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Federal Experimentation Through State Constitutional Initiatives

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I. INTRODUCTION

This Article describes how reformers, who were often blocked by Congress, were able to achieve their policy aims through state constitutional initiatives. The Constitution grants the state and federal governments shared, concurrent constitutional powers. On concurrent powers matters, reformers might attempt either state or federal constitutional revision.[1] Reformers might petition Congress for a federal amendment to dictate national policy or to bind or homogenize the states. But federal amendments rarely clear the two-thirds supermajorities needed to pass Congress or the three-quarters supermajorities needed for subsequent ratification by the states. Of the 11,790 proposed federal amendments, only thirty-three have been

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1. The federal Constitution delegates some powers to the federal government and denies some powers to the states. ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 2 (2021). The remaining powers not denied to the states are subject to concurrent state and federal regulation under the Tenth Amendment. *Id.* Political actors can broadly or narrowly interpret the extent of concurrent powers to strategically channel constitutional conflict into friendly venues. *Id.*

passed by Congress and twenty-seven ratified by the states.[2] Scholars have thus deemed the Article V amendment process dead letter.[3] Landmark federal judicial decisions can be similarly difficult, taking decades of coordinated litigation.[4]

In contrast, state constitutions are easier to revise. All state constitutions impose lower bars to amendment passage and ratification—of the 11,635 amendments proposed to the fifty standing state constitutions, 7,695 have been ratified.[5] Initiative amendments also face low bars to passage and ratification. In Massachusetts, for example, a pro-

2. Article V of the federal Constitution requires a proposed amendment be passed by two-thirds of both chambers of Congress or a convention called by two-thirds of the states. U.S. CONST. art. V. Party realignment and congressional polarization discourage the former route, while the latter route has never been used. Amendments must then be ratified by three-quarters of the states in convention or legislature. U.S. CONST. art. V. The addition of states has multiplied veto players in the ratification process, further discouraging amendment. Federal courts have affirmed Congress can subject ratification to strict time limits. *See* Dillon v. Gloss, 256 U.S. 368, 376 (1921); Coleman v. Miller, 307 U.S. 433, 452 (1939); WOODWARD-BURNS, *supra* note 1, at 7–8.

3. Sanford Levinson, for example, notes that "Article V constitutes what may be the most important bars of our constitutional iron cage." SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 160 (2006). *See also* Robert G. Dixon, *Article V: The Comatose Article of Our Living Constitution?*, 66 MICH. L. REV. 931, 931–48 (1968) (detailing the amendments to the Constitution and difficulties of applying article V); David Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (arguing that the changes to the Constitution are no longer made through the amendment process but rather through other means); ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 81–83, 99–101, 140–41, 163 (2009) (propounding that "[a]rticle V is neither necessary nor sufficient to explain constitutional change. . . . [j]udicial review . . . has provided a mechanism for updating the Constitution, thus ensuring that its allegedly timeless principles are applied to modern realities."); WOODWARD-BURNS, *supra* note 1, at 1 (noting the longevity of the US Constiution and how few of the proposed amendments have been ratified); Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1054 (2014) (emphasizing that informal amendments have reduced the need to formally amend the Constitution but article V nevertheless remains in use).

4. *See generally* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 279–95 (1957); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Benjamin I. Page ed., 2d ed. 2008).

5. Amendment passage requires a two-thirds legislative supermajority in most states. Twenty-one states require only a simple majority, though eleven of these require approval over two legislative sessions. Ratification by popular vote is also relatively lax. New Hampshire requires a two-thirds majority of voters for approval, Florida, a three-fifths majority, and Colorado a fifty-five percent majority. Illinois has a provision for majority voting in election or three-fifths voting on amendment, while Delaware does not require voter approval at all. States can also wholly replace their constitutions by calling conventions, commissions, or special legislative sessions. The states have proposed drafting at least 411 new constitutions and ratified 144. WOODWARD-BURNS, *supra* note 1 at 1–19; *see gen-*

posed constitutional initiative needs only 25,000 petition signatures to make the ballot.[6] Nearly all states use some form of simple majority vote to ratify constitutional initiatives.[7] This has yielded long, detailed state constitutions, which in turn are subject to frequent reform by amendment.[8] This frequent amendment, coupled with the federal Constitution's relative brevity, lets states serve as subnational "laboratories of democracy,"[9] testing diverse solutions to national constitutional problems.[10] Federal judges have long refused to intervene in

erally Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS: J. FEDERALISM 153–179 (1987).

6. THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 10 (Audrey S. Wall & Heather M. Perkins 2019).

7. But note that ten initiative states require a geographic distribution of petition signatures, that six limit constitutional provisions or topics subject to amendment by constitutional initiative, and that constitutional initiatives fail ratification at a higher rate than do legislatively initiated amendments. JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 16–19 (2018). Massachusetts also requires proposed initiative amendments receive a number of signatures greater than three percent of the total votes cast in the preceding gubernatorial election. MASS. CONST. art. XLVIII; MASS. CONST. art. LXXXI. This the lowest bar in any state. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 27, 140 (1998); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 403–04 (2009); THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 10 (Audrey S. Wall & Heather M. Perkins 2019).

8. *See generally* Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 357–59 (1994); May, *supra* note 5 at 164–70; EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 22–27 (2013) (highlighting that in contrast to the federal Constitution the "amendment procedures for state constitutions promote broad popular involvement in their development."). In 1990, state constitutions were on average 28,000 words, nearly four times longer than the 7,591 word federal document. *See* Daniel Berkowitz & Karen Clay, *American Civil Law Origins: Implications for State Constitutions*, 7 AM. L. ECON. REV. 62, 69 (2005) (calculating the average length of state constitutions). *See generally* U.S. CONST. pmbl.; U.S. CONST. art. I–VII; U.S. CONST. amend. I–XXVII.

9. Per Louis Brandeis in 1932, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). Similarly, Lord Bryce wrote in 1888, "[s]tate [c]onstitutions furnish invaluable materials for history. Their interest is all the greater, because the succession of [c]onstitutions and amendments to [c]onstitutions from 1776 till to-day enables the annals of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities." JAMES BRYCE, THE AMERICAN COMMONWEALTH 450 (1889).

10. Scholars note the national Constitution's brevity leaves some issues to subnational regulation and experimentation by state constitutional revision, including through the initiative. *See* Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 27 (1982); Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 803–13, 818 (1996); Jonathan L. Marshfield, *Models of Substantial Constitutionalism*, 115

the states' amendment and initiative processes, leaving the states to experiment with little interference.[11]

Voters often use the constitutional initiative process against state lawmakers. Circumventing or constraining state officials (including state legislators) is one of the main, original functions of the state constitutional initiative. Between 1902 and 1918, fourteen states, mainly in the West and Midwest, empowered voters to revise their constitutions by initiative.[12] In the West, where partisan coalitions were newer and more flexible, voters elected antiestablishment progressives and populists to draft or redraft their constitutions. These framers empowered allied voters to use the initiative, or the threat of the initiative, to check future legislators.[13] As Amy Bridges and Thad Kousser conclude: "Direct democracy was a reform directed against state legislatures."[14] Another four states later adopted the constitutional initiative, bringing the present total to eighteen states.[15]

Less has been written on the relationship between state constitutional initiatives and federal lawmaking. On concurrent powers matters, reformers can use state constitutional initiatives to circumvent members of Congress. This Article argues that reformers thwarted by Congress often pursue their policy goals through the relatively easy

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PENN. ST. L. REV. 1151 (2010); G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 PENN. ST. L. REV. 1133 (2010); WOODWARD-BURNS, *supra* note 1.

11. Though note that state parties increasingly adhere to national party platforms. *See generally* DANIEL HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED (Benjamin I. Page et al. eds., 2018); Luther v. Borden, 48 U.S. 1 (1849); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912); TARR, *supra* note 7, at 142–43; WILLIAMS, *supra* note 7, at 388–92.
12. Scheiber, *supra* note 10, at 790–95; Amy Bridges & Thad Kousser, *Where Politicians Gave Power to the People: Adoption of the Citizen Initiative in the U.S. States*, 11 STATE POL. POL'Y Q. 167, 167–79 (2011); DINAN, *supra* note 6, at 16–19.
13. In the West and Midwest, Populist Party lawmakers championed the initiative as a tool to constrain legislators captured by railroad, mining, and lumber interests. *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 57, 69–70, 80–81 (1982); Scheiber, *supra* note 9, at 790–795; TARR, *supra* note 6, at 151–52; Amy Bridges & Thad Kousser, *Where Politicians Gave Power to the People: Adoption of the Citizen Initiative in the U.S. States*, 11 STATE POL. POL'Y Q. 167, 167–79 (2011); DINAN, *supra* note 6, at 16–19. For further information on these early Western framers and state constitutions, *see generally* GORDON MORRIS BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 (Paul L. Murphy ed., 1987); DAVID ALAN JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890 (1992); Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945 (1994); Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, 22 STUDIES AM. POL. DEV. 32 (2008); AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES (2015).
14. Bridges & Kousser, *supra* note 13, at 168.
15. *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 17 (2018).

state initiative process instead of traditional legislative lawmaking. Successful state initiatives can spur interstate policy diffusion and imitation, even in states without the initiative process. States may converge or diverge, preempting or guiding subsequent congressional intervention in the initiative process. This suggests that the state constitutional initiative process is significant not only for state constitutional politics, but also for national constitutionalism. Of course, there are limits to the effect of state initiatives on national constitutionalism—constitutional initiatives are unavailable in many states, cannot bind federal lawmakers, and cannot address issues subject to exclusive federal jurisdiction. But on concurrent powers matters, state constitutional initiatives can vent pressure for reforms blocked at the federal level.[16]

This article first offers two short, illustrative case studies tracing this process, one from the turn of the twentieth century and the other from the late twentieth century, the two zeniths of state constitutional amendment by initiative. The article then concludes by considering implications of this argument, noting how state constitutional reform affects national constitutionalism.[17]

The first case addresses the campaign for direct senatorial election in the late nineteenth and early twentieth century. Initially, state legislators elected United States senators, though bribery and partisan deadlocks occasionally interfered with that selection. Reformers passed five direct election amendments in the House of Representatives between 1893 and 1902.[18] But as these amendments failed before a hostile Senate, reformers instead petitioned state legislators to institute direct election.[19] In response, between 1890 and 1912, twenty-nine states allowed direct election of senators, though in many cases, legislators ignored these nonbinding advisory elections.[20] Parallel to this, states also allowed constitutional initiatives. Between 1902 and 1912, eleven states adopted both the constitutional initiative and direct senatorial election. In these states, citizens used the initiative, or the threat of the initiative, to constitutionally bind their legislators to award their state's Senate seat to the winner of the popular vote.[21] This system, pioneered by Oregon,[22] demonstrated the viability of direct senatorial election. Following the institution of the "Ore-

16. For an elaboration of the claim, noting how state constitutionalism can resolve or exacerbate national constitutional controversies, *see* WOODWARD-BURNS, *supra* note 1.

17. Scheiber, *supra* note 10, at 798–99.

18. WOODWARD-BURNS, *supra* note 1, at 106–12.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

gon system" in 1902, additional states instituted direct election.[23] The Senate's composition and interests changed as the proportion of senators selected by direct election increased from one-fifth in 1905 to four-fifths in 1909.[24] The chamber passed the Seventeenth Amendment in 1912, which the states ratified the following year.[25]

The second case concerns fiscal reform campaigns in the late twentieth century. As federal expenditures threatened to outpace revenues through the mid-twentieth century, fiscal reform groups like the National Taxpayer's Union (NTU) and the National Tax Limitation Committee (NTLC) appealed to Congress for federal fiscal restraint measures. At NTU behest, between 1975 and 1979, thirty states petitioned Congress for an Article V convention to pass a balanced budget amendment. But fearing a runaway convention and loathe to constitutionally restrict their fiscal powers, members rebuffed the amendment convention. Reformers instead directly lobbied conservative members of Congress, who, hoping to please their constituents, proposed hundreds of fiscal restraint amendments. Being unable to get the cross-party majorities needed for ratification, these were mainly symbolic measures. Between 1980 and 1994, Congress proposed 272 amendments balancing budgets, 103 on appropriations, eighty-two on item vetoes, and forty-five on the national debt.[26] Though a 1995 proposal came close, no amendments cleared Article V supermajority thresholds.[27] Stymied by Article V and congressional opposition, reformers also looked to channel popular antitax sentiment through state constitutional initiatives. Here they met more success.[28] California limited property taxes through Proposition 13 in 1978 and state expenditures through Proposition 4 in 1979.[29] Voters nationwide followed the California example—in 1978, seventeen states attempted tax initiatives, by 1981, forty-three states capped taxes, and by 1984, forty-four had called fiscal responsibility referenda.[30] Through the 1990s, the states passed another five amendments by initiative and eight by referendum.[31] While fiscal reform groups could not clear Article V or opposed members of Congress or address federal budgeting and taxation, and thus could not achieve all their initial policy goals, state constitutional initiatives served as an alternate route to partial reform, drawing the

23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 181–88.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*

efforts of interest groups and venting popular antitax sentiment through the 1990s.[32]

II. INITIATIVES AND DIRECT SENATORIAL ELECTION, 1890s–1910s

Until the early twentieth century, state legislators selected United States Senators. Legislative deadlocks and allegations of corruption prompted reform of this system.[33] Congressmen had proposed seven amendments for direct senatorial election in the antebellum years, and at President Andrew Johnson's behest, members proposed another sixteen between 1868 and 1877. A sustained national reform movement began in the 1880s. During the Gilded Age, party bosses used closed meetings to arrange Senate nominations, hiding "the real fight in the caucus behind the scenes."[34] The caucus, Haynes explained, "meets behind closed doors; its proceedings are not a matter of record," nominating state legislators who, conferring with local bosses and industrialists, then picked party loyalists for the Senate.[35] The *Saturday Review* reported that through bribes "senatorships are directly bought . . . [or] are indirectly bought by contributions to party funds."[36] Partisan splits in the state legislatures often derailed the selection process, deadlocking legislatures forty-six times between 1891 and 1905.[37] Bribes sometimes broke ties, spurring ten Senate investigations and a few resignations. In the 1890s, another nine split state legislatures failed to fill Senate vacancies. In total, between 1893 and 1907, the United States Senate was fully seated only for the fifty-eighth Congress, a period of two years.[38] New York Senator Elihu Root thus proposed lowering the selection bar from majority to a mere plurality, but United States senators, many loyal to their local majority party, refused, compounding the problem. As Haynes concluded, "there is never a long contest over a senatorial election which does not do serious harm to the interests of the Commonwealth."[39]

Congress and the White House struggled to resolve the issue. Presidents James Garfield and Grover Cleveland deferred senatorial selection to state machines, as did President William McKinley, himself selected by the national Republican boss Mark Hanna. As press coverage stirred public indignation, the Populist Party adopted a direct election plank in 1892 and the Democratic Party did the same in 1900.

32. *Id.*
33. GEORGE HENRY HAYNES, THE ELECTION OF SENATORS 39–42 (1912).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

The House proved friendliest to reform. Beginning in 1881, House Democrats and some Western Republicans proposed direct election amendments over Northeastern and Republican resistance, with amendments passing in 1893, 1894, 1898, 1900, and 1902. The 1900 amendment, for example, passed the House 242 to 15, but like the other amendments, never received a Senate vote, dying in the Committee on Privileges and Elections. House members proposed dozens of additional amendments, but the Senate remained unmoved. The federal courts, unable to significantly restructure the Senate, were no more helpful.[40]

Progressive academics, journalists, and anti-corruption reformers looked instead to the state legislatures. Prominent progressive political scientists like Woodrow Wilson, Charles Edward Merriam, and George H. Haynes proposed that the state legislatures invoke their Article I power to unilaterally set the time, place, and manner of senatorial elections. State legislators, stymied by deadlocked Senate elections, too sought to reform selection. Between 1891 and 1905, forty-six senatorial selection votes deadlocked, on average for thirty-eight days, nearly the length of a normal legislative session—derailing whole sessions. For example, in 1897 a faction of Oregon legislators blocked quorum for an entire session to prevent a Senate vote. Four other deadlocked states had to call special sessions, and six left their Senate seat vacant, with Delaware forgoing any Senate representation in 1901. As anti-corruption measures weakened state party bosses, state legislators urged broader reforms. For example, Washington state legislators, hoping to prevent another "tedious repetition of ballots," resolved in 1903 to cast only two ballots and then return to "matters and things of vital interest to the people."[41]

40. *See also* HAYNES, *supra* note 33, at 36–70, 100–05 (on congressional support for a direct election amendment); H.R. Res. 82, 70th Cong., 2nd Sess. (1928) *reprinted* 1976 H.R. Doc. No. 551 (compiling all proposed amendments to the Constitution from 1889 through 1928); ALAN P. GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 74–76 (1978) (highlighting that the Senate had become a "tool of corporate interests"); RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 61–62 (1988) (on the popular movement for direct election of senators); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995 at 208–10 (1996) (discussing failed congressional direct election amendments); WENDY J. SCHILLER & CHARLES STEWART, ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT (2014) (on state-level agitation for an amendment).

41. Of the 752 Senate elections held between 1871 and 1913, only nineteen failed to select a candidate, suggesting the concerns among legislators, academics, and the public exceeded the actual harm done. SCHILLER & STEWART, *supra* note 40, at 16–17; CHARLES EDWARD MERRIAM, PRIMARY ELECTIONS: A STUDY OF THE HISTORY AND TENDENCIES OF PRIMARY ELECTION LEGISLATION (2nd ed. 1909). For the Washington legislature's resolution, *see* HAYNES, *supra* note 33, at 38–39, 65–70, 159.

To circumvent the deadlocked and biased state legislatures, reformers proposed selection by popular vote. Haynes held that legislative selection brought gridlock to "the whole range of state and local politics" and that underrepresentation and "misrepresentation in the Senate" required that "elections be placed directly in the hands of the people." Populist and agrarian state parties soon proposed a popular vote amendment to the Constitution, with five state Democratic parties and two Republican parties following by 1892. Reformist third parties joined the cause, and by 1913, 220 different state party platforms had called for the direct election of senators. State legislators next swung into action. In the 1890s, twenty-seven states across the country sent Congress forty-five petitions asking for an amendment. Amendments passed the House in 1893 and 1894 but failed decisively in the Senate.[42]

Stymied by the Senate, state legislators instead unilaterally reformed Senate elections. Allowing the popular vote in primaries was a first step. Between 1901 and 1907, most Southern legislatures statutorily allowed or mandated that the Democratic Party hold popular primary elections, which, in the one-party region, effectively picked state officers, including United States Senators. Wisconsin, Minnesota, Michigan, Indiana, Illinois, and Massachusetts also considered or instituted direct primaries for federal senators. But legislators in these states could still ignore direct election results and make their own, alternate selection. Some Western and Great Plains states thus went further, allowing a popular vote in the general election. Nebraska voters appended to their 1875 Constitution a provision letting the legislature call nonbinding popular elections for senators, though counties rarely placed Senate candidates on the ballot, leaving turnout low and legislators free to ignore the results. Similarly, in 1899 Nevada legislators required that ballots include Senate candidates but still did not bind themselves to follow the popular vote. State legislators, constrained only by statute, often ignored primary rules and outcomes.[43]

Voters solved this issue by using state initiatives to constitutionally bind legislators to the popular vote. Oregon pioneered the system. In 1901, recalling their deadlocked sessions of 1895 and 1897, Oregon legislators resolved to award their Senate seats based on the state's

42. In California, Nevada, and Illinois voters overwhelmingly approved their state legislature's popular election petitions to Congress. Petition figures from HAYNES, *supra* note 33 at 38–39, 65–70, 100–115, 110–129; GEORGE HENRY HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE I, 85–96 (1938); RALPH A. ROSSUM, FEDERALISM, THE SUPREME COURT, AND THE SEVENTEENTH AMENDMENT: THE IRONY OF CONSTITUTIONAL DEMOCRACY 180–81 (2001).

43. Note also that nationally, Senate primaries actually occurred in only 43 of the 121 elections in which they were authorized. *See* NEB. CONST. 1875, art. XVI, § 12; SCHILLER & STEWART, *supra* note 40, at 116.

popular vote. Governor Theodore Geer reminded legislators to obey the "general demand from the people and press of the state," especially since "this first attempt at the popular vote for United States senators is watched with much interest . . . in other States." But the legislators ignored Geer and slipped their statutory bond to the popular vote, picking an alternate candidate after a five-week deadlock. Frustrated voters in 1904 invoked the state constitution to pass an initiative requiring that legislators publicly pledge to accept the next popular vote and circulated an accompanying petition promising to oust legislators who reneged. The legislators, mainly Republicans, could not statutorily block this constitutionally-implemented citizen initiative, and so in the following election they folded and picked the popularly-selected candidate—a Democrat—after only twenty minutes of balloting. Oregon voters had succeeded in using their state constitution initiative process to constrain legislators and implement direct senatorial election.[44]

Eleven states imitated elements of Oregon's initiative system. Nebraska adopted Oregon's public oath verbatim, additionally marking on the ballot which state legislative candidates had not signed the oath, while North Dakota bumped these candidates from the ballot entirely. South Carolina imposed a similar oath, and the Colorado legislature promised to expel members who voted against the popularly elected candidate. Woodrow Wilson—who, as a scholar, had once thought reform without federal amendment impossible—as New Jersey Governor now came "to believe in the popular election of Senators and the primary devices by which the thing is virtually brought about without a Constitutional amendment." He recommended the Oregon system to the New Jersey legislature, noting: "What I said in my [gubernatorial] Inaugural address about the Oregon system was simply that I commended it most warmly to the studious attention of our own legislature."[45] Between the optional party primary, the mandatory party primary, and the Oregon system, by 1913 thirty states had implemented direct senatorial elections, as a House report observed.[46]

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44. *See* OR. CONST. art. IV, § 3. *See also* James D. Barnett, *Forestalling the Direct Primary in Oregon*, 27 POL. SCI. Q. 648, 648–68 (1912) (on the development of the Oregon system).

45. New York's Senate too reported on the Oregon experiment. For the report and quote by Geer, *see* XX DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK: ONE HUNDRED AND TWENTY-SEVENTH SESSION, 44 (1904). *See also* HAYNES, *supra* note 39, at 130–52 (discussing the mounting support for direct election); HAYNES, *supra* note 42, at 96–106, 104 n.3 (highlighting the success of the initiative in binding the Oregon legislators to the "People's Choice" and detailing that in a letter to the author, Woodrow Wilson stated his belief in the popular election).

46. Scholars agree on when states instituted their primaries but disagree on when these laws were implemented. For example, in 1908 Charles Merriam counted twelve states with senatorial primaries, while a 1907 Senate report counted

State legislatures used several tactics to nudge the Senate toward amendment. First, between 1901 and 1905, nineteen state legislatures sent thirty-two petitions calling for an Article V constitutional convention. Pennsylvania's legislature organized an interstate committee of correspondence to coordinate appeals, pushing the number of petitions to twenty-seven in 1910, then to thirty-one by 1912, just short of the thirty-two-state threshold needed to trigger a national convention and override the Senate. Noting the possibility of a constitutional convention, the usually circumspect professor Haynes declared "we are on the eve of seeing the final step taken in the proposing of the long-desired amendment." Observers warned that such an Article V convention could address questions beyond senatorial selection. Senator Weldon Heyburn warned that a radical runaway convention would challenge Jim Crow and reopen the "bitterness of the race question." Worrying that "enough States will act to take it out of our hands," Senator Fred DuBois urged his colleagues to instead preempt a convention by agreeing to "debate this question" of amendment. Amendment, once radical, became the conservative, stabilizing option to recognize the status quo established by the states.[47]

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eight. *See* MERRIAM, *supra* note 17, at 273–88 (Illinois, Indiana, Kansas, Louisiana, Missouri, New Jersey, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wisconsin); MOSES E. CLAPP, ABSTRACT OF LAWS RELATING TO THE ELECTION OF UNITED STATES SENATORS, S. DOC. NO. 393 (1907) (Alabama, Arkansas, Florida, Louisiana, Mississippi, Oregon, South Carolina, Texas). Romero and Schiller and Stewart agree that Lapinski presents the most accurate and recent data, which is largely supported by data from Rossum. *See* Francine Sanders Romero, *The Impact of Direct Election on Reform Votes in the U.S. Senate*, 88 SOC. SCI. Q. 816 (2007); SCHILLER & STEWART, *supra* note 16, at 111–16; John S. Lapinski, *Direct Election and the Emergence of the Modern Senate* (2004), ResearchGate; ROSSUM, *supra* note 18, at 192 n.49.This Article therefore uses the Lapinski data as presented in Schiller and Stewart. For another recent account, *see* Erik J. Engstrom & Samuel Kernell, *The Effects of Presidential Elections on Party Control of the Senate under Indirect and Direct Elections* (2003). *See also* H.R. Res. 82, 70th Cong., 2nd Sess. (1928) *reprinted* 1976 H.R. Doc. No. 551 at 217–20 (compiling all proposed amendments to the Constitution from 1889 through 1928); C. H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 133 (2014) (on the state-level movement of direct election).

47. States coordinated their petitions—as a 1901 Pennsylvania petition reminded Congress, in total twenty-seven states had requested an amendment in some form. Between 1890 and 1905, thirty-one states across the country sent Congress ninety-three petitions asking Congress to propose an amendment. Twenty-six petitions came from the Midwest, twenty-two from the South, forty-three from the West, and two from the staid Northeast. Heyburn speculated that reformers wanted the:constitutional convention so that they can get into the Constitution the recognition of [their] radical demands . . . All the old bitterness of the race question would have to be thrashed out in such a convention . . . . The restriction that insures equal representation in this body would be wiped out, as would every other provision. 46 CONG. REC. 2745, 2772 (1911). The Socialist Party had indeed called for abolition of the Senate in their 1908 platform. *See also* 35 CONG. REC.

Further, as petitions mounted in the late 1900s, additional states implemented direct election laws, which reformist senators periodically presented to their chamber. Praising the accumulation of these democratic laws and petitions, in 1910 Senator Robert Owen of Oklahoma told the chamber that now "37 States to have expressed themselves (in one form or another) favorably to the election of Senators by direct vote." Joined by Oregon's Johnathan Bourne, Owen effusively praised Oregon's initiative system and other states for instituting direct elections, and warned that continued obstruction by Northeastern Senate Republicans, including the obstinate Nelson Aldrich, would not deter the states from a unilateral convention or further state-level reform. Moreover, this state-level reform convinced senators that there was indeed a national constituency backing the impending convention. Finally, with the proliferation of state direct election and initiative measures, the proportion of senators selected by direct election increased, from one-fifth in 1905 to four-fifths in 1909, when fourteen of the thirty senators won by popular vote, displacing ten anti-amendment Republicans. These factors likely inclined the Senate to support an amendment.[48]

Proposed amendments gained traction. On February 24, 1911, George Sutherland derailed a promising amendment by appending a clause letting Congress intervene in state elections, including in the South, threatening Jim Crow. Conferring with Maryland's Isidore Rayner, Judiciary Committee Chairman William Borah recognized the next amendment would have to cut such language to win required Southern votes. Michigan's William Smith agreed:

> It would have been better to have confined the resolution to the direct election of Senators without complicating the question . . . mindful of the fact that this joint resolution must receive the sanction of two-thirds of the States . . . . We can not afford to involve this question with sectional or race problems.

A short amendment, deferential to exiting state electoral practice, would satisfy populists, Southerners, and the conservatives who

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2611, 2617 (1902) (discussing the appeal of the people electing senators by popular vote); HAYNES, *supra* note 33, at 38–39, 65–70, 120–25, 159 (on the state-level movement for direct election); ROSSUM, *supra* note 4, at 181–82 (discussing generally the shift to popular vote).

48. Owen added: "Only nine States . . . have failed to definitely act in favor of the election or selection of Senators by direct vote of the people, and even in these States the tendency of the people is strongly manifested toward such selection of Senators." Senator Augustus Bacon of Georgia also praised the direct election as an anti-corruption measure. ABSTRACT OF LAWS RELATING TO THE ELECTION OF UNITED STATES SENATORS, S. DOC. NO. 393 (1907); 45 CONG. REC. xxx, 5824–30, 7109–21 (1910); 46 CONG. REC. 2745, 2771 (1911); C. H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 150 (1995); Jay Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. UNIV. L. REV. 500, 527–28 (1997); ROBERT HARRISON, CONGRESS, PROGRESSIVE REFORM, AND THE NEW AMERICAN STATE 156–91 (2004); Romero, *supra* note 46, at 281.

sought to preempt a convention. The House passed such an amendment on April 13th, 1911, and Borah sponsored a matching amendment, to which Republican Joseph Bristow attached a weak federal regulation rider, which cleared the Senate by a single vote. After sixteen weeks of foot-dragging, House Democrats in the conference committee accepted the Bristow rider as sufficiently innocuous and passed the measure. The states, having vociferously backed direct election for nearly a decade, ratified the Amendment decisively, completing the process on April 8, 1913.[49]

Scholars have suggested that rising populism and frustration with legislative deadlocks and corruption pushed United States Senators to pass the Seventeenth Amendment. This is not wholly wrong, for reformist senators did indeed mention these issues through the 1890s and 1900s.[50] But the adoption and imitation of Oregon's initiative system also helped secure passage of the Seventeenth Amendment and likely helped avert a second constitutional convention. As historian C. H. Hoebke explains, the state constitutional initiative paired with "the direct primary had done its work before the convention became necessary. Twenty-nine states had instituted the direct senatorial primary, most of them tightening the reign on legislative discretion with enactments similar to those of the 'Oregon System.'" Voters then used state constitutional initiatives to bind their state legislators to direct senatorial election. Between 1883 and 1912, thirty states implemented direct senatorial election. Eleven that instituted or implemented direct election states also constitutionally allowed the citizen initiative. In these states, voters could and did invoke the state constitutional initiative to constrain or punish state legislators who bucked their obligation to the popular vote, as Oregon voters demonstrated.[51] In these

49. 4.6 CONG. REC. 2745, 3307 (1911); HAYNES, *supra* note 39, at 116–20, 250; H.R. Res. 82, 70th Cong., 2nd Sess. (1928) *reprinted* 1976 H.R. Doc. No. 551 at 217–19; ALAN GRIMES, DEMOCRACY AND THE AMENDMENTS TO THE CONSTITUTION 76–82 (1978); CAPLAN, *supra* note 40, at 62–65; KYVIG, *supra* note 40, at 211–13 (1996); HARRISON, *supra* note 48, at 184–85.

50. The Democratic Party, the National Grange, and the American Federation of Labor adopted popular election planks at the turn of the century, though it failed nearly ten-to-one at the 1908 Republican Convention. For a summary of these accounts, *see generally* Todd Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV., 1015–26 (1994); Bybee, *supra* note 48, at 536–47.

51. Prior to 1913, Arizona, Nebraska, and Ohio constitutionally guaranteed the popular vote in senatorial elections. ARIZ. CONST. of 1912, art. VII, § 9–20; NEB. CONST. art. XVI, § 312; OHIO CONST. art. V, § 7. Zywicki suggests Oregon and Nevada did so as well, though I found no record of this. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and Its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 191–92 (1997). About a dozen states revised their constitutions after the Seventeenth Amendment's ratification. Between 1902 and 1912, the constitutional initiative was adopted in Oregon (1902), Oklahoma (1907), Michigan (1908), Missouri

states, the threat—though not always the use—of the state constitutional initiative was essential to binding state legislators to accept the results of direct senatorial election. The success of the Oregon system, using the state constitutional initiative to bind state legislators to the popular vote, encouraged other states, including states without the initiative, to later adopt direct senatorial selection. This state-level band wagoning around direct senatorial election pushed the United States Senate to finally ratify the Seventeenth Amendment.

III. INITIATIVES AND FISCAL REFORM, 1970S–1990S

In the late twentieth century, reformers sought amendments to curtail congressional fiscal powers, including proposals for a balanced budget, a tax cap, an item veto. These measures won some congressional support, but also drew opposition, particularly among members who were unwilling to constitutionally restrict their fiscal powers. Thwarted by congressional opposition and high Article V barriers to amendment, reformers instead passed fiscal restraint measures through the state constitutional initiative process.[52]

Conservatives had long tried to cap or limit federal spending. While emergency Treasury bonds financed expansive Depression and wartime projects, postwar Congresses hesitated to accordingly raise taxes, leading fiscal hawks to propose ninety budget constraint amendments between 1943 and 1973. The 1974 Budget and Impoundment Control Act further expanded Congress' budget drafting powers, leading the moderate House Democrat Paul Simon and Senate Republican Carl Curtis to jointly propose a 1975 amendment tethering congressional spending to taxes. That year, the newly founded National

(1908), Arkansas (1910), California (1911), Arizona (1912), Colorado (1912), Nebraska (1912), Nevada (1912), and Ohio (1912). See DINAN, *supra* note 7, at 16–19. The statutory initiative was adopted in South Dakota (1898) and Utah (1900). Direct election was also instituted or implemented in all these states. *See generally* HAYNES, *supra* note 33, at 120–29; ROSSUM, *supra* note 4, at 181; HOEBEKE, *supra* note 46, at 133.

52. These congressional amendments reflected broader popular desire to check federal and state legislators. These efforts met success mainly at the state level. Addressing popular frustration with rising congressional incumbency, the advocacy group U.S. Term Limits helped twenty-three states cap congressional tenure. The Supreme Court overrode Arkansas' state constitutional limit on congressional terms, but allowed limits on state legislators' tenure, which passed in twenty-one states, mainly by state constitutional amendment. And while Congress tried and failed to pass dozens of amendments reversing the Court's authorization of flag burning in *Texas v. Johnson*, the states uniformly statutorily banned the practice. *See* Engel v. Vitale, 370 U.S. 421 (1962); Texas v. Johnson, 491 U.S. 397 (1989); Patrick M. Condray & Timothy J. Conlan, *Article V Conventions and American Federalism: Contemporary Politics in Historical Perspective*, 49 PUBLIUS: J. FEDERALISM 515 (2019); WOODWARD-BURNS, *supra* note 1, at 179–93.

Taxpayer's Union (NTU) and National Tax Limitation Committee (NTLC) proposed stricter tax caps, alleging that the federal government, like a family, had to balance yearly accounts. The small government rhetoric mobilized disaffected white suburban voters and lawmakers already chafing at expansive federal school integration and bussing plans. With the Curtis amendment trapped in the Senate Judiciary Committee's Subcommittee on the Constitution, the NTU instead pushed Maryland and Mississippi to directly petition Congress for a balanced budget amendment convention in 1975, reaching twenty-two states by 1978, and thirty by summer 1979, nearing the thirty-four-state threshold. Such a convention would not be subject to congressional oversight and could significantly limit Congress' budgeting and spending powers. For some members, credit-claiming for federal spending within their district was central to reelection. National lawmakers attempted to block the amendment convention. President Jimmy Carter and even libertarian Senator Barry Goldwater warned against a runaway convention and Judiciary Chair Birch Bayh's staff noted a dozen state petitions were incorrectly filed and thus void. In December 1979, the Subcommittee on the Constitution attempted to derail the convention by endorsing an alternate amendment.[53]

Republican congressional gains in 1980 boosted prospects for a federal amendment. NTLC chair Lewis Uhler urged President Reagan to statutorily cut taxes, which Reagan did, albeit while increasing defense spending in 1981 and pushing the 1982 budget deficit over $100 billion. Reagan then decried this deficit in summer 1982, requesting a balanced budget amendment. Members answered this budget and deficit growth with detailed, quasi-statutory amendments. Charles W. Stenholm's eight-section proposal required the president transmit an annual budget to Congress tying expenses to revenue and capping annual debt, with specified exemptions allowed by a bicameral congressional supermajority. The proposal also let Congress override these limits following a declaration of war or of a national security emergency with bicameral majorities. However unwieldy, these amendments advanced through Congress. Replacing Democrat Birch Bayh as Senate Judiciary Chair, the Republican Strom Thurmond joined Orrin Hatch to draft an amendment, which, with NTU and NTLC endorsement, barely cleared the Senate on August 4, 1982. But fortunes quickly reversed. Democrats added twenty-seven House seats in November 1982, and in 1984 and 1985, California, Michigan, and Montana rejected federal convention petitions. Frustrated with hardline Republicans' simultaneous deficit spending and increasingly byzantine, detailed budget constraint amendments, the liberal Republican Senator Charles Mathias argued Congress should avoid amendment:

53. WOODWARD-BURNS, *supra* note 1, at 181–88.

"I do not think we should use the Constitution as a fig leaf to cover our embarrassment over the deficit." Given some members' opposition to constraining their powers by amendment, in 1985, Congress settled for a balanced budget statute, the Gramm-Rudman-Hollings Act. But the Supreme Court promptly overturned the Act, spurring new amendments, albeit increasingly symbolic ones aimed at restraining the Court. On February 4, 1986, Reagan addressed Congress with an alternate request: "I ask you to give me what 43 Governors have: Give me a line-item veto this year. Give me the authority to veto waste." He reiterated this in his 1987 address, and members of Congress proposed dozens of item veto amendments, some members citing the state clauses as models, which scholars credited for constraining state budgets.[54] Between feasible and longshot proposals, from 1980 to 1994, Congress proposed 272 amendments balancing budgets, 103 on appropriations, eighty-two on item vetoes, and forty-five on the national debt.[55]

Facing opposition and deadlock in Congress, fiscal reformers also undertook state constitutional revision. While these state amendments could not balance the federal budget, reformers found the states to be a more hospitable venue. Grassroots suburban organizing against bussing and property taxes and for the Nixon and Reagan

54. *See* Bowsher v. Synar, 478 U.S. 714 (1986); Ronald Reagan, *February 4, 1986: State of the Union Address*, MILLER CENTER, millercenter.org/the-presidency/presidential-speeches/february-4-1986-state-union-address [https://perma.cc/B5RT-ZPL6]; Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto be Transferred to the President?*, 75 GEO. L. J. 159 (1986); RONALD C. MOE, PROSPECTS FOR THE ITEM VETO AT THE FEDERAL LEVEL: LESSONS FROM THE STATES (1988); James Alm & Mark Evers, *The Item Veto and State Government Expenditures*, 68 PUB. CHOICE 1 (1991); COMMITTEE ON THE BUDGET,102D CONG., PROPOSED CONSTITUTIONAL AMENDMENTS TO BALANCE THE FEDERAL BUDGET, 83, 1057, 1501 (Comm. Print 1994); COMMITTEE ON RULES, 99TH CONG., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION (Comm. Print 1986); JAMES SAVAGE, BALANCED BUDGETS AND AMERICAN POLITICS 198–236 (1988); Balanced Budget Amendment Fails in House, *in* CQ ALMANAC 1982, at 391–94 (1983), library.cqpress.com/cqalmanac/document.php?id=CQal82-1164709 [https://perma.cc/H2M4-XSWX].

55. Note that these amendment counts are nonexclusive, and many individual amendment proposals included balanced budget, tax cap, and line-item veto provisions. See Bowsher v. Synar, 478 U.S. 714 (1986); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1975); RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? 181–87 (1993); KYVIG, *supra* note 40, at 426–47; LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2002); MATTHEW D. LASSITER, THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH (2006); JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2015 at 37–38 (Fourth ed. 2015); ROGER C. HARTLEY, HOW FAILED ATTEMPTS TO AMEND THE CONSTITUTION MOBILIZE POLITICAL CHANGE 181–87 (2017); NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA (2017).

campaigns built strong Sunbelt and Southern state-level fiscal reform networks. And while some members of Congress balked at adding detailed budget amendments to the brief federal Constitution, the state constitutions, with lower bars to amendment, already included dozens of lengthy clauses checking legislative budgeting, many passed by nineteenth century framers after cyclical economic crises.[56] Through the 1970s and 1980s, fiscal reformers, addressing economic stagnation, amended their state constitutions to update these old budget checks and institute new ones. Convention delegates imposed balanced budget amendments in Illinois in 1971 and Tennessee and Hawaii in 1978, as did voters in Maryland in 1974, North Carolina in 1977, Virginia in 1984, and Rhode Island in 1986. By 1993, thirty-five states had balanced budget clauses, and including statutory provisions, forty-nine states now mandate balanced budgets. These detailed measures mirrored Congress' rejected amendments, requiring executives or legislators provide or pass a budget in which annual or biennial revenue exceeds expenses or debt, unless exempted by legislative supermajority.[57]

Reformers also channeled popular antitax sentiments toward state constitutional initiatives. By initiative, voters imposed absolute limits or legislative supermajority requirements on property tax increases, restricted non-property taxes, and capped statewide tax expenditure by population. California pioneered each approach. In 1973, Reagan advisor Lewis Uhler drafted Proposition 1 to reduce state spending, nudging legislators to try to curb rising property taxes in 1977. When the attempt failed in 1978, fiscal conservatives Howard Jarvis and Paul Gann proposed Proposition 13 to limit property taxes and Proposition 4 to limit state expenditures by population. Californians that backed the initiatives, many of them conservative or suburban homeowners, tended to see the state's lawmaking process as unresponsive,

56. For example, Indiana's budget clause, dating to 1851, and West Virginia's, from 1872, forbid legislators from assuming debt, and Nevada's 1864 clause tethers debt to taxes, which reformers strengthened by amendment in 1989. *See* IND. CONST. of 1851, art. I, § 5; NEV. CONST. of 1864, art. XI, § 3; W. VA. CONST. of 1872, art. X, § 4.

57. Dinan also explains there is some academic disagreement whether to class debt limit clauses as balanced budget provisions, so the count of thirty-five balanced budget clauses is likely modest. DINAN, *supra* note 7 at 171–3. *See also* R.I. CONST. art. IV, § 13; MD. CONST. art. III, § 52 (amended 1974); TENN. CONST. art. II, § 24 (amended 1978); ILL. CONST. art. VIII, § 2; N.C. CONST. art. III, § 5 (amended 1977); HAW. CONST. art. VII, § 5 (amended 1978); VA. CONST. art. X, § 7 (amended 1984); R.I. CONST. art. VI, § 16; Richard Briffault, *State and Local Finance*, 3 *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 211–17 (G. Alan Tarr & Robert F. Williams eds., 2006); Yilin Hou & Daniel L. Smith, *Do State Balanced Budget Requirements Matter? Testing Two Explanatory Frameworks*, 145 PUBLIC CHOICE 57 (2010); STATE BALANCED BUDGET PROVISIONS, (2010).

inefficient, and wasteful, soundly rejecting the legislature's alternate, the more moderate Proposition 8.

California triggered a landslide of tax initiatives. National media coverage introduced Proposition 13 to three-quarters of Americans outside California, two-thirds of whom supported similar reforms according to November 1978 polls. Voters used initiatives and referenda to force state lawmakers into swift change. Convention delegates in Tennessee and Hawaii, sensing the nation's anti-tax tenor, proposed referenda capping state taxes and expenses. In total seventeen states attempted tax initiatives in 1978, and by 1981, forty-three states stabilized or reduced taxes. By 1984, forty-four had called for fiscal reform referenda. Congress too took note, proposing twenty-eight amendments for national referenda between 1977 and 1983, the first such amendment proposals since the New Deal. The movement spread, with Lewis Uhler advising Michigan's 1978 initiative capping state revenue and California's 1990 term limits initiative, Missourians passed a similar revenue initiative in 1980. Massachusetts' Proposition 2 1/2 of 1980 statutorily reduced the state's relatively high property taxes, and by 1985, voters approved legislative-initiated tax reduction amendments in seven more states. Through the 1990s, the states passed another five initiative amendments and eight referendum amendments. These continued the fiscal reform efforts of the 1980s—for example, in the 1990s, Arizona, Oklahoma, and Nevada passed amendments requiring legislative supermajorities for tax increases. Remarkably, respondents in California, Massachusetts, and Michigan supported broad tax cuts while favoring program-specific spending increases. Something had to give.[58]

58. Note that Isaac Martin casts the California tax revolt as a moderate homeowners' effort to protect tax exemptions. Note also that Congress in 1971 considered a narrowly-tailored amendment requiring a national referendum on war declarations. *See* NEV. CONST. art. IV, § 18 (amended 1996); TENN. CONST. art. II, § 24 (amended 1978); CALI. CONST. art. XIII A–B (amended 1978 & 1979); OKLA. CONST. art. V, § 33 (amended 1992); ARIZ. CONST. art. 9, § 22 (amended 1992); MO. CONST. art. X, § 16 (amended 1980); HAW. CONST. art. VII, § 9 (amended 1978); MICH. CONST. art. IX, § 26 (amended 1978); TARR, *supra* note , at 156–60; DINAN, *supra* note 7, at 177–84; John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 184–85 (2014); David Lowery & Lee Sigelman, *Understanding the Tax Revolt: Eight Explanations*, 75 AM. POL. SCI. REV. 963–74 (1981); Daniel R. Mullins & Bruce A. Wallin, *Tax and Expenditure Limitations: Introduction and Overview*, 24 PUB. BUDGET FIN. 2–15 (2004); DAVID O. SEARS & JACK CITRIN, TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA 19–42 (1985); ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 115–18 (2008); ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES & TAX REVOLTS: THE LEGACY OF PROPOSITION 13 (1995); ALVIN RABUSHKA & PAULINE RYAN, THE TAX REVOLT 185–94 (1982); John L. Mikesell, *The Path of the Tax Revolt: Statewide Expenditure and Tax Control Referenda since Proposition 13*, 18 STATE LOC. GOV. REV. 5–12 (1986).

Voters rolled back some of these clauses. Although Colorado initially imposed relatively low state and local taxes, through the 1980s, state legislators tried and failed to further lower taxes, leading Douglas Bruce, who had observed California's Proposition 13 campaign, to propose circumventing the legislature by constitutional initiative. Paul Gann, who authored Propositions 13 and 4, also advised Colorado's amendment campaign, which culminated in 1992 when voters passed a briefly-worded ballot initiative, the "Taxpayer's Bill of Rights," constitutionally forbidding legislators from increasing state revenue over that of a previous year, distributing the excess as taxpayer refunds. Rife with populist symbolism, the much longer, more complex amendment text promised to "restrain most the growth of government," holding "limits on district revenue, spending, and debt may be weakened only by future voter approval," while financing taxpayer suits against legislative nonenforcement. Coloradans did not expect a decrease in public services, but predictably, the amendment's procrustean budget constraints hobbled the state government. By 2000, primary and secondary education funding plummeted to forty-sixth nationally, forcing voters to pass an amendment exempting K-12 education spending. A 2001 recession then forced legislators to cut a billion dollars from the state's thirteen-billion-dollar budget, yielding deep cutbacks to higher education, infrastructure, and child healthcare budgets, hampering child immunization, which voters also exempted in 2005. Across the states, lawmakers exempted necessary hospital, university, public housing, and infrastructure projects from debt caps, and allowed exempted entities to assume debt for nonexempt ones. Richard Briffault concluded that three-quarters of state debt escaped these strict, if increasingly rhetorical, state constitutional constraints. Surveying these carveouts and the differences between state and federal budgeting processes, a 1993 General Office report to the House Budget Committee concluded that state balanced budget clauses were not a successful model for Congress to emulate.[59]

Congress failed to pass budget amendments in the 1990s. In November 1994, Republicans gained nine Senate seats and fifty-four House seats on a fiscal restraint platform, and in 1995 proposed twenty-nine balanced budget amendments, one of which cleared the

59. *See* COLO. CONST. 1876, art. X, § 20, amend. 1992; Vicky Bollenbacher, *Two Sides of Colorado, Amplified through Constitutional Redesign*, *in* THE CONSTITUTIONALISM OF AMERICAN STATES , 603–08 (George E. Connor & Christopher W. Hammond eds., 2008); Briffault, *supra* note 57, at 217–21; BALANCED BUDGET REQUIREMENTS: STATE EXPERIENCES AND IMPLICATIONS FOR THE FEDERAL GOVERNMENT (1993); Franklin J. James & Allan Wallis, *Tax and Spending Limits in Colorado*, 24 PUB. BUDGET FIN. 16–33 (2004); Daniel A. Smith, *Populist Entrepreneur: Douglass Bruce and the Tax and Government Limitation Movement in Colorado, 1986-1992*, 6 GT. PLAINS RES. 269–94 (1996); O'SULLIVAN ET AL., *supra* note 58.

Republican House but failed in the Senate by a single vote. Congress attempted alternate reforms, passing a House rule requiring a three-fifths vote for tax increases and proposing ten item veto amendments. As Reagan noted, nearly all governors had item vetoes—progressive-era state framers and voters had checked pork-barrel legislative appropriations through the gubernatorial item veto, constitutionalized in forty-four states, and through governor-initiated budgets constitutionalized in several states.[60] But none of the analogous federal amendments cleared Congress, which in January 1997 instead passed the Line Item Veto Act. The Supreme Court promptly rejected this in 1998, holding the item veto required an amendment, only seventeen of which have since appeared on the congressional agenda. The item veto remained a matter for the states. The Court meanwhile upheld California's anti-tax initiatives.[61]

Congressional budget, tax, and item veto amendments and statutes failed against congressional opposition, Article V supermajority requirements, and the Supreme Court. Reformers instead harnessed popular sentiment to pass fiscal restraint measures through states' laxer initiative processes. Applying only to state finance, these state amendments could not address federal fiscal concerns or replace federal amendment proposals, but they did vent popular disaffection, channeling discontent, and reform efforts, through the state initiative process.

IV. CONCLUSION

This Article details how reformers thwarted by Congress often instead realized their policy aims through state constitutional initiatives. Relative to the federal Constitution, the states uniformly impose lower barriers to amendment, including by initiative. Reforms undertaken by state constitutional initiative can diffuse across state lines, even to non-initiative states. Interstate convergence or divergence on a constitutional policy can satisfy reformers and address national constitutional controversies, preempting or guiding subsequent congressional lawmaking.

We can draw a few lessons from this. First, on concurrent powers matters, state initiatives can vent pressures for national constitutional reform. By framing a constitutional issue as a concurrent powers matter, reformers can strategically move between state and federal venues, seeking the path of least resistance. Reformers may blend paths, seeking a federal amendment or judicial ruling to bind

60. JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 113–23, 337–38 n.99, 102 (2006); DINAN, *supra* note 7, at 60–64.

61. *See* Nordlinger v. Hahn, 505 U.S. 1 (1992); Clinton v. City of New York, 524 U.S. 417 (1998); VILE, *supra* note 55, at 368–70, 456; KYVIG, *supra* note 40, at 443–47.

the states, or failing this, reformers may campaign at the state level, using state constitutional initiatives to achieve their policy aims. States may diverge, settling on diverse outcomes. In the 1970s, 1980s, and 1990s, many, but not all states, implemented or maintained fiscal reform measures. This divergent, checkerboard outcome can offer a stable national solution, making congressional or federal judicial intervention unnecessary. Alternately, the states may converge on a single policy. In the case of the Seventeenth Amendment, reformers used the state constitutional initiative to better implement direct senatorial election, building an interstate electoral and legislative coalition that pushed the Amendment through the Senate. Through divergence or convergence, state constitutional reform broadly, and state constitutional initiatives specifically, can vent pressure for national constitutional reform.[62]

Second, as a corollary, state constitutional initiatives can cause outcomes ascribed to federal lawmakers. A history of the passage of the Seventeenth Amendment that focused solely on congressional bargaining or presidential leadership would miss how state constitutional initiatives reshaped the selection, makeup, and policy interests of United States senators, helping Congress form the bicameral supermajorities needed to pass a federal amendment for direct senatorial election. In ignoring state constitutional initiatives, we would not only mischaracterize the passage of the Seventeenth Amendment, but also mischaracterize the role of Congress in passing the Amendment. That is, in ignoring state constitutionalism, we risk misunderstanding national constitutional politics.

States pose low bars to amendment, including by initiative. Initiatives empower reformers to constrain noncompliant state legislators, and on concurrent powers matters, to circumvent federal legislators. Resulting state constitutional reform is often varied, incorporating measures absent at the federal level. This variety and idiosyncrasy deserve study so that we may better understand not only the state constitutions, but also the federal Constitution.

62. For further development of these claims, see WOODWARD-BURNS, *supra* note 1, at 1–10.