproductive government action; the state legislature spends more than half of its time debating issues that have only local relevance, and two-thirds of the constitutional amendments address issues specific to one town or county.

There have been numerous efforts to change Alabama’s constitution—six different governors have tried to change the existing 1901 document. In each case, they were met with resistance from the legislature, the state supreme court, or powerful planters and industrialists. The latest attempt at reform involves a constitutional revision commission created in 2011 by the legislature. The job of this 16-member commission is to comb through the constitution and recommend changes. These are recommendations, though, not mandates. Recommendations by the commission can be rejected by the legislature and must be approved by voters before taking effect. So while Alabama’s constitution is likely not set in stone forever, the prospects of a start-from-scratch do-over still seem slim.

**Constitutional Convention**

- State legislature proposes constitutional convention.
- State legislature selects delegates for constitutional convention.
- Convention begins; legislature may not interfere with the convention’s decisions.
- Voters approve.
- New constitution ratified by popular vote.

**Article-by-Article Amendments**

- State legislature proposes amendments; may propose more than one at the same time.
- Amendments must be approved by popular vote and may not be part of entirely new constitutional document.


Term limits on school board members to eliminating greyhound racing. Most controversially, the commission also weighed a constitutional ban on assault weapons that took on particular significance in the wake of the February 2018 school shooting in Parkland, Florida, that left 17 high school students and teachers dead. The commission actually has a history of putting gun control measures to a statewide ballot. In 1998, for example, it sent to the voters a provision to allow local governments to expand their requirements for background checks and waiting periods for firearms purchases. More than 70 percent of voters supported the measure.

The other state with an unusual constitutional revision commission is Utah, the only state whose commission is permanent. Members of the Utah Constitutional Revision Commission are appointed by the governor, by the leaders of both houses of the legislature, and by sitting commission members. Unlike Florida’s commission, Utah’s commission issues its recommendations only in the form of a public report to the governor.
Although a permanent body, the Utah commission has not met much lately. After the legislature passed a law mandating that the commission can meet only if it is specifically requested to do so by the governor or legislature, few such requests have been issued.

**Ratification**

Once a constitutional amendment has been proposed and found acceptable, it must be ratified before it can go into effect. In most states, this is a straightforward process: the proposed amendment or new constitution is put before the voting public in the next statewide election, and the electorate either approves or rejects it. Two states add a twist to this process. In South Carolina, a majority of both houses of the state legislature must vote to approve a constitutional amendment—after a successful popular referendum—before the amendment can go into effect. In Delaware, approval by a two-thirds vote in two successive general assemblies gets a constitutional amendment ratified. As already discussed, the ballot initiative essentially combines the proposal and ratification stages. Once a proposed amendment is qualified for the ballot, it usually requires only a simple majority vote to become part of the constitution.

**Informal Methods for Changing Constitutions**

Constitutions can change even if the actual words in them do not. Indeed, such informal changes can be pretty dramatic and have far-reaching policy implications. The most common route of informal constitutional change is via the state supreme courts. For instance, this is the case when a court interprets an existing constitution in a way that creates a new right, such as the right to an adequate or equitable education (discussed in Chapter 13, on education).

Sometimes constitutional changes also come about from *judicial review*, which is the power of courts to review the actions of the legislative and executive branches of government and invalidate them if they are not in compliance with the constitution. When state supreme courts in places like Vermont, Iowa, and Massachusetts began ruling that their state constitutions gave same-sex couples the same (or at least similar) marriage rights as heterosexual couples, they helped set off two decades of political conflict. Many states responded to the securing of gay marriage rights through judicial review by seeking to change the constitutions being reviewed. Many states—more than half—amended their constitutions to specify, in language that no one could misinterpret, that gay marriage was not allowed. All those amendments, however, were effectively nulled by another exercise of judicial review, this time by the U.S. Supreme Court in Obergefell v. Hodges (2015), which held that same-sex couples are guaranteed equal marriage rights under the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution. When the U.S. Constitution is found to be in conflict with a state constitution, the U.S. Constitution wins, so all those state constitutional amendments banning gay marriage no longer had a legal basis and could not be enforced.

State constitutions also can change when other branches of government successfully lay claim to broader powers. For example, Rhode Island’s legislature has used its strong constitutional position—a clause in the state constitution says that the General Assembly “can exercise any power” unless the constitution explicitly forbids it—to take control of functions that most states delegate to governors. This means that in Rhode Island legislators not only sit on the boards and commissions that oversee a range of state agencies, but they also dominate the board that sets the salaries for high-ranking executive branch officials. Not surprisingly, this has given the legislature a great deal of power over executive branch decisions. In short, Rhode Island has just the type of government that John Adams feared.

Southern states such as Florida, Mississippi, and Texas also tend to have constitutions that provide for weak governors. In these cases, this arrangement is a legacy of the post–Civil War *Reconstruction* period. During Reconstruction, the victorious Union army forced most of the former Confederate states to replace their constitutions. Reconstruction ended in 1876, and the Union troops withdrew. With the exception of Arkansas, North Carolina, and Tennessee, the southern states soon abandoned their revised constitutions in favor of new ones that greatly weakened gubernatorial powers. Part of the reasoning for this was that weak governors could be kept from enacting policies that the federal government encouraged but that were contrary to the norms of these traditionalistic states. This had happened during Reconstruction, when the governors of the states that had seceded from the Union

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**Judicial review** The power of courts to assess whether a law is in compliance with the constitution.

**Reconstruction** The period following the Civil War when the southern states were governed under the direction of the Union army.
Procedures for Constitutional Amendment

**MAP 3-3  ● Legislative Vote Required for Approval**

- Majority
- 3/5 Majority
- 2/3 Majority


**MAP 3-4  ● Vote Required for Ratification**

- Majority Vote on Amendment
- Majority Vote in Election
- Other

were replaced by individuals sympathetic to the federal government in Washington or were forced to cooperate with federal policy in regard to such issues as African American rights. For example, in 1885, Florida passed a constitution that took away the governor’s right to appoint his own cabinet; members were elected instead. Although it has been amended many times since, that constitution is still in effect today. As a result, Florida has one of the weakest governorships in the country.24

Of course, state legislatures do not always gain the upper hand. In states whose constitutions give governors the edge, some chief executives have been very aggressive in expanding their powers. Although their techniques do not involve written amendments to the state constitutions themselves, they do affect the distribution of powers within state government—a function that is a primary concern of state constitutions.

State constitutions may also be changed in another way—through simple neglect. Sometimes state governments just stop enforcing obscure or repugnant sections of their state constitutions, effectively changing the constitutions in the process. No politician today would dare to argue for denying the vote to individuals simply because they are poor or do not own land or belong to a minority group, yet until 1999 Texas’s constitution contained a provision that limited the right to vote to citizens who owned land and paid a poll tax. The state government had stopped enforcing these objectionable requirements long before but had neglected to actually repeal them. Likewise, Alabama’s constitution outlawed interracial marriages until an amendment overturned the ban in 2000; the state had informally dropped enforcement of the provision years earlier.

**Why State Constitutions Vary**

Without a doubt, constitutions vary widely from state to state. What explains these differences? Four factors seem particularly important: historical circumstances, political culture, geography, and changing notions of good government.

To understand how historical circumstances and culture can create a constitution—and then be shaped by that constitution—consider the case of Texas. The Lone Star State’s current constitution was written in 1876, soon after federal troops had withdrawn and Reconstruction had ended. During Reconstruction, a strong Unionist governor backed by federal troops had governed the state, centralized police and education functions in state hands in Austin, and generally defied the white Democrats who had been in power before the Civil War. So Texas followed in the footsteps of other southern states and drew up a constitution designed to ensure that the state would never again have an activist state government. Toward that end, the new constitution allowed the legislature to meet only infrequently, limited the governor’s power over the executive branch, and provided for an elected judiciary. The document’s sole progressive feature was a provision that for the first time allowed women to continue to own property after they were married.25

White Democrats’ antipathy toward Reconstruction explains much of the content of Texas’s 1876 constitution. The state’s political culture explains why its constitution has endured to the present. Political scientist Daniel Elazar classifies Texas as a traditionalistic/individualistic state that, in his words, “places a premium on limiting community intervention” and “accepts a natural hierarchical society as part of the ordered nature of things.”26 Although Elazar’s categories have blurred in recent years, state constitutions continue to bear them out. In short, Texas’s constitution is well suited to the state’s political culture—a culture that views strong activist government with suspicion.

In contrast, a constitution that allowed the legislature to meet only every other year would suit a moralistic state poorly. Not surprisingly, moralistic states such as Michigan, Minnesota, and Wisconsin allow their legislatures to meet far more frequently than does Texas. Because they envision fairly robust styles of governance, the constitutions in these states allow the legislatures to meet throughout the year, creating what are, for all intents and purposes, full-time professional legislatures.

New England’s propensity for short, framework-oriented constitutions is a variation based noticeably on geography. One political scientist has hypothesized that such a variation may reflect the fact that New England states are small and relatively homogeneous and their citizens are thus less inclined to fight to include in their states’ constitutions policies they support.27

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Of course, history, political culture, and geography aren’t the only factors that determine the kind of constitution a state will have. Another important factor is the changing sense of what works best.
of course, history, political culture, and geography aren't the only factors that determine the kind of constitution a state will have. Another important factor is the changing sense of what works best. In the early 19th century, many states concluded that a system in which the legislature operates with unbridled power simply did not work well, so they changed their constitutions in ways that strengthened the chief executive. Eighty years ago, groups such as the National Municipal League argued that state constitutions should be more like the federal constitution; that is, they should be much shorter documents that provide a framework for governance rather than long documents that get into the details of policies. That argument gave rise to the model constitution, a kind of ideal notion of a constitution that states interested in “improving” could adopt. During the 1960s and 1970s, many states did revise their constitutions in ways designed to make their governments more effective, although the latest edition of the model constitution was written in 1968.

Since the mid-20th century, however, some political scientists have questioned the assumptions behind the model constitution movement. To these revisionists, the fact that most state constitutions outside New England are long and policy rich is actually a good thing—a healthy sign of an engaged electorate. Revisionists argue that, although Americans have essentially left it to the U.S. Supreme Court to interpret and on occasion to change the federal constitution, citizens have defended their right to participate by shaping their state constitutions.

How State Constitutions Differ

The most obvious ways state constitutions differ involve their length and ease of amendment. These differences are not simply cosmetic; they almost always reflect the different functions that state constitutions serve. Vermont has the shortest state constitution. Like the U.S. Constitution, its goal is primarily to establish a framework for effective government, not to regulate the details of specific policy matters. This is true to a lesser extent of other states in New England as well.

In contrast, constitutions in other regions of the country tend to be longer and more specific in their policy prescriptions. In most states, voters and interest groups that want to accomplish particular goals, such as increased state spending on education, will lobby the governor or the legislature. In California, a state with a long, policy-specific constitution that provides for a high degree of direct democracy, people often attempt to amend the constitution instead. Although the majority of political scientists wring their hands about this tendency, it is undeniable that Californians play a role in shaping their constitution that voters in New England cannot. Also note that these two aspects—length and ease of amendment—not only reflect differences in goals and purposes but also directly influence each other. If a constitution is easier to amend, it makes sense that it is more likely to get amended—and that usually means it gets longer. Again, a difference makes a difference.

Operating Rules and Selection for Office

State constitutions create varying organizational structures and operating rules for the constituent elements of state government. They establish different methods and requirements for serving in state politics. Some of these differences reflect the historical differences among states as well as variations in political culture and geography. Other differences reflect differing notions of what makes good government. Sometimes these notions can be quite quirky. Consider the following, for example. To serve as the governor of Oklahoma, a state of 3.8 million people, you must be at least 31 years old. In contrast, to be the chief executive of California's population of 38 million, you need only be 18. You might be eligible to lead one of the nation’s largest states, but don’t plan on buying beer or wine, even at your own fundraising events!

In addition, state constitutions differ widely in how many statewide elected positions they create and how those positions are filled. One of the most important of these differences has to do with the judiciary. At the federal level, judges are selected by the president and approved by the U.S. Senate. Things work very differently in the states. Some states elect their judges; some states appoint their judges, many states use a combination of appointment and election, and some states use different selection methods for different types of courts. The details of these various systems and their particular pros and cons are discussed in depth in Chapter 9. What's important for our purposes here is that there are big differences from state to state in how judges end up on the bench, and those differences are products
A DIFFERENCE THAT MAKES A DIFFERENCE

KNOW YOUR RIGHTS

Citizens in Missouri have a constitutional right to farm. Californians have a constitutional right to fish, but not to hunt. Hoosiers have a constitutional right to fish and to hunt. Residents in Arkansas have no constitutional right to sue the state government, even if the legislature explicitly gives them permission to do so. Citizens in every state have a constitutional right to a free K–12 education, though how much the state is constitutionally obligated to spend on that education varies wildly.

As discussed in the text, your rights under the U.S. Constitution are uniform; they do not change when you cross state lines. What does change are your rights under state law. Indeed, the fact that state constitutions are not the same is arguably the mother of all differences that make a difference. This is because those constitutional differences make a difference in the liberties and freedoms you are (or are not) guaranteed as a citizen. For example, in California, you have a constitutional right to get copies of pretty much any local government documents you want, and the local government has to foot the bill for providing them. In Ohio, crime victims have a constitutional right to be treated with fairness and respect. Neither of these rights is guaranteed by the U.S. Constitution or by all state constitutions.

There are a number of reasons for all these state constitutional differences. Some are simply idiosyncratic, a product of the politics, issues, personalities, and power dynamics of a particular state’s unique history. Some are due to institutional factors, notably the presence or absence of the ballot initiative. This provides a mechanism to bypass the legislature and take proposed constitutional amendments directly to the people. Some are due to informal changes, such as constitutional interpretation in rulings by state supreme courts.

As examples of how these mechanisms translate into meaningful differences, consider hunting and fishing rights in Indiana, and the lack of a right to sue the state government in Arkansas. Prior to 1996, only one state (Vermont) had a guaranteed right to hunt and fish. Currently, more than 20 states do. Indiana offers a fairly typical case study in how and why states have expanded these rights. A freedom to hunt and fish amendment was debated in the state legislature, where it was supported by the National Rifle Association (NRA) and opposed by environmental groups. The latter saw the proposed amendment as unneeded because no one was proposing to prevent or limit existing hunting and fishing rights. The NRA argued hunting and fishing rights were under increasing attack from environmental groups and constitutional protections were necessary. The legislature passed the proposed amendment and submitted it to the voters, where it was approved by a huge majority in November 2016. The result is that in Indiana, the state constitution now plainly declares that “people have a right . . . to hunt, fish, and harvest wildlife.”

While hunting and fishing rights were secured in Indiana through a formal constitutional change, people in Arkansas lost their right to sue their government through an informal change. Specifically, the right to sue the state government was lost because of a 2018 ruling by the Arkansas Supreme Court. The ruling was not arbitrary; it was a product of how the court interpreted the “sovereign immunity” clause of the Arkansas constitution. Sovereign immunity is legal doctrine that basically assumes the government cannot commit a legal wrong and therefore should not be subject to criminal prosecution or a civil lawsuit. Yet, for decades, the legislature had been passing laws allowing a variety of exceptions to the sovereign immunity provision. For example, it gave citizens the right to take the state to court over pay disputes.

The court ruling basically said the legislature did not have the legal authority to do that; in other words, legislators could not pass laws that waived provisions of the state constitution. The court’s reasoning was that if a law passed by the legislature conflicts with the state constitution, the constitution trumps the statute. The result of that line of reasoning? No suing the state. The bottom line is that the right to sue state government given by the legislature was nullified by the court’s interpretation of the state constitution.

Multiply the Indiana and Arkansas examples by a thousand; substitute hunting, fishing, and the right to sue with scattered political issues that include everything from gun rights to marriage rights to special education needs; and you have a lot of differences—differences that make a difference to your rights.

of different constitutional approaches to structuring and staffing the judicial branch of government.

Even seemingly small institutional differences created by different constitutional approaches can have big impacts on how state governments work. For example, if a state’s constitution gives the executive strong veto powers, the governor may have an easier time getting a recalcitrant legislature to consider his or her point of view on a particular piece of legislation than would a governor with weak veto powers. Similarly, some studies have shown that elected judges are more likely than those more insulated from the ballot box to uphold the death penalty in cases involving capital crimes.29 In short, the different operating rules embedded in state constitutions lead to very different types of governance.

Distribution of Power

State constitutions make widely differing decisions about where power should reside. Although all state constitutions make at least a bow toward the principle of the separation of powers, in actuality many give one branch of government a preponderance of power. Under some state constitutions, the reins of government are clearly in the hands of the legislature or general assembly. Other states have amended their constitutions to give executives the upper hand.

Traditionally, state constitutions tended to create stronger legislatures and weaker executives. In recent decades, however, even though strong state legislatures are still the norm, constitutional changes in many states have bolstered governors’ powers. More than 40 state constitutions now give governors the important power of the line-item veto, the ability to veto certain portions of appropriations bills while approving the rest. Exactly what counts as an item, and thus what is fair game for a governor’s veto pen, is often unclear. As a result, line-item veto court cases have become a common part of the legal landscape.

Some states go even further. In Wisconsin, for example, the state constitution allows the governor the power to strike out an appropriation entirely and write in a lower figure.30 During his term in office, Wisconsin governor Tommy Thompson pushed the power of the partial veto to strike passages and even individual words from bills that came to his desk. In some cases, Thompson would strike individual letters from words within bills, creating new words to change the entire meaning of the legislation. Critics came to call Thompson’s creative writing “the Vanna White veto.” In one case, Thompson used the Vanna White veto and his Scrabble skills to transform a piece of legislation from a bill that set the maximum detention period for juvenile offenders at 48 hours into one that allowed for a 10-day detention period, a move that enraged the Democratic legislature.14 Voters later amended the constitution to prohibit that particular veto maneuver. Yet, despite the controversies that surrounded such actions, during his record 14-year reign, Thompson never saw any of his more than 1,900 budget vetoes overturned by the legislature.29

The power structures set up by the constitutional systems of some states resist easy classification. Take Texas, for example. The fact that the legislature meets for only five or six months every other year might lead you to think that power in Texas resides primarily with the governor. Not so. In fact, the Texas Constitution arguably makes the office of lieutenant governor the most powerful in the state. In Texas, the lieutenant governor presides over the Senate, appoints Senate committees and assigns bills, and chairs the powerful Texas Legislative Council, which is responsible for research and drafting bills. Indeed, many observers attribute George W. Bush’s two successful terms as governor to his close relationship with his lieutenant governor, Bob Bullock, a Democrat.

Rights Granted

State constitutions differ not only in the mechanisms of governance they create and the sets of constraints and powers they give to government but also in the rights they confer on citizens (see “A Difference That Makes a Difference: Know Your Rights”). For example, the U.S. Constitution does not explicitly mention a right to privacy, although the U.S. Supreme Court did define a limited right to privacy in <i>Griswold v. Connecticut</i> (1965). In contrast, Montana’s constitution states that “the right to individual privacy is essential to the
Representative Government versus Direct Democracy

One of the most striking differences among state constitutions is the degree to which they have (or have not) embraced direct democracy. Most Americans celebrate the United States as a democracy, but the founders believed that they were establishing something somewhat different—a representative democracy. This is a form of government in which qualified representatives of the public make the decisions. Most of the founders viewed direct, or pure, democracy with suspicion. A “pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction,” warned James Madison, one of the primary authors of the U.S. Constitution, in his famous argument for the document in Federalist No. 10:

A common passion or interest will, in almost every case, be felt by a majority of the whole . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.35

In other words, Madison believed that entrusting a simple majority with the power to carry out its will would lead to fickle and tyrannical behavior and to a government that would teeter between anarchy and autocracy.

The U.S. Constitution’s solution to the problem of pure democracy was to create a representative government, or, as Madison saw it, government by a small group of elected officials “whose wisdom may best discern the true interest of their country.”36 In accordance with this belief, the U.S. Constitution created an upper chamber—the Senate—whose members would be selected by state legislatures from among their eminent men. The document also created an electoral college to elect the president. Both of these decisions were made to insulate the federal government from the whims of the majority. The Constitution makes no provision for direct democratic processes. There is not a single federal officeholder directly elected by the entire nation. Indeed,
as we saw in 2016 with the election of Donald Trump, the Electoral College system can result in a candidate's winning the presidency after losing the popular vote.

Whereas the creators of the federal government took great care to ensure it was insulated from direct democratic processes, many states decided to do just the opposite during the Progressive Era. By giving their citizens the chance to make laws and change their constitutions directly, the Progressives sought to circumvent legislatures and executives they viewed as being beholden to wealthy special interests. As Robert M. La Follette, a leader of the Progressive Party in Wisconsin and later a governor and senator from the state, put it:

The forces of the special privileges are deeply entrenched. Their resources are inexhaustible. Their efforts are never lax. Their political methods are insidious. It is impossible for the people to maintain perfect organization in mass. They are often taken unaware and are liable to lose at one stroke the achievements of years of effort. In such a crisis, nothing but the united power of the people expressed directly through the ballot can overthrow the enemy.\(^\text{17}\)

For politicians such as La Follette, direct democratic mechanisms, such as the ballot initiative and the referendum, represented the general populace's best hope for breaking the power of political bosses and moneyed interests. From 1902 through 1918, direct democracy enjoyed a great vogue in the states. Sixteen states adopted the ballot initiative in that period. After World War I, ballot initiatives lost some of their luster as popular enthusiasm for Progressive ideas waned. Only five states—Alaska (1959), Florida (1968), Wyoming (1968), Illinois (1970), and Mississippi (1992)—have amended their constitutions to allow for ballot initiatives since the end of the Progressive Era.\(^\text{18}\) What's more, note where these states are located. The majority of the states that allow direct democracy lie west of the Mississippi River, where the practice fits with much of the West's populist history.\(^\text{19}\)

For much of their existence, initiatives and referendums were used sparingly. Then came Proposition 13 in California. In the 1970s, taxpayer activist Howard Jarvis and retired real estate salesman Paul Gann launched what at first seemed a foolishly impractical campaign to roll back California property taxes and cap the rate at which they could grow. Their campaign struck a chord with many Californians. The state's booming economy had sent property values skyrocketing. Higher property assessments led to higher real estate taxes, which created a huge revenue boom for the state and local governments. Indeed, at the time, the state government had a $5 billion annual surplus. Yet despite the public outcry for relief from rising property costs, Governor Jerry Brown and the rest of the politicians in Sacramento could not agree on a tax reduction plan.

In 1978, California voters passed Proposition 13 and took the decision out of politicians' hands. The proposition directed the state to roll back real estate taxes to 1975 levels and decreed that property assessments could not increase by more than 2 percent a year, regardless of inflation. Most localities previously had reassessed real estate taxes every two years. Proposition 13 decreed that property could be reassessed only when it was sold. The legislation also cut property tax receipts in half and marked the beginning of a nationwide “taxpayer revolt.” The revolt culminated in the election of former California governor Ronald Reagan to the presidency two years later.

California's political establishment viewed the passage of Proposition 13 with great trepidation. Politicians worried that the legislation would cripple their ability to pay for the schools and infrastructure that had contributed so much to California's post-World War II successes. These fears proved well founded. In the wake of Proposition 13, California went from having one of the nation's best-funded public school systems (in the top third in terms of per-pupil spending) to having one of the worst (in the bottom third). The proposition put such draconian limits on the ability of local governments to raise revenues that municipalities and counties became increasingly dependent on the state for their funding—so much so that 10 years later, in 1988, California teachers' unions pushed through Proposition 98, which mandated that upwards of 40 percent of California's general revenue go to education.\(^\text{40}\)

In addition to complicating government finances and drastically reducing the flexibility of lawmakers in California, the successful passage of Proposition 13 revived interest in ballot initiatives in the 24 other states in which they were permitted. In the three decades from 1940 through 1970, an average of 19 initiatives appeared on ballots per two-year election cycle in the United States. In the 1980s, that number shot up to 50 initiatives in the average election cycle. In the 1990s, it...
hit 76 per election cycle. In 2016, there were 71 initiatives on state ballots, plus an additional 69 proposed constitutional amendments submitted to a popular vote after passing state legislatures. These numbers suggest that states allowing ballot initiatives are now engaged in an almost continuous cycle of changing their constitutions. These changes are increasingly less about broad questions of good governance and more about pushing narrow agendas.

In the past two decades, the initiative process has been used to push through legislation on some of the most controversial political issues in the entire country. Oregon voters used a ballot initiative to narrowly (51–49 percent) approve physician-assisted suicide in 1994. In California, voters have used initiatives to impose some of the nation’s strictest term limits on elected officials (Proposition 140), to end affirmative action (Propositions 209 and 96), to deny education and health benefits to families of illegal immigrants (Proposition 87), to spend $3 billion on stem-cell research (Proposition 71), and to recall a sitting governor and replace him with an action-movie star. In 2016, Colorado voted to give its citizens a constitutionally guaranteed minimum wage (Amendment 70). You can check out the latest ballot initiatives and their electoral fates at Ballotpedia.org, which keeps a running tally of these proposals and how they fare at the ballot box.

The initiative process has become big business. Hundreds of millions can be spent in a single election cycle on battles waged over ballot measures. Several companies are devoted to gathering the signatures needed to get issues placed on ballots for anyone who can afford their services, and signature gathering can be a pretty lucrative business. For example, in the 2016 election cycle, roughly $45 million was spent on gathering signatures for proposed ballot initiatives in California. On average, backers of California’s 2016 crop of proposed initiatives shelled out roughly $4 for every signature gathered. Those who have used them successfully see ballot initiatives as tools for circumventing hostile legislatures and acting on the will of the majority. But most political scientists and close observers of state politics have a different viewpoint. They argue that the results of the use of ballot initiatives only reinforce the wisdom of the founders in their decision to keep direct democratic processes out of the U.S. Constitution. A number of those who have examined initiatives have concluded that the process has been hijacked by organizations with deep pockets and by individuals who use the initiatives to further their own self-interests. Veteran Washington Post political reporter David Broder describes ballot initiatives in scathing terms, calling them “the favored tool of millionaires and interest groups that use their wealth to achieve their own policy goals—a lucrative business for a new set of political entrepreneurs.”

Exploiting the public’s disdain for politics and distrust of politicians, interest groups with deep pockets now have a mechanism through which they can
literally rewrite state constitutions to advance their own agendas. For example, in 1997, Microsoft cofounder and Seattle Seahawks owner Paul Allen made an end run around a balky state legislature and spent $6 million on a ballot initiative that required the state of Washington to foot much of the cost for a new stadium for his team. It proved to be a good investment; the initiative passed with 51 percent of the vote. Although this was welcome news for many football fans, most political scientists probably see it as an illustration of the very problem that Madison identified in *Federalist No. 10*. In some ways, the initiative has created a very odd form of governance in which citizens live under laws that are often resisted by their elected legislators. With its ability to make sweeping changes in state constitutions, the initiative process could radically change the American system of government in the next few decades.

**Constitutions for Local Government?**

For the most part, substate governments, such as school districts, counties, and many municipalities, are considered subordinate arms of the state. They may seem like autonomous political units, but they in fact operate under state constitutions and at the discretion of state governments. The courts generally have viewed only the federal government and the states as sovereign entities with the right to determine how their authority should be exercised. The authority and power of local governments is largely confined, if not outright dictated, by the states (these issues are discussed in more depth in Chapter 11).

There are some exceptions to this rule. The *municipal charter* is a key example. In a rough sense, municipal charters are similar to the charters that served as the governing documents for the original colonies. Legally, most municipalities are corporations, and their charters describe the purposes of the municipalities and the processes for achieving these objectives. A charter is not a constitution; rather, it is a grant of authority derived from a constitution or from state law. Some states have home rule, which allows municipalities the right to draft and amend their own charters and to regulate local matters within their jurisdictions without interference from the state (see Chapter 11). Some states have municipal home rule provisions in their constitutions; others grant home rule to municipalities through legislation. Municipal home rule means that some local governments are operated by charters that “can take on many characteristics of a constitution.” Even in the most liberal home rule states, however, state constitutions and state law generally take precedence over municipal charters.

**Conclusion**

Even though they tend to fly under the radar, especially compared with the U.S. Constitution, state constitutions play the critical role in defining the possibilities of politics in most states. All state constitutions set the basic structure of government, apportion power and responsibilities to particular institutions and political actors, and determine the rights and privileges of citizenship. State constitutions reflect states’ distinctive political cultures and, over time, reinforce or alter those traditions.

Beyond this common core of shared functions, however, state constitutions vary greatly. Some protect and extend the rights of the individual beyond the guarantees of the U.S. Constitution; others do not. Perhaps the single biggest difference among state constitutions is the degree to which they serve as a venue for policy-making. In western states, whose constitutions provide for a high degree of direct democracy, advocates and interest groups often attempt to enshrine their policy positions in the state constitutions. As a result, these states have long, detailed constitutions. In contrast, the constitutions of the eastern states, particularly in New England, more closely resemble the U.S. Constitution.

State constitutions tend to have a bad reputation with political scientists, for understandable reasons. Although many function well, in more than a few instances they play an outright disruptive role. In states such as Alabama and Texas, antiquated constitutions have made it difficult for state governments to promote economic development—a function that most people believe the state government should serve. In California and other states, interest groups have used state constitutions to ensure that the states’ general revenues flow toward the programs they support. In the process, they have reduced—in some areas drastically—the flexibility of legislatures to make independent decisions, a set of constraints that amounts to putting limits on representative democracy.

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**Municipal charter** A document that establishes operating procedures for a local government.
But, as political scientist Christopher Hammons has argued from another perspective, the fact that constitutions continue to be a contentious venue for politics in many states is not necessarily all bad. Although it is still theoretically possible to change the U.S. Constitution, for all practical purposes we as a society have given that right over to the U.S. Supreme Court. It takes an extraordinarily contentious issue, such as reproductive rights, to provoke talk about changing the federal constitution. In contrast, citizens continue to exercise their right to tamper with and tweak their state constitutions. Is that all bad?

**THE LATEST RESEARCH**

State constitutions are one of the most important and understudied aspects of subnational government. While it is not hard to find constitutional scholars in political science, the vast majority of these study the U.S. Constitution, not its state counterparts. More attention is paid to state constitutions in the field of law, but even there scholars focusing on state constitutions regularly lament the relative lack of research available on these centrally important legal documents.

This lack of attention is surprising because, as the studies listed below amply demonstrate, state constitutions are important—not just as the bases for much of the criminal and civil law in the United States but also as documents that reflect deeper philosophical notions of what a government is, what it should do, and what rights citizens should or should not have. Below we summarize some of the more recent and prominent research on state constitutions. All these studies reflect a constant theme: not just the central importance of state constitutions to the American political system but also how those constitutions are constantly changing and creating differences in state-level legal structure that have big, real-world impacts on the lives of state residents.


The U.S. Constitution is different from the constitutions of other nations in that it almost exclusively emphasizes negative rather than positive rights. A negative right is a right that you are free to exercise without government interference; Congress, for example, is constitutionally prohibited from interfering with your right to speak your mind or practice your religious beliefs. A positive right, in contrast, requires government to take positive action, to provide you with a good or service. The U.S. Constitution is pretty quiet on what services government owes its people, and this has led a lot of legal scholars to conclude that the United States really has no established tradition of positive rights. In this book, Zackin disagrees, arguing that there is a strong tradition of positive rights in the United States; legal scholars haven’t found these rights because they have been looking in the wrong places.
place. She suggests that Americans actually have quite a lot of positive rights—for example, they have a right to a free public education. These positive rights, however, are found not in the U.S. Constitution but in state constitutions.


This is an in-depth examination of the “constitutional space” of the states and how they use it. Tarr, one of the best-known contemporary scholars of state constitutions, begins by explaining how, constitutionally speaking, the states are relatively unconstrained in what they can do with their constitutions. The federal constitution takes precedence over state constitution and laws, but outside of that, states are pretty much free to fashion their constitutions as they see fit. What have they done with that “space”? Tarr provides an in-depth analysis that shows states have done quite a lot. States have used their constitutional space to aggressively experiment and innovate, frequently revising their constitutions and moving them in directions that have no real analogue at the federal level. They have provided for mechanisms of direct democracy, created (local) governments not mentioned in the U.S. Constitution, and guaranteed gender equality, privacy, and other rights and freedoms that go far beyond the federal constitution. All this activity in the constitutional space made available to states raises a lot of questions. Is change constant, or are there periods of heavy reform activity and periods of stability? Where do states get their ideas for constitutional change? Why do states pursue different avenues of constitutional change? In examining potential answers to those questions, Tarr details patterns in the dynamics of state-level constitutional change.

(Continued)
2. State constitutions fulfill many of the same functions as the U.S. Constitution. For example, all create three primary branches of government (executive, legislative, judicial), provide a general governmental framework, and guarantee certain rights to citizens.

3. While similar in general terms, state constitutions vary enormously, so the powers and responsibilities of different government actors and institutions, as well as the rights of citizens, vary from state to state.

4. State constitutions are different from the U.S. Constitution in important ways. For example, they tend to be longer, more specific, and easier to change, and they grant plenary rather than limited powers to government.

5. State constitutions originated in colonial charters, documents issued by the British monarchy granting individuals or corporations the right to govern areas within the American colonies. State constitutions as we know them were developed after independence and have changed considerably—much more so than the U.S. Constitution—in the past 250 years.

6. State constitutions can be formally changed in several ways, including through legislative proposals, ballot initiatives, and constitutional conventions. Typically, all proposed changes to a state constitution must be ratified by popular vote.

7. State constitutions can also be changed informally, notably through the process of judicial review.

8. State constitutions differ from one another because they are reflections of the different histories, political cultures, and politics of individual states.

9. One of the most important differences between state constitutions, and between state constitutions and the U.S. Constitution, lies in whether or not they permit direct democracy. Roughly half of the states allow some form of direct democracy. Other states, and the U.S. Constitution, allow only representative democracy.

10. Unlike states, local governments are not sovereign governments and therefore do not have constitutions. However, in some states, at least some municipalities operate under municipal charters, which have some of the basic elements of a constitution, although they are all clearly subordinate to the state constitution.

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**Key Concepts**

- appropriations bills (p. 57)
- ballot initiatives (p. 61)
- bicameral legislatures (p. 58)
- colonial charters (p. 57)
- constitutional amendments (p. 55)
- constitutional convention (p. 59)
- constitutional revision commissions (p. 63)
- direct democracy (p. 54)
- dual constitutionalism (p. 55)
- electorare (p. 54)

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franchise (p. 58)  
Jim Crow laws (p. 59)  
judicial federalism (p. 54)  
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line-item veto (p. 70)  
model constitution (p. 68)  
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natural law or higher law (p. 55)  
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Reconstruction (p. 65)  
referendums (p. 61)  
separation of powers (p. 58)  
unicameral legislatures (p. 58)

Suggested Websites

- [www.iandrinstitute.org](http://www.iandrinstitute.org). Website for the Initiative and Referendum Institute at the University of Southern California, a clearinghouse for information about the initiative and referendum processes of the states.

- [statecon.camden.rutgers.edu](http://statecon.camden.rutgers.edu). Website for the Center for State Constitutional Studies at Rutgers University–Camden, an interdisciplinary institute focused on studying state constitutions.
State of Massachusetts-Bay.

In the House of REPRESENTATIVES, February 19, 1779.

WHERE IS the Constitution or Form of Civil Government, which was proposed by the late Convention of this State to the People thereof, has been disapproved by a Majority of the Inhabitants of said State:

And whereas it is doubtful, from the Representations made to this Court, what are the Sentiments of the major Part of the good People of this State, as to the Expediency of now proceeding to form a new Constitution of Government:

Therefore, Resolved, That the Selectmen of the several Towns within this State cause the Freeholders, and other Inhabitants in their respective Towns duly qualified to vote for Representatives, to be lawfully warned to meet together in some convenient Place therein, on or before the last Wednesday of May next, to consider of and determine upon the following Questions.

First, Whether they chuse at this Time to have a new Constitution or Form of Government made.

Secondly, Whether they will impower their Representatives for the next Year to vote for the calling a State Convention, for the sole Purpose of forming a new Constitution.