STATE CONSTITUTIONAL FAILURE

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With the economic and political conditions of state governments in free fall, attention has turned to major structural deficits in the processes of state governance. Although the prospects for systematic state constitutional reform in light of these grim circumstances have brightened, the focus and strategy of this reform is often fuzzy and incoherent. This Article returns to some fundamental aspects of constitutional government in the contemporary United States. With reference to specific examples of constitutional architecture, it explores the question of how we assess state constitutional failure and how, on the basis of this assessment, we can best undertake structural, institutional, and doctrinal reform.

Why do constitutions fail? And how may we best assess the criteria for, and likelihood of, such failures in light of what the constitution aspires to become? To ask the question the other way around, how ought we to judge constitutional *success*? Although this question may be rather academic where the U.S. Constitution is concerned,[1] it is of deep practical importance in the context of U.S. state constitutions. The circumstances of state governance are, when considered as a whole, dismal and worsening, with budgets melting down,[2] basic social services in

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1. "Academic" in the sense that the extraordinary difficulties faced in changing the document, to say nothing of comprehensive changes, make the prospects of addressing large-scale constitutional difficulties unlikely, and perhaps even ill-advised. *But see* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (arguing vigorously that the U.S. Constitution has failed in important respects and should be systematically improved through large-scale reform); LARRY J. SABATO, A MORE PERFECT CONSTITUTION: 23 PROPOSALS TO REVITALIZE OUR CONSTITUTION AND MAKE AMERICA A FAIRER COUNTRY (2007) (same); Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859 (2007) (same).

2. *See, e.g.*, Bob Herbert, Op-Ed., *Invitation to Disaster*, N.Y. TIMES, Jan. 9, 2010, at A19; Bob Herbert, Op-Ed., *A Ruinous Meltdown*, N.Y. TIMES, Mar. 20, 2010, at A17. The National Conference

decline,[3] the housing market in tatters,[4] and general economic progress stalled.[5] While these problems have national salience,[6] state and local governments are at the front lines in dealing immediately and constructively with these vexing problems. For a large number of perceptive commentators, the core difficulties are not solely matters of macroeconomics. State fiscal crises often reveal serious "structural deficits."[7] Insofar as the respective state constitutions frame the key mechanisms

on State Legislatures (NCSL) collects data on the status of current budget battles in state legislatures. *See, e.g.*, *State Measures to Balance FY 2010 Budgets*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/IssuesResearch/BudgetTax/StateMeasurestoBalanceFY2010Budgets/tabid/17255/Default.aspx (last updated May 3, 2010). On its current website, NCLS describes the state fiscal situation as "rapidly deteriorating and the figures for fiscal years FY 2009 through FY 2011 have moved from sobering to distressing." *Issues and Research*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/Default.aspx?TabID=756&tabs=951,61,161#951 (last visited June 8, 2011).

3. *See, e.g.*, Gretchen Morgenson, *Exotic Deals Put Denver Schools Deeper in Debt*, N.Y. TIMES, Aug. 6, 2010, at A1. To take just one example, nearly half the states have either implemented or are seriously considering implementing a four-day school week. *See Four-Day School Weeks*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/IssuesResearch/Education/SchoolCalendarExtendedDayYearFourDaySchoo/tabid/12934/Default.aspx (last visited June 8, 2011).

4. *See, e.g.*, David Streitfeld, *Housing Market Plunged in July, Fueling Anxiety*, N.Y. TIMES, Aug. 25, 2010, at A1; Editorial, *Fighting Back on Foreclosures*, L.A. TIMES, Aug. 17, 2010, at A12; Timothy R. Homan, *Housing Starts in U.S. Increased Less Than Forecast in July*, BLOOMBERG, (Aug. 17, 2010), http://www.bloomberg.com/news/2010-08-17/housing-starts-in-u-s-increased-less-than-economists-forecast-last-month.html.

5. *See, e.g.*, Paul Krugman, Op-Ed., *Fifty Herbert Hoovers*, N.Y. TIMES, Dec. 29, 2008, at A25.

6. *See* Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax As a Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187, 191–92 (2010) (describing the impact of state fiscal crises on national economic conditions).

7. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-358, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK: MARCH 2010 UPDATE (2010), http://www.gao.gov/new.items/d10358.pdf ("In the long-term, we project that the fiscal position [of state and local governments] will steadily decline through 2060 absent any policy changes"). Though not a new insight, the attention to these structural considerations gained traction in the mid-1990s. *See, e.g.*, THE FISCAL CRISIS OF THE STATES: LESSONS FOR THE FUTURE (Steven D. Gold ed., 1995); James M. Poterba, *State Responses to Fiscal Crises: The Effects of Budgetary Institutions and Politics*, 102 J. POL. ECON. 799 (1994). The most alarming set of conditions noted by scholars over the past decade and a half were expansions in education costs (connected primarily to increases in enrollment), the growing pension crises, expansion of federal mandates, and notably, the rapid growth in Medicaid payments. On health care, in particular, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-210T, STATE AND LOCAL FISCAL CHALLENGES: RISING HEALTH CARE COSTS DRIVE LONG-TERM AND IMMEDIATE PRESSURES (2008), http://www.gao.gov/new.items/d09210t.pdf; Letter from Stanley J. Czerwinski, Dir., Strategic Issues, U.S. Gov't Accountability Office, and Thomas J. McCool, Dir., Ctr. for Econ., U.S. Gov't Accountability Office, to Max Baucus, Chairman, Comm. on Fin., U.S. Senate, and Charles E. Grassley, Ranking Member, Comm. on Fin., U.S. Senate (Jan. 26, 2009), http://www.gao.gov/new.items/d09320r.pdf. *See also* Robert B. Ward & Lucy Dadayan, *State and Local Finance: Increasing Focus on Fiscal Sustainability*, 39 PUBLIUS: J. FEDERALISM 455 (2009). The dire predictions made in the mid to late 1990s about these and other considerations have thus far gone largely unheaded. The depictions of the situation now has, if anything, become even more dire, with the principal focus on "fiscal sustainability," that is, the question whether state and local governments will be able to navigate their worsening fiscal predicaments even if the economy rights itself. To take just one horror story from what is an astonishingly horrific literature, see Howard Bornstein et al., *Going for Broke: Reforming California's Public Employee Pension Systems*, STAN. INST. ECON. POL'Y RES. (Apr. 2, 2010), *available at* http://siepr.stanford.edu/publicationsprofile/2123, which describes the funding shortfall in the California pension system as just under half a trillion dollars.

through which state and local institutions govern, the persistent problems are, in a word, *constitutional* in nature and scope.[8]

While the design and performance of state constitutions may not be the *causes* of modern governance problems, in many respects they represent barriers to improvement.[9] States are, in the cogent words of a prominent 2009 article in *The Economist*, simply "ungovernable."[10] In this account, the road to recovery requires not merely improvement in constitutional structure or reform of certain governmental institutions, but a frank acknowledgment of the failure of state constitutions and systematic reform that is predicated on this acknowledgment. The ungovernability of modern state and local institutions may reveal deep deficiencies—or, worse, structural failures—of the sort which require considerable, and perhaps urgent, attention.[11]

8. *See* G. Alan Tarr, *Introduction*, *in* 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 10 (G. Alan Tarr & Robert F. Williams eds., 2006) ("Like Alabama, New York has experienced major problems attributable, at least in part, to constitutional deficiencies."); H. Bailey Thomson, *Constitutional Reform in Alabama*, *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra*, at 113 ("[T]he 1901 Constitution's restrictions and antiquated provisions hinder efforts to reform government and improve the economy."); Jennifer Steinhauer, *In California, Democracy Doesn't Pay the Bills*, N.Y. TIMES, May 21, 2009, at A1 ("[T]he state may finally consider another way by overhauling its Constitution for the first time in 130 years.").

9. *See, e.g.*, Dennis Byrne, Editorial, *Had Enough Yet? Vote for Change*, CHI. TRIB., Oct. 28, 2008, § 1, at 31 ("Folks who are sincerely interested in 'real change' should vote . . . for an Illinois constitutional convention."); Walt Carlington, Letter to the Editor, *State Needs Big Changes*, NEWS-STAR (Monroe, La.), Oct. 11, 2007, at 7B ("What is needed . . . is structural change in our government itself . . . ."); Carla Rivera, *Site Aims to Explain State Government*, L.A. TIMES, June 8, 2010, at AA5 ("California could end up as a 'failed state' . . . ."); Op-Ed., *Emmett Has Big Lesson for Michigan*, TIMES HERALD (Port Huron, Mich.), June 10, 2010, at 7A ("[T]he Michigan Constitution makes it all but impossible to merge services, consolidate communities or streamline government in even modest ways."); Jason Hancock, *Iowa One of Four States Considering Constitutional Convention*, IOWA INDEP. (May 3, 2010, 10:30 AM), http://iowaindependent.com/33328/iowa-one-of-four-states-considering-constitutional-convention; Rochelle Riley, *Michigan Needs Constitutional Convention*, DETROIT FREE PRESS (Aug. 13, 2010, 1:41 AM), http://www.freep.com/article/20100813/COL10/8130374/Michigan-needs-constitutional-convention ("Michigan needs dramatic reform."); Daniel C. Vock, *Three States Weigh Calls for New Charters*, STATELINE (Sept. 25, 2008), http://www.stateline.org/live/details/story?contentId=343522.

10. *California: The Ungovernable State*, ECONOMIST, May 16, 2009, at 33; *see also* Sandy Levinson, *Our Defective State Constitutions? (or Does This Crisis Portend the End of What Remains of Robust Federalism?)*, BALKINIZATION BLOG (Dec. 29, 2008, 5:54 PM), http://balkin.blogspot.com/2008/12/our-defective-state-constitutions-or.html.

11. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94–135 (1998) (describing processes of constitution making in the nineteenth century); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 364–79 (2009) (describing various efforts at omnibus state constitutional reform in the twentieth century). Most of these efforts at wide reform were built on claims that existing state constitutions were fundamentally defective. For a century-old article canvassing various claims made about the defective California Constitution of 1848, the context of which was the call for a constitutional convention in 1878, see Noel Sargent, *The California Constitutional Convention of 1878–9*, 6 CALIF. L. REV. 1, 3–4 (1917) (describing "agitation" growing out of the manifest defects in the document); *see also* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 52–55 (Ken Gormley et al. eds., 2004) (describing fierce calls for constitutional reform in the period between 1776, the date of the first Pennsylvania Constitution, and 1790 when the new constitution was enacted).

The question of how to measure constitutional failure—or, indeed, the threshold question of whether such measurement is even a fruitful enterprise—is one about which it is difficult to get traction. Assessment of the failure and collapse of a republic begins in earnest after such a regime has ended, either formally or for all practical purposes. At the beginning of the pipeline, we typically undertake predictions of success in a constitutional context based upon an admixture of analysis about constitutional structure, sociopolitical history, economic conditions, institutional capacity, and a myriad of assumptions about how governance might unfold in a new regime.[12] It would seem especially hard, however, to make fruitful evaluations of whether and to what extent a current constitution has failed, leaving the regime basically intact but without the fundamental rules of the game to further its objectives and aims. Yet, such an undertaking seems useful not only in the abstract—as a key component in our omnibus analyses of constitutional design and performance—but especially pertinent as we puzzle over the serious, urgent conditions in our fifty states. This Article aims to further understand why constitutions fail or, to put the point more precisely, how can we know from close scrutiny of constitutional performance whether the essential governing document of the state has truly failed We the (State's) People.

Drawing a coherent distinction between instances of failure and serious flaws in an otherwise successful document will help us more constructively to consider strategies for constitutional change. Reform efforts must be framed by the nature and scope of the problems that need attention. Without question, the structures of state governance are bowing under significant strain, and the prospects for improvement will rely on sophisticated efforts at reforming constitutional governance. While this is not the place to sketch a detailed template for constitutional reform, it is the place for serious analysis of how we ought to think about the constitutional reform process. Specifically, how and why do constitutions fail and what can we learn from these failures about how best to reconfigure our state constitutions to tackle enduring governance crises?

In Part I, I consider some fundamentals of constitutionalism and constitutional function in order to set the stage for an investigation into how and why state constitutions can be said to have failed. The reason

12. In the modern literature on constitutional design and performance, questions of constitutional success are front and center. *See, e.g.*, CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? (Sujit Choudhry ed., 2008); ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS (2009); EDWARD SCHNEIER, CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN (2006). In their recent book on constitutional endurance, Elkins et al., caution that constitutions frequently fail; the lifespan of a normal constitution is less than two decades, far shorter than old U.S. Constitution—and, indeed, far shorter than nearly every existing state constitution in the United States. ELKINS ET AL., *supra*, at 129–34.

should be apparent: it is only with an understanding of what functions a state constitution performs and how the design and implementation aims to fulfill these functions that we can then move to a reasoned consideration of constitutional failure. Part II frames the issue of constitutional failure around the distinct circumstances of state constitutions. With the fundamentals in sharper focus, Part III considers the complex matter of constitutional performance. A close examination of constitutional performance in the context of U.S. state constitutionalism reveals certain problems, perhaps even pathologies, which contribute to constitutional failures. This Article discusses, with specific institutional and doctrinal examples, how these problems negatively impact constitutional performance. Part IV connects the preceding analysis to some larger questions of how we might think about constitutional reform and repair.

I. CONSTITUTIONAL OBJECTIVES, STABILITY, AND PROGRESS

"Constitutions fail," writes Kim Scheppele, "because the success of a constitution is not predictable merely from its initial design."[13] Perhaps so. But to avoid merely restating a truism, we need to be more precise when we draw connections among constitutional objectives, constitutional design, and the circumstances of failure. Such precision will aid our positive assessments as social scientists; and, so far as normative analysis is concerned, a better understanding of the nature and contours of constitutional failure will help us make more informed projections about the conditions for, and the likelihood of, constitutional success.

Any fruitful evaluation of constitutional failure must begin with the right baseline: *what* has the constitution failed to do? The essential theme of this Part is twofold. Constitutions can work on behalf of the pertinent polity only where they are stable; furthermore, constitutional success can be assessed from the vantage point of the objectives of the polity.[14]

For state constitutions to be meaningful in carrying out these described functions, these documents must be more than mere "parchment barriers,"[15] but core sources of a constitutional order that create and incentivize governance mechanisms to promote good public policy and to secure wide consent.[16] To understand state constitutional failure, we

13. Kim Lane Scheppele, *A Constitution Between Past and Future*, 49 WM. & MARY L. REV. 1377, 1406 (2008).

14. I here use "polity" as a placeholder for the relevant group (framers? citizenry? the current configuration of political officials?) whose objectives are relevant to the basic inquiry.

15. THE FEDERALIST NO. 48, at 308 (James Madison) (Henry Cabot Lodge ed., 1888).

16. *See, e.g.*, Norman Schofield, *Evolution of the Constitution*, 32 BRIT. J. POL. SCI. 1, 1 (2002) ("Much more important than the [constitutional] rules themselves is the conceptual basis for the acceptance of these rules. . . . [T]he beliefs that underpin the constitution must themselves generally be in equilibrium.").

should attend to the core question of what objectives state constitutions fulfill. The emerging new political economy literature on constitutionalism provides a helpful framework for understanding these elements.[17]

A. Objectives

To work for their intended purposes, constitutions must be stable. Successful constitutions are self-enforcing; that is, citizens and government officials alike agree to be bound to the constitution in order to realize mutually beneficial aims. These agreements, essentially tacit, enable citizens to realize the objective of security and economic well-being.[18] Constitutional democracy, implemented through constitutional structures, rules, and institutions, maintains a stable equilibrium in which pertinent members of a polity can prosper and in which serious risks of violence and disintegration of order are minimized.[19] Yet, a constitutional democracy must be on guard against omnipresent incentives and efforts to defect.[20] Structuring the system in a way that encourages rational citi-

17. The following analysis is distilled from a wide range of overlapping political economists, political scientists, and legal scholars working with what we can broadly call the new political economy tradition. *See, e.g.*, DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY (1996); DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2005); DOUGLASS C. NORTH ET AL., VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY (2009); Russell Hardin, *Constitutionalism*, *in* THE OXFORD HANDBOOK OF POLITICAL ECON. 289 (Barry R. Weingast & Donald A. Wittman eds., 2006) [hereinafter Hardin, *Constitutionalism*]; Russell Hardin, *Why a Constitution?*, *in* THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 100 (Bernard Grofman & Donald Wittman eds., 1989); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989); Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245 (1997); Sonia Mittal & Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century (July 2010) (unpublished manuscript) (on file with the Stanford University Department of Political Science), http://politicalscience.stanford.edu/faculty/weingast/MITTALsecFINAL100724submission4.pdf.

18. On the connection between constitutional government and economic progress, see, for example, DARON ACEMOGLU & JAMES A. ROBINSON, ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY (2006).

19. *See* MUELLER, *supra* note 17, at 61.

20. In the rational choice framework within which this ample literature on the political economy of constitutionalism proceeds, these incentives are largely the product of strategic choice and self-interested calculation. There are other perspectives on this dilemma which largely avoid this strong assumption, emphasizing the notion of human weakness and fallibility. Madison's famous statement in *Federalist No. 51* that "[i]f men were angels, no government would be necessary" tracks this theme. THE FEDERALIST NO. 51, at 323 (James Madison) (Henry Cabot Lodge ed., 1888); *see also* Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24, 26 (G. Alan Tar ed., 1996) ("Since fallibility was part of human nature, provision had to be made for altering institutions after experience revealed their flaws and unintended consequences. Originally, therefore, the amendment process was predicated not only on the need to adapt to changing circumstances but also on the need to compensate for the limits of human understanding and virtue. *In a sense, the entire idea*

zens and officials to obey constitutional commands—to commit to the basic constitutional forms—is the key challenge for constitutional designers and for the managers of institutions who craft and administer policy under the rubric of these constitutions.[21]

The creation of a constitution is just the first order of business; ensuring that constitutional commitments endure to create optimal constitutional stability is the central challenge.[22] Among the problems that threaten this stability are, first, the *rationality of fear*, that is, the risks citizens face to their lives and livelihoods by changes in public policy.[23] "When citizens feel threatened by potential changes in public policy," write Sonia Mittal and Barry Weingast, "they will take steps to defend themselves."[24] These risks will be met by resort to extraconstitutional means—in the worst case scenario, by violence—unless the advantages of constitutional commitment ameliorate and finally outweigh these risks.[25] Second, the difficulties of coordinating, that is, acting "in concert against political leaders who transgress constitutional rules" requires close attention.[26] After all, to the extent that political leaders will take advantage of the discretion left by inadequate enforcement and restraint (a point emphasized long ago by Thomas Hobbes[27]), constructive devices to improve coordination will be essential to ensure constitutional efficacy and hence, stability.[28] Finally, changing conditions and circumstances require "adaptive efficiency," that is, "the capacity to adjust in the face of shocks and

of a constitution rests on an assumption of human fallibility, since, if humans were angels, there would be no need to erect, direct, and limit government through a constitution." (emphasis added)).

21. *See* Hardin, *Constitutionalism*, *supra* note 17, at 302 ("In a constitutional government we cannot simply decide at every turn what would be the best thing to do, even the mutually advantageously best thing to do, and then do it. We must do what can be accomplished within and by the constitutionally established institutions."); Levinson, *supra* note 17, at 669 (describing the self-enforcing character of the U.S. Constitution as consistent with "Madison's hope").

22. *See* Levinson, *supra* note 17, at 662 ("[Madison] hoped and hypothesized that the Constitution could be made politically self-enforcing by selectively empowering political decisionmakers whose interests and incentives would remain in alignment with constitutional values."); Mittal & Weingast, *supra* note 17, at 2–4.

23. *See* Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *Self-Enforcing Federalism*, 21 J.L. ECON. & ORG. 103 (2005).

24. Mittal & Weingast, *supra* note 17, at 2.

25. *See* NORTH ET AL., *supra* note 17, at 55–100. On the distinction between intra- and extra-constitutional mechanisms of change, see ELKINS ET AL., *supra* note 12, at 74–76.

26. Mittal & Weingast, *supra* note 17, at 3; *see also* Weingast, *supra* note 17, at 247–48.

27. THOMAS HOBBES, LEVIATHAN 184 (Richard Tuck ed., Cambridge Univ. Press, rev. student ed. 1996) (1651).

28. On the coordination problem in political behavior more generally, see Randall L. Calvert, *Rational Actors, Equilibrium, and Social Institutions*, *in* EXPLAINING SOCIAL INSTITUTIONS 57 (Jack Knight & Itai Sened eds., 1995). The implications of this problem for constitutional formation and maintenance in the U.S. context have been the subject of a wide literature. *See, e.g.*, Schofield, *supra* note 16, at 4–5; *see also infra* note 36 and sources cited therein.

to restructure institutions within the constitutional framework to effectively deal with an altered reality."[29]

Devices to effectively manage these problems are necessary conditions for ensuring constitutional stability,[30] that is, for ensuring that the constitution will be self-enforcing. They are not, as we will consider below, sufficient for meeting all the objectives of constitutional order.[31] With respect to the rationality of fear problem noted above, constitutions must "lower the stakes of politics."[32] This means appropriately limiting the discretion of government actors so that citizens will have less to fear from government.[33] Citizen preferences over policy—or, to think about this more globally, how citizens wish to live their lives—will be heterogenous and enduring, but they will have less to fear from government threats to their well-being if the "stakes" of politics are cabined by reasonably stable constitutional rules.[34] This, as James Madison famously noted in the context of the U.S. Constitution of 1787,[35] was the main function of critical structural devices such as federalism and the separation of powers.[36] It also explained the imperative of delineated rights and the restriction of government authority to that which is embodied in the constitution.[37]

Threats to citizens' well-being will still be possible in a regime with lower stakes, but such threats will be tempered by ubiquitous incentives to act for self-interested reasons or, relatedly, to comply with the wishes

29. Mittal & Weingast, *supra* note 17, at 4. This condition manages shocks to the system which might otherwise "threaten cooperative activity." *Id.* at 15. The device of separation of powers and, correlatively, checks and balances, is an example of this adaptive efficiency. Such a device incentivizes competition among governmental institutions, thereby improving the prospects for "mutual monitoring" and "forc[ing] lawmaking institutions to invest in skills and knowledge to survive. . . ." *Id.* at 15–16; *see also* NORTH, *supra* note 17.

30. However, as Adam Przeworski notes, constitutional stability may not be necessary (or sufficient) for democracy to survive. *See* Adam Przeworski, *Self-Enforcing Democracy*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY, *supra* note 17, at 312, 320–21.

31. On the notion of constitutional order described in terms broadly congruent with the discussion above, see MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 1 (2003); see also Levinson, *supra* note 17.

32. Mittal & Weingast, *supra* note 17, at 2; *see also* NORTH ET AL., *supra* note 17, at 194–202.

33. *See* Mittal & Weingast, *supra* note 17, at 2–3; *see also* ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET: POLITICAL AND ECONOMIC REFORMS IN EASTERN EUROPE AND LATIN AMERICA 51–99 (1991).

34. Mittal & Weingast, *supra* note 17, at 2.

35. THE FEDERALIST NOS. 10, 39 (James Madison); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161–202 (1996) (on federalism); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 197–255, 257–305 (1969) (on "mixed government" and on the "checking and balancing of power," respectively).

36. *See* Sonia Mittal et al., *The Constitutional Choices of 1787 and Their Consequences*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 25 (Douglas A. Irwin & Richard Sylla eds., 2011); Jack N. Rakove et al., Ideas, Interests, and Credible Commitments in the American Revolution (Feb. 2000) (unpublished manuscript) (on file with author). *See generally* WILLIAM H. RIKER, THE DEVELOPMENT OF AMERICAN FEDERALISM 1–41 (1987).

37. *See* RAKOVE, *supra* note 35, at 288–338.

of influential factions (a point, again, described well by James Madison in the *Federalist No. 10*).[38] In order to credibly commit to constitutions, individuals and government officials must believe, over time and under conditions of some uncertainty,[39] that their well-being is positively impacted by the presence of constitutional constraints on government action and, further, the fidelity of the government to these constraints. "An oft-cited benefit," says Daryl Levinson in an important recent article, "of constitutionalism is that it enables us to commit to normatively preferred policies in order to stand firm during moments when pathological politics might undermine these policies."[40] If anything, describing these politics as "pathological" puts the point too strongly; we could say simply that constitutional commitments oblige citizens and government to eschew short-term benefit in order to realize the palpable advantages of mutually reinforcing long-term benefits. Constitutional stability begets stability of other valuable forms.[41]

B. Design and Implementation

There are two fundamental ways in which constitutional design, if done well, can fashion these optimal commitments in order to ensure stability. One is to impose structural barriers to change; the other is to create rules and other arrangements which are incentive compatible, that is, they create the conditions under which citizens and officials will cooperate and thereby avoid the sort of confrontations that will unravel the pact by encouraging resort to extraconstitutional means of change.[42] By "structural barriers," we can include a range of rules, such as devices which increase the transaction costs of legislating,[43] enforceable rights

38. *See* THE FEDERALIST NO. 10 (James Madison); *see also* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 61–66 (1984) (discussing factions and the problems they present).

39. "Uncertainty" here refers both to uncertainty about future states of the world and also uncertainty about the extent to which individuals' preferences will change over time and in ways that create regret about their decision to commit to rules and bargains in the first instance. *Cf.* ELKINS ET AL., *supra* note 12, at 69–74 (describing the related problem of "hidden information" in the context of a theory of constitutional renegotiation).

40. Levinson, *supra* note 17, at 675.

41. This theme is prominent in the large literature on constitutionalism, democracy, and economic performance. *See, e.g.*, AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY: LESSONS FROM MEDIEVAL TRADE 153–57 (2006); INSTITUTIONS AND ECONOMIC PERFORMANCE (Elhanan Helpman ed., 2008). *See also* Hardin, *Constitutionalism*, *supra* note 17, at 291.

42. *See* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 220 (2006) ("The System of Institutions Should Be Grounded in a Coherent Theory That Should Be Apparent from the Behavioral Implications of the Institutional Design."); Levinson, *supra* note 17, at 670, 677 ("[P]olitical communities can successfully commit by pointing the incentives of influential constituencies in the right directions or by imposing structural barriers to change."); Mittal & Weingast, *supra* note 17, at 12–16.

43. Bicameralism and the requirement of presentment, for instance, have these characteristics. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992). So too do rules and practices of subconstitutional dimensions, ranging from internal legislative

that restrict the domain of governmental powers, and division of powers across the terrain of governance (federalism in the national context;[44] localism in the context of U.S. states[45]). The optimal configuration of "structural barriers" is the central question of constitutional design.[46] The purpose of carefully configured "structural barriers" is to increase the likelihood that democratic governance remains stable and enduring and that the noxious fallout of instability, including economic and social turmoil, and in some cases violence and chaos, is avoided.[47]

Incentive compatible devices include that combination of rules, institutions, and mechanisms that promote the smooth functioning of governance, even when conditions are problematic and preferences diverge.[48] They promote such good aims because they jibe with what citizens and government officials want from the process of policy making[49] and, more to the point, they reduce the friction that impedes cooperation.[50] Bicameralism, for example, is valuable in increasing the likelihood

rules, see Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized As Markets*, 96 J. POL. ECON. 132 (1988), to administrative procedures in the regulatory context of subconstitutional dimensions, see Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

44. *See generally* JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 95–131 (2009).

45. *See generally* Richard Briffault, *Localism in State Constitutional Law*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 117 (1988).

46. *See generally* Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 203–10 (2009); Richard Simeon, *Constitutional Design and Change in Federal Systems: Issues and Questions*, 39 PUBLIUS: J. FEDERALISM 1 (2009).

47. *See* NORTH ET AL., *supra* note 17, at 18–21.

48. *See* Levinson, *supra* note 17, at 23–29; *see also supra* Part I.A.

49. "Constitutional design should also take into account the probable consequences of the design itself for future factional alignments." LUTZ, *supra* note 42, at 206.

50. *See* Calvert, *supra* note 28. In a recent article, Daryl Levinson extends this argument in ambitious, provocative directions, depicting, first, the logic of interinstitutional strategic behavior and, second, the mechanisms which entrench both arrangements and policies. *See* Levinson, *supra* note 17, at 681–91. The basic analysis is by and large impeccable; however, significant questions remain. For one thing, decisions to persist in the entrenchment of these institutions (note that, within the basic rational choice framework which Levinson operates, these decisions are purposive and carried out with full information) will take account of the tradeoff between short-term and long-term agendas. Political resistance will be overcome, this logic suggests, "by a higher-order willingness to support the institutional decision making process that generates the same set of outcomes." *Id.* at 696. But here Levinson moves rather seamlessly from the nature of constitutional commitment to the apparatus of certain distinct institutions crafted in the shadow of this commitment. *Id.* at 681–91. Institutional constructions are the product of *infra*-marginal decisions; the logic of structure-induced equilibrium supposes that the institutions which become entrenched do so because they are (1) in the strategic interest of political officials to create, and (2) not in the strategic interest of officials to dissolve or recreate. It is precisely the circumstances for deciding when institutions must be replaced, according to these rational actors, by new institutions that call for more nuanced analysis. Levinson makes the essential point that officials and citizens will decide these matters in accordance with the logic of constitutional commitment and the "r" trio (reciprocity, repeat-play, and reputation), see *id.* at 684; but which particular institutions are more or less likely to realize the agendas of ensuring this fundamental commitment? That is the meaty question teed up by Levinson's comprehensive analysis of constitutional commitment. We need more, however, by way of answer than the claim "that political arrange-

that policies emerging from the legislature are optimal in the Condorcet winners sense.[51] This is advantageous from the standpoint of the citizenry, on the assumption that we want, *ceteris paribus*, policies which are more rationally tied to the discernible preferences of the public. As Elkins, Ginsburg, and Melton put it:

> Constitution-particular institutions will tend to reinforce existing political arrangements. As these collateral institutions develop, they develop constituencies that invest in their processes and structures, and will resist efforts to overturn or modify basic structures too drastically. . . . Tying actors' hands with respect to the rules of the game compels them to compete with more democratic methods.[52]

It is also important to understand that a successful constitution must not only be the sum of its various functioning parts but should be understood as a complex piece of machinery in which the parts should work effectively in tandem.[53] One element often presupposes and requires another. The basic logic of checks and balances in the federal constitutional context, including the horizontal separation of powers, federalism, and the structure of legislative lawmaking, is built on the notion that the various constitutional provisions work synergistically with one another and do so in order to meet the conditions of stability and progress noted above.[54] Less obviously, but perhaps no less importantly, the Bill of Rights functions to ensure both complicity with the overarching constitutional mission and also the realization of its general principles.[55]

The discussion thus far has emphasized, rather abstractly, conditions and elements of constitutionalism, with an occasional focus on the U.S. Constitution. There is nothing unique, however, about our national Constitution; the conditions for constitutional stability are generally applicable. But insofar as my subject here is *state* constitutional failure, I must turn to the question of why state constitutions are especially worthy of attention. What is in the nature of state constitutionalism that frames a distinct inquiry into constitutional objectives and the right measure of

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ments . . . can become psychologically and sociologically embedded in such a way that they are no longer experienced by actors as constraints or even as matters of choice." *Id.* at 691.

51. *See* Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 155–59 (1992); *see also* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 67–81 (1982).

52. ELKINS ET AL., *supra* note 12, at 20.

53. *See generally* ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL (2007).

54. *See supra* Part I.A.

55. A point made cogently, albeit outside the rational choice paradigm, by Akhil Reed Amar. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 313–47 (2005).

whether and to what extent these objectives have been realized in the processes of governance?

II. HOW ARE STATE CONSTITUTIONS SPECIAL?

A. State Constitutions and U.S. Constitutionalism

State constitutions are important elements in the collective structure of U.S. constitutionalism. While this structure is built upon the union of states created in the late eighteenth century,[56] it remains unequivocally so that many aspects of public governance in the United States are dealt with primarily, and in some cases even exclusively, by state governments under the rubric of state constitutions.[57] This is not merely the result of inattention on the part of the national government; of course, public power under state constitutional direction does more than fill a lacuna in the general scope of public power nationally. As political scientist Donald Lutz insightfully explains, state constitutions are best understood as part of a larger constitutional framework constructed by the framers of a much earlier generation, a framework which was discernibly and intentionally left incomplete.[58] Just as the constitutional amendment process would be expected to help accomplish the objective that this "experiment that needed careful control and some means for future adjustment," so, too, would "[p]utting significant power in the hands of state government" through a rich, evolving process of state constitutionalism.[59] State constitutional power, in this account, is not the power which is simply left over when federal power under the U.S. Constitution runs out; rather, state constitutions function to complete the constitutional text.[60]

56. The story is an elaborate one, of course, assembled in critical politico-legal "chapters," beginning with the founding period, continuing through the periodic admission of new states into the Union, and shifting as a result of key ruptures in U.S. governance, perhaps most notably during the Reconstruction period, where the fundamental structure of national citizenship was solidified and where the Confederate states were readmitted to the Union. *See generally* WOOD, *supra* note 35. And it is a story that comes in different shades and colors. *Compare* SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 1–25 (1993) (describing the national idea in U.S. politics), *with* DANIEL J. ELAZAR, THE AMERICAN CONSTITUTIONAL TRADITION 169 (1988) (describing the federal constitution and government as "incomplete and need[ing] the states to be complete").

57. *See* TARR, *supra* note 11, at 6–28 (exploring the distinctiveness of state constitutionalism); WILLIAMS, *supra* note 11, at 15–36 (describing the form and functions of the other U.S. constitutions); John Kincaid, *State Constitutions in the Federal System*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 12, 14 (1988) (describing state constitutional law as "a beehive of activity").

58. Donald S. Lutz, *The United States Constitution As an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988). *See also* WOOD, *supra* note 35.

59. Lutz, *supra* note 58, at 32.

60. While this point would take more reflection to unpack with any sophistication, the invitation by Michael Dorf and Charles Sabel to consider modalities of what they call "democratic experimentalism" fits well into this conception of state constitutions as completing the U.S. Constitution's larger constitutional ambitions. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Federalism is concerned, after all, with the demarcation of power—and thus the separation of spheres of sovereignty—between the federal and state gov-

This is an idealized rendering, to be sure, of what state constitutionalism is or can become. The question remains of how successful state constitutions are in performing these ambitious tasks. Scholars have expressed skepticism about the general condition of modern state constitutionalism, noting that the state constitutional law is "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements,"[61] and that states constitutions are "mostly anchor and little sail."[62] In a somewhat related vein, influential critics of U.S. federalism devalue the U.S. Constitution's historic demarcation of federal and state powers, believing that such a scheme is deeply anachronistic. Both views are orthogonal to my main point, however, which is that state constitutions remain relevant as documents which forge state and local government,[63] empower institutions to act on behalf of the respective people of the fifty states,[64] regulate the conduct of important state institutions,[65] and prescribe individual rights.[66] And while it is fashionable to attribute the renaissance in state constitutional studies to Justice William Brennan's lodestar 1977 *Harvard Law Review* article,[67] state constitutions have been critical parts of U.S. legal architecture since the beginning of the republic. They remain so today.[68]

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ernments. Democratic experimentalism, as Dorf and Sabel explain, better incorporates the potentialities of local knowledge to further aims constructed by democratically authorized decision makers at a more central level. Just as this knowledge contributes to the completion of the general goals mapped out by the polity through whatever configuration of public deliberative processes are appropriate, state constitutions can function to fill in larger sociopolitical goals while also innovating the mechanisms of policy implementation and governmental performance. Professor Heather Gerken has something similar in mind, albeit framed in the language of constitutional federalism, as she writes of the virtues of federalism "all the way down," that is, the consideration of subnational governance schemes as superior mechanisms for realizing salutary aims. *See generally* Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

61. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

62. Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, *in* TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS 388, 411 (Paul Finkelman & Stephen E. Gottlieb eds., 1991). For a famous, early statement reflecting this view, see ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 148–52 (Henry Reeve trans., 1839) (1835) (giving reasons for his view "that the Federal Constitution is superior to all the Constitutions of the States").

63. *See generally* TARR, *supra* note 11, at 19–20; Michael E. Libonati, *Intergovernmental Relations in State Constitutional Law: A Historical Overview*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 107 (1988).

64. *See generally* WILLIAMS, *supra* note 11, at 247–81; W.F. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201 (1915). *See also infra* notes 69–72 and accompanying text.

65. *See generally* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 97–136 (2006); WILLIAMS, *supra* note 11, at 235–45 (describing the state constitutional distribution of powers).

66. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 25–26 (2005) (noting that every state constitution "enumerates and protects a set of common, basic liberties"); TARR, *supra* note 11, at 11–13.

67. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

68. As G. Alan Tarr describes it: "No longer are the states merely called on to address their traditional responsibilities. The federal government has devolved new responsibilities for policy development and implementation to the states . . . . The states are therefore being expected to address new problems and to generate novel solutions for long-standing, intractable ones." Tarr, *supra* note 8, at 4;

B. Ends and Means

State constitutions in the U.S. system have several overlapping functions. At the very least, state constitutions configure the arrangements of *intrastate* governance and limit the exercise of state and local governmental power.[69] State-to-state differences mean that the specific objectives of a particular constitution will track the hopes, dreams, and plans of the state citizenry. Yet, we can generalize in useful ways about the governance objectives of state constitutions across the nation. A core function of all state constitutions is to arrange government institutions and processes in order to further the objectives of the polity.[70] These arrangements will involve both the *creation* of powers[71]—as in the creation of the police power in order to establish plenary authority to govern[72]—and the delineation of *limits* to the exercise of those powers.

To what end are these broad powers directed? Certainly toward the safeguarding of public welfare, at least insofar as such "safeguarding" is within the purview of state, rather than national governance. There is a more ambitious rendering of state governmental power, however, which finds support in the modern historiography of state constitutional development. Various scholars note that the eighteenth century project of constitution making was an essentially progressive one, with the goal being to facilitate social and economic progress through an active government.[73] Progressive state government—which Daniel Elazar goes so far

see also FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 8–14 (2006). We can broaden this point to include the values attendant to federalism more generally, of which state constitutionalism is a key element. *See generally* ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS (2009).

69. *See generally* WILLIAMS, *supra* note 11, at 3 ("A state constitution serves as a charter of law and government for the state—the supreme law of the state—and prescribes in more or less detail the structure and functions of state and, sometimes, local government.").

70. *See* ELKINS ET AL., *supra* note 12, at 38–39.

71. By contrast to the national Constitution, the regulatory powers created by state constitutions are plenary; that is what we mean when we say that the state governments have the "police power," which is the delegated power to regulate the health, safety, and welfare of citizens without the need for a specific constitutional grant. State constitutions, as the saying goes, are documents of *limit*, not *grant*.

72. *See, e.g.*, DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830 (2005) (describing the multilayered function of police power in constitutionalism). For earlier statements, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572–97 (1868); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904).

73. *See, e.g.*, William B. Munro, *An Ideal State Constitution*, 181 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 3 (1935) ("The idea that state governments shall confine themselves to a minimum of activity has long since passed into the discard. It has given place to the doctrine that these governments should busy themselves with all sorts of regulatory functions in the interests of the collective citizenship . . . ."); Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 57, 64–66 (1982).

as to see that state constitutions are concerned with moral perfectionism[74]—was embodied in state constitutions precisely because the national Constitution had more limited aims.[75] This is not the only way to see the origins of state constitutional development to be sure;[76] and this is not the place to resolve the complex debate over the global purposes of state constitutional development in the eighteenth and nineteenth centuries.[77] But I note the debate only to highlight the point that an ambitious view of state constitutional functions does sharpen our perspective about state constitutional performance. If we have high aims for constitutional achievement, we will have a particular picture in mind for how we want our constitutions to perform.[78] Moreover, we will have special concerns about the capacity of state constitutions, as distinct from the federal constitution and other national sources of law, to realize these objectives within the structure of U.S. politics.[79]

C. Control and Governance

State constitutions are not only about authorizing public authorities to wield power, they are concerned as well with structuring appropriate limits on that power. In our attention to constitutionally created public authority, we should not lose sight of the fact that "[p]ower is also limited through specific prohibitions on decision outcomes reached by those in power."[80] The constitutional law of the states is fundamental law. It sets out (sometimes in general and other times in specific terms) the parameters of state and local governance. State constitutions create the basic in-

74. *See* Daniel J. Elazar, *Forward: The Moral Compass of State Constitutionalism*, 30 RUTGERS L.J. 849, 862 (1999) (describing purposes of state constitutions as including "building a certain kind of citizenry").

75. *See* GARDNER, *supra* note 66, at 154–59 ("Every single state constitution, without exception, grants power to each branch of state government in one immense, undifferentiated, and unlimited block. . . . State legislatures may, quite simply, take up any subject at all, without limit."); TARR, *supra* note 11, at 7 ("[S]tate governments have historically been understood to possess plenary legislative powers—that is, those residual legislative powers not ceded to the national government or prohibited to them by the federal Constitution."). The classic statement of this view is in COOLEY, *supra* note 72. In speaking specifically of state legislative power, Justice Cooley observes that "[t]he legislative department is not made a special agency, for the exercise of specifically defined legislative powers, but is entrusted with the general authority to make laws at [its] discretion." *Id.* at 87.

76. *See generally* Dodd, *supra* note 64.

77. I explore some of these themes in Daniel B. Rodriguez, *William J. Brennan Lecture: Are State Constitutions Fundamentally Progressive Documents (And Why Should We Care?)*, 36 OKLA. CITY U. L. REV. (forthcoming Fall 2011).

78. *See* GRAD & WILLIAMS, *supra* note 68, at 12 ("Since effective state constitutional change requires a detailed substantive examination of how the state's business of government may best be structured in the light of the functions it must fulfill and the needs it must serve, the state constitution-maker must first determine the precise nature of such needs and functions.").

79. Likewise, Frank Grad and Robert Williams describe state constitutions as "tools or instruments of government, the 'suitability and adaptability' of which 'can only be gauged in the relationship to its set task.'" WILLIAMS, *supra* note 11, at 360 (quoting GRAD & WILLIAMS, *supra* note 68, at 8).

80. LUTZ, *supra* note 42, at 17.

struments of intrastate governance.[81] They do so not only by the delineation of the scope and limits of official authority[82] but also through the express establishment of appropriate institutions to facilitate the state's variegated policy objectives. To whatever ends these institutions direct their energies, a core function of state constitutions is the establishment of these complex local governing institutions.[83]

The instruments of governance crafted by state constitutions are inevitably incomplete, however. For example, state constitutions typically contemplate that significant regulatory and administrative power will be exercised by municipal governments. These governments play an extraordinarily important, multilayered role in regulation and administration, both of statewide programs and also of programs originating within these municipalities.[84] To be sure, local governments are properly described, as the nineteenth century treatise writers posited, as "creatures" of state government.[85] But they are creatures whose structured power and practical functioning is rendered in ways frequently remote from the guidelines of state constitutions.[86]

In a related vein, special purpose governments have taken on an increasing amount of intrastate regulatory authority in recent decades.[87]

81. *See, e.g.*, Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 27, 31 (1982) ("A written constitution is a political technology.").

82. *See* WILLIAMS, *supra* note 11, at 362 ("State constitutions . . . serve primarily to limit the plenary authority retained by states at the time of formation of the Union.").

83. *See id.* ("State constitutions structure a subnational government—a government functioning within a government . . . .").

84. *See generally* LYNN A. BAKER & CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 46–51 (4th ed. 2010) (presenting comprehensive data on the "forms and structures of local government" in the United States). There is a separate normative literature, growing steadily, emphasizing the imperative of local government power in the U.S. constitutional scheme. *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008); David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

85. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); *accord* Williams v. Mayor & City Council of Balt., 289 U.S. 36 (1933); Trenton v. New Jersey, 262 U.S. 182 (1923). For a classic, early statement of this position, see Howard Lee McBain, *The Doctrine of An Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190 (1916).

86. That is to say that state constitutions, which create the general architecture within which local governments exercise power, are seldom explicit about what specific roles and responsibilities these institutions of government have in the regulatory scheme of the state. *But see infra* text accompanying notes 123–136 (describing tax and expenditure limitations and their impact on local control). In addition, local governments frequently exercise power under home-rule provisions of state constitutions. *See generally* DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001). Depending upon the type of home rule at issue, this may fracture, to some degree, the responsibility of governing and may further distance local policy making from discrete constitutional commands. *See infra* text accompanying notes 137–141 (discussing home rule in the context of state constitutional performance).

87. There are over 37,000 such governments in the United States, according to the 2000 census data. *See* BAKER & GILLETTE, *supra* note 84, at 50–51; *see also* KATHRYN A. FOSTER, THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT (1997).

The growth in relevance of such governments is a function of several circumstances at work, some involving comparative institutional competence and others involving fiscal legerdemain.[88] For whatever combination of reasons, state and local officials are relying to a great degree on these special-purpose governments to implement wide swaths of regulatory policy. An adequate accounting of the relationship between state constitutions and substate governance institutions, such as municipal governments and public authorities, is beyond the scope of this Article. I note these complex phenomena in passing, however, to underscore the point that state constitutions and the institutions created thereby are best viewed as incomplete instruments of governance.

D. "A Polity Within a Polity": Identity and Interest

The principal function of state constitutions is to create instruments of governance by creating institutions which yield public power on behalf of the state and, moreover, to create the rules of the game in which these institutions operate. But to what purpose is this structure directed? Presumably, it is toward the welfare and well-being of the state's polity. At some level of generality, this is undoubtedly true. "State constitutions," writes Robert Post, "face a fundamental challenge: They must constitute a polity within a polity. They must establish a distinctive political culture within the confines of the encompassing and transcendent political culture of the nation."[89]

States, however, are not islands on their own; they are nested not only in a federal system with constraints set by the national Constitution but also in a system with forty-nine other states respectively. *State constitutions help to facilitate intrastate communities of interest*.[90] This concept trades on the idea commonly discussed in the ample literature on constitutionalism generally, that is, that constitutions function to ratify and promote the cultural identity of a common people with shared interests.[91] While the prevailing view of the national Constitution is that the U.S. constitutional order, by design and effect, promotes this national identity,[92] it is far less obvious that state constitutions can and do have a similar objective. The notion that each state constitution reflects the distinct

88. *See generally* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW (7th ed. 2009) (describing reasons for the creation of special-purpose governments).

89. Robert C. Post, *The Challenge of State Constitutions*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 45, 46 (Bruce E. Cain & Roger G. Noll eds., 1995).

90. *See id.*

91. *See* Elazar, *supra* note 74.

92. On the role of constitutions in constituting the polity, see ELKINS ET AL., *supra* note 12, at 20–21.

identity of its people is almost certainly misleading.[93] Few believe that the differences among state citizens are sufficiently salient and intractable to warrant distinct constitutional mechanisms to foment real difference. We can reject here—as others have rejected plausibly before—that there are meaningful intrastate communities of identity that the (constitutional) law ought to value.[94]

The community-building idea, however, can be reformulated in a way that makes better sense of state constitutional purpose. We need to sort out identity from interest. We should understand that community in the intrastate context is not principally a community of identity, but one of *interest*.

Communities of interest are collections of individuals assembled within geographically or legally defined borders who share common, collective interests. Employees of a company are an example of this; students in a university setting are another. Individuals in these settings may be enormously diverse and share little in common other than matters attending particularly to the work or educational setting. Still, these settings are enormously important and enduring. The communities of interest that are configured within the employment or educational settings are, while not limitless, important. More to the point, they are protected to a greater or lesser degree through state constitutional and statutory law.

State citizenship both defines and fosters communities of interest.[95] Individuals yoked together as citizens of a state—even if this citizenship is transient—have common agendas and objectives. For example, the decision of land-grant colleges and universities to restrict access to state residents (or, at the very least, accord favorable financial treatment to in-state residents) will generate a common interest in maintaining this system against efforts to widen access.[96] State citizenship is an artificial construct; it hardly matters in the grand ways that national citizenship does, for example, in eligibility for military service or certain governmental

93. *Compare* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 7–12 (2008) (describing the nationalization of culture and policy), *and* SCHAPIRO, *supra* note 68, at 25–26 (same), *with* BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART (2008) (noting salience of regional differences), *and* ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO (2008) (same).

94. *See, e.g.*, Gardner, *supra* note 61; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389 (1998).

95. I use residency and citizenship interchangeably here. *See generally* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

96. For a handy guide to residency requirements for in-state tuition at state colleges, see *In-State Tuition and State Residency Requirements*, FINAID, http://www.finaid.org/otheraid/stateresidency.phtml (last visited June 8, 2011).

employment. But that it matters at all—as it clearly does in key contexts[97]—is enough to generate communities of interest.[98]

This point is relatively straightforward: state citizens have interests that derive distinctly from this citizenship and will, on occasion, drive political judgment and strategy. What is less apparent is precisely how state constitutions facilitate these communities of interest. State constitutions function in part to protect, preserve, and further these communities of interest. Of course, these communities are ever evolving; they are contingent on shifting judgments and allegiances both within the community and by outside decision makers whose views bear on the prerogatives of these communities. A state constitution functions successfully where it furthers intrastate interest communities, taking full account of the dynamic nature of these communities.[99]

The main way state constitutions do so is twofold. First, state constitutions delineate the franchise and thereby make clear whose interests matter for the purpose of state policy making. Second, and relatedly, state constitutions and the institutions they create establish mechanisms of access to political power and influence. Only state citizens can vote in state elections; accordingly, state political officials will, to the extent possible, respond to the interest of these citizens; they will presumably do so at the expense of folks just passing through.[100] The exportability of state and local taxes is just a complex economic version of this rather obvious insight.[101] In the state political context, you are, like the contestants on Project Runway, either *in* or you're *out.* Whenever you have folks on both sides of the divide, you have communities of interest.

State constitutions are frameworks in which key matters of state governance are carried out. They structure the (incomplete) mechanisms for authorizing and limiting public power and they facilitate communities of interest within the state. Having in mind the purposes of state consti-

97. *See, e.g.*, Snowden v. Hughes, 321 U.S. 1, 6–7 (1944) ("The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but *does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law*. The right to become a candidate for state office, like the right to vote for the election of state officers, is a right or privilege of state citizenship, not of national citizenship . . . ." (emphasis added) (citations omitted)).

98. To be sure, the U.S. Constitution imposes important limits on states' ability to discriminate in the service of these communities of interest (or for any other purpose). *See generally* Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277.

99. "[C]onstitutional design requires careful attention to the structure of interests and therefore the nature of factions." LUTZ, *supra* note 42, at 206.

100. *See generally* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) (describing this phenomenon in the context of municipal boundary law).

101. On tax exporting, see Robert P. Inman & Dan L. Rubinfeld, *Designing Tax Policy in Federalist Economies: An Overview*, 60 J. PUB. ECON. 307, 322–25 (1996).

tutions, and also the conditions for constitutional stability and progress, we can move next to a close examination of constitutional performance.

III. CONSTITUTIONAL PERFORMANCE

Until now, we have been exploring the qualities that are necessary to ensure a stable constitutional system and the general functions of constitutional government in the states. We are ready to turn to the more practical question of how well or how poorly state constitutions do in realizing these general and specific objectives.

The underlying assumption here is that a constitution is designed to work.[102] Thus, how well a constitution performs is just another way of asking the question of how well, given the overall constitutional framework, does state government work on behalf of its citizens. The constitution establishes a framework of governance through a delineated set of rules and principles. Some of the rules—indeed, not a small number, when we look closely at the fifty state constitutions[103]—are laid down in clear text (as, for example, rules governing how a bill becomes a law); other rules grow out of plausible interpretations of the constitutional text and context;[104] and, arguably, some are delineated in other sources of law, including legislation which give effect to these principles.[105] These sources of fundamental law make up the information, the blueprint of sorts, which underpin credible assessments of constitutional performance. Matters of assessment are deeply complicated and surely beyond the scope of what constitutes normal legal analysis. But, in any event, any serious effort to examine and evaluate the performance of a constitu-

102. *See supra* text accompanying note 50.

103. State constitutions are famously verbose when considered in comparison to the national Constitution. For information on the word length of U.S. state constitutions, see 40 COUNCIL OF STATE GOV'TS, THE BOOK OF STATES 10 tbl.1.1 (2008) (providing data on the word length of each state constitution).

104. Some may reflect what Mitchell Berman labels "constitutional operative propositions," to describe "the judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision . . . ." Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004). This does not necessarily exhaust the category of such principles, however. For example, principles crafted and implemented by nonjudicial government officials may credibly be viewed as constitutional rules. In some instances, they may reflect the interpretation given by these officials to express rules (an analogue to Berman's label); in other instances, however, they may emerge as a rule from the immanent principles of the constitutional document more generally, as with, for example, the principle under which the governor exercises certain managerial control over executive officials within his sphere or the principle of separation of powers. For my purposes, it is sufficient to say that constitutional rules emerge from a myriad of sources—a view that is in conflict only with a rigid textualist account which views constitutional rules as exhausted by the express words of the document.

105. Influential recent accounts of this observation in the context of the U.S. Constitution include WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010), and Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007). In the non-U.S. context, see Matthew S.R. Palmer, *Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution*, 54 AM. J. COMP. L. 587 (2006).

tion in realizing the objectives sketched above requires an inquiry into whether and to what extent the design and implementation of the written constitution matches up to the state's manifest principles of constitutional government.

First a caveat: I leave mostly by the side of the road the question of what particular principles are embodied in one or another state constitution. Answering this question would require the impossible, that is, an exegesis of each state constitution, its history, philosophy, and structure. We might rightly despair at the possibility of reaching general conclusions about *the* principles of all state constitutional governments.[106] Nonetheless, we can make some generalizations about constitutional performance by paying attention to problems which plague public governance in many U.S. states. To be able to reach cogent conclusions about constitutional success and failure, we should explore the more conspicuous problems of contemporary state governance and consider whether and to what extent they share certain features in common. These are *shared* predicaments, revealed in structural and doctrinal elements common to many state constitutions. These predicaments impact constitutional performance; and the connection between these governance problems and the content of state constitutions and constitutional law shed light on the conundrum of why state constitutions fail. An inquiry into constitutional performance will frame our analysis of failure and also reform.

In this Part, I will describe three sets of constitutional problems. Some of these problems have their origins in deep constitutional structure; others emerge principally from judicial interpretation; still others are the product of an admixture of doctrine, design, and political practice. I am principally invested here in describing the nature of the key problems of constitutional performance and, in doing so, shaping a helpful vocabulary in order to better understand why and how constitutions fail to perform the tasks essential for realizing the objectives of the document and the objectives of constitutional government more generally.

A. Incorrigibility

In some circumstances, a constitutional rule, however clear, is in tension with the document's underlying principles. The governance problem emerges from a rule or structure that is counterproductive when

106. Which is not to say, however, that we ought not to think about state constitutionalism from a "trans-state" vantage point. *See* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271 (1998); *see also* James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 126–27 (1998) (associating the emphasis on constitutional universalism with Thomas Cooley); Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

measured against the principles and functions of the constitution. Although the rule is being implemented essentially as designed, the central problem is that the rule frustrates the overarching purposes of the constitution and the constitutional order. Let us call this the problem of *incorrigibility*.

A salient current example of this incorrigibility problem is the requirement of legislative supermajorities for certain fiscal decision making required by many state constitutions. In nine U.S. states, a supermajority of the legislature must sometimes be secured in order to reach a budget agreement.[107] Moreover, in fifteen states, a supermajority is required for at least some tax increases.[108] The vexing problem of supermajority requirements has occasioned various reform efforts, including the recent, unsuccessful initiative proposal in California, and the related efforts by interest groups in that state to call for a constitutional convention to, among other reforms, eradicate these requirements.[109]

At an abstract level, the supermajority requirement is not unusual as a functional device to limit taxing and spending. It reflects a judgment on the part of constitutional architects that the government's tendency to overspend on public initiatives should be reined in by deliberate rules.[110] This judgment, however, is in tension—hence the label "incorrigible"—with the actual performance of this rule and, moreover, with the fundamental commitment tacit in every constitutional scheme that enacted public policy should be capable of being properly implemented.

The principal performance deficit emerges from an unintended consequence of the supermajority rule. We know from the positive political theory of lawmaking that, although designed to rein in legislative spending and taxing excesses, supermajority requirements, paradoxically, contribute to increases in aggregate spending.[111]

107. For a table listing these states and detailing the requirements for budget enactments, see *Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=12654 (last updated Oct. 2008).

108. *See Legislative Supermajority to Raise Taxes—2008*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/?TabID=17421 (last visited June 8, 2011).

109. Some state courts have taken matters into their own hands, reading the supermajority requirement for budget agreement out of their constitution in order to realize other goals. *See, e.g.*, Guinn v. Legislature of Nev., 71 P.3d 1269 (Nev. 2003). This simply trades off one problem (incorrigibility) for another (fidelity). This is not to say with confidence that the tradeoff is not warranted, all things considered, but simply to say that the conundrum which gives rise to this consideration illustrates failures in the state constitutional structure.

110. *See generally* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 720–22 (2002) (describing James Madison as "Father of the Constitution and Mr. Supermajority").

111. *See, e.g.*, Mathew D. McCubbins, *Party Governance and U.S. Budget Deficits: Divided Government and Fiscal Stalemate*, *in* POLITICS AND ECONOMICS IN THE EIGHTIES 83 (Alberto Alesina & Geoffrey Carliner eds., 1991); *see also* Meagan M. Jordan & Kim U. Hoffman, *The Revenue Impact of State Legislative Supermajority Voting Requirements*, 10 MIDSOUTH POL. SCI. REV. 1 (2009); Brian G.

The logic of this paradox is that both parties compromise in order to realize objectives that they would otherwise be unable to achieve given the high bar set by the supermajority requirement. With a simple majority, the majority party can implement its priorities; the only challenge is maintaining discipline within the party. With bipartisanship to some degree required to secure agreement under supermajorities, there are gains from trade. These gains will result in more, rather than less, spending.[112] Moreover, supermajority requirements fracture the accountability between elected representatives and the citizenry.[113] The essential problem is that voters cannot know for sure who in the legislature is responsible for fiscal decisions. Supermajority requirements create obstacles for agreement and, in the worst case, gridlock. The result is, even aside from the obvious costs to effective policy making, "finger pointing" and an abnegation of responsibility.[114] In such an environment, it is rather unrealistic to suppose that voters will practically be able to hold their officials accountable.

A second, and more global, incorrigibility problem with supermajority requirements is that it hampers the ability of legislators to implement enacted public policy. Why, given the framers' preference for supermajority, is this a problem of incorrigibility? The principal difficulty here is the gap left between the governance objectives of the state as manifest in its constitution and rules which make these objectives much harder to realize. "We the People" of Nevada or California are entitled to have minimal government if that be our aim; however, this preference should instead be reflected in a particularly powerful constitutional rule such as a two-thirds requirement for budget agreement, but should be manifest in a comprehensive series of constitutional rules which are internally logical and externally transparent and which represent clear directives to limit the scale and scope of government. After all, requiring supermajorities for taxing and spending decisions does not, in and of itself, make it more difficult for legislatures to create policy, that they can do through ordinary majority rule. What it does do is decouple decisions about policy from fiscal decision making about implementation.[115]

Another example of incorrigibility is the modern innovation of legislative term limits. The impetus between the term limits movement was

Knight, *Supermajority Voting Requirements for Tax Increases: Evidence from the States*, 76 J. PUB. ECON. 41 (2000).

112. *See* John W. Ellwood & Mary Sprague, *Options for Reforming the California State Budget Process*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 89, at 329, 348.

113. *See, e.g.*, Mathew D. McCubbins, *Putting the State Back into State Government: The Constitution and the Budget*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 89, at 353, 364–66.

114. *Id.* at 366.

115. In this respect, supermajority requirements are distinct from, say, the filibuster rule in the U.S. Senate.

to substitute professional legislators with new, more transient political leaders subject to a different confluence of incentives and pressures.[116] The result, however, has been debilitating for legislative policy making and the separation of powers in the term-limited U.S. states. Close looks at the data by a number of prominent political scientists has revealed a number of significant effects on legislative performance and public governance.[117] First, there is an impairment of legislative accountability to the electorate;[118] second, there is a decline in the ability of the legislature to compete effectively with the executive branch and therefore an impairment of the system of checks and balances reflected in state constitutions through their insistence on a separation of powers;[119] third, there is an increase in legislative polarization over the terrain of policy making;[120] fourth, there is a decline in policy innovation;[121] and, finally, there is a

116. *See, e.g.*, GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY (1992).

117. The principal contemporary studies include BRUCE E. CAIN & THAD KOUSSER, ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS (2004); THAD KOUSSER, TERM LIMITS AND THE DISMANTLING OF STATE LEGISLATIVE PROFESSIONALISM (2005); THE TEST OF TIME: COPING WITH LEGISLATIVE TERM LIMITS (Rick Farmer et al. eds., 2003); INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS (Karl T. Kurtz et al. eds., 2007). Another key collection of studies, although somewhat dated in light of growing data about the actual impact of term limits in U.S. states, is LEGISLATIVE TERM LIMITS: PUBLIC CHOICE PERSPECTIVES (Bernard Grofman ed., 1996).

118. *See* JOHN M. CAREY, TERM LIMITS AND LEGISLATIVE REPRESENTATION (1996); Elizabeth A. Capell, *The Impact of Term Limits on the California Legislature: An Interest Group Perspective*, *in* LEGISLATIVE TERM LIMITS, *supra* note 117, at 67; Linda R. Cohen & Matthew L. Spitzer, *Term Limits and Representation*, *in* LEGISLATIVE TERM LIMITS, *supra* note 117, at 47. *But see* Kangoh Lee, *An Analysis of Welfare Effects of Legislative Term Limits*, 110 PUB. CHOICE 245 (2002) (showing that the welfare effects of term limits depend on the shape of the voters' utility function). The argument is that term limits have fragmented representative democracy by limiting one form of accountability between lawmakers and the citizenry. Elkins, Ginsburg, and Melton analogize legislative term limits to formal requirements of constitutional sunsetting. ELKINS ET AL., *supra* note 12, at 13–17. Indeed, as they write, "[t]erm limits for officeholders may provide an even more extreme institutional limitation on choice than those proposed by Jefferson for laws." *Id.* at 14.

119. *See, e.g.*, KOUSSER, *supra* note 117, at 151–76 (concluding that "[e]very state with term limits shows a substantial decline over the past decade in how much legislatures are able to alter the governor's requests . . . ."); John M. Carey et al., *The Effects of Term Limits on State Legislatures*, 23 LEGIS. STUD. Q. 271 (1998) (concluding that term limits redistribute power away from majority party leaders and toward governors); Richard J. Powell, *Executive-Legislative Relations*, *in* INSTITUTIONAL CHANGE IN AMERICAN POLITICS, *supra* note 117, at 134, 135–43 (describing the "changing balance of power").

120. *See* CAIN & KOUSSER, *supra* note 117, at 61–70. They identify three ways that term limits increase aggregate levels of partisan polarization: first, "[b]y expelling members just as they become more centrist, term limits ensure that a house will be composed only of newer, more partisan legislators;" second, "short terms of service in the Legislature have been attractive mostly to ideologues;" and, finally, "new members today behave just like new members in previous decades did but that react to the way term limits dramatically cut their time horizons." *Id.* at 63; *see also id.* at 61 (quoting a former Senate committee chair who declares: "The single biggest effect of term limits is increased partisanship. You don't know your colleagues well, and you don't treat them as part of your future.").

121. The impact on policy innovation presents its own problem, although, admittedly, whether this is a serious problem is somewhat in the eye of the beholder. What, after all, are the precise values of innovation? Lastly, the polarization of the legislature impacts the constitutional ideal of workable governance by making it hard to achieve policies which reflect the agenda and objectives of a wide,

general deterioration in the quality of legislative policy making.[122]

What can we say generally about the impact of these term limits on the problem of incorrigibility? To answer this question credibly, we need to frame the basic claim on behalf of term limits and put it into the context of state constitutional governance. Term limits were intended to replace professional legislators with fresh blood; the objective was to increase turnover and pursue objectives which long-term legislators, arguably beholden to special interests and preoccupied with the quest for reelection, lacked the incentive to do. These advantages, to whatever end, were ultimately realized at the expense of certain legislative qualities, qualities which map onto the governance objectives sketched above, that is, providing a check on the executive branch, reducing partisan struggles and thereby achieving compromise, creating innovative policy, and legislating skillfully and on the basis of accumulated experience and expertise. These goals are congruent with both the larger constitutional objective of facilitating sound governance and with the critical goal of providing a suitable structure of checks and balances. Structural changes which undermine these goals undermine, in turn, the larger constitutional objective. Without denying that there are both costs and benefits to institutional innovation, the costs borne here are centrally concentrated around governance matters. Term limits are incorrigible; that is, they rest uneasily with the principal objectives of salutary constitutional governance. And, in assessing the growing evidence that they are hindering the processes of good legislating, they contribute to constitutional failures.

Supermajority requirements and term limits illustrate well the point that performance deficits frequently emerge when constitutional reformers develop rules which are palpably in tension with the underlying principles of the state constitution. A constitution fails where there is an insufficient congruence between the rules spelled out in the document and the principles embodied in the document. Of course, where the mismatch is severe, we can rightly ask the question: what is our basis for be-

diverse range of public preferences—what Rousseau called the "general will." *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., Penguin Books 1968) (1762).

122. As one Senate committee consultant colorfully put it: "Long-term issues get ignored, and legislation is smaller and crappier." CAIN & KOUSSER, *supra* note 117, at 44. A key measure used in this investigation is the complexity of enacted laws, the supposition being that more prolix bills make the implementation of public policy considerably more problematic. After all, these particularistic bills fracture the connection between legislators and agencies. "Term-limited legislators," write Cain and Kousser, "who know that they will not be around long enough to oversee the bureaucracy's implementation of their legislation may attempt to lock in their intentions by crafting very specific bills." *Id.* at 51; *see also* Thad Kousser & John Straayer, *Budgets and the Policy Process*, *in* INSTITUTIONAL CHANGE IN AMERICAN POLITICS, *supra* note 117, at 148, 148–49; David R. Berman, *Effects of Legislative Term Limits in Arizona*, NAT'L CONF. ST. LEGISLATURES (2004), http://www.ncsl.org/Portals/1/documents/jptl/casestudies/Arizonav2.pdf.

lieving that there are, in fact, general constitutional principles which are being disserved by certain constitutional rules? Yet I want to suppose, as I believe plausible, that often these principles are widely agreed upon and not difficult to identify. Thus the challenge is to determine with some level of specificity, whether the rules track these principles.

To be sure, innovative institutional reform has its place. Moreover, experimentation in governance techniques can be a worthwhile element of such innovation. But the kind of political reform represented by supermajority requirements and term limits is problematic precisely because these emergent constitutional arrangements constrain the ability of governmental institutions to perform as the constitution demands. Adopting these reform strategies brings state citizenry to a fork in the road: either they can move in the direction of a weakened public sphere with roadblocks to policy adoption, or they can move toward legislative flexibility and active governance, movements impeded, if not imperiled, by supermajority requirements and term limits. The problem of incorrigibility is implicated most conspicuously where voters want to have their cake and to eat it, too.

B. Incommensurability

A second aspect of constitutional performance illustrates a different dynamic at work. New rules added to the constitution in order to implement important functions and aims often create deep conflicts between competing, irreconcilable goals. By contrast to the two problems described above, the situation here is one in which there are competing objectives at war with one another, with the war being waged through these conflicting rules. Let us call this the problem of *incommensurability*.

Two related examples come to mind, one from the fabled effort to limit property and other taxes in California through Proposition 13 and the other from the so-called "taxpayer bill of rights" (TABOR) in Colorado. The centerpiece of the so-called "taxpayers' revolt" of the 1970s was Proposition 13, which was enacted in 1978 by a wide majority of California citizens fed up with rising property taxes.[123] The constitutional amendment capped property tax increases and also installed a supermajority requirement for general tax increases.[124] The fallout of this initiative, while slow in coming, was to severely reduce the discretion state and local lawmakers had to raise revenues for public policy objectives, espe-

123. *See generally* Jon Coupal, *The California Tax Revolt*, *in* THE CALIFORNIA REPUBLIC: INSTITUTIONS, STATESMANSHIP, AND POLICIES 187 (Brian P. Janiskee & Ken Masugi eds., 2004).

124. CAL. CONST. art. XIII.A.

cially education.[125] Without much question, Proposition 13 represented a watershed decision regarding tax policy and the role ascribed by a large majority of voters to state and local government.[126] There is precious little evidence that the voters were duped or that they enacted this propelled curtailment of fiscal prerogative by mistake.

At the same time, California voters regularly pushed ahead initiatives that favored education and other social welfare initiatives. Proposition 98, for example, sets aside a big chunk of the state budget for K–4 education;[127] state bonds for education were frequently approved, often by large majorities; and, although this did not reflect an unbroken line, majorities of voters and elected officials enacted expensive policies both before 1978 and for many years thereafter. Clearly, the California electorate and its elected representatives were content to pursue two very different lawmaking tracks. One track reflected skepticism about state fiscal policy, the capacity of state and local institutions to properly tax and spend, and concern about the incentives of governmental decision makers. The other track, however, was optimistic, if not often exceedingly so, about broad governmental initiative. Citizens wanted good schools and, when presented with the choice to spend money to support them, often elected to do so; they wanted environmental protection, augmented criminal law enforcement, and sports and cultural activities and they frequently manifested their commitment to this wish list,[128] even when the budgetary pressures generated by constitutional limits such as Proposition 13 and its progeny made these agendas harder and harder to support.

A similar dynamic was at work in Colorado. In 1992, Colorado voters enacted the TABOR law, a constitutional amendment which significantly capped the rate of spending in the state.[129] The law was designed to significantly limit increases in spending and, by all accounts, it has had the intended effect. Aggregate spending, when compared with other states, has declined significantly. And while the impact of TABOR was blunted somewhat by a strong period of economic growth in the 1990s

125. *See generally* ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 (1995).

126. *See* Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191, 192 (2001) ("Prop 13 marked a watershed moment in the evolution of American attitudes toward government and taxation.").

127. *See* Ellwood & Sprague, *supra* note 112, at 335–36 (describing Proposition 98 and its effects).

128. One significant set-aside was enacted in 2004 when California voters passed Proposition 71: the Stem Cell Initiative. *See Proposition 71: Stem Cell Research. Funding. Bonds.*, CAL. LEGIS. ANALYST'S OFF., http://www.lao.ca.gov/ballot/2004/71_11_2004.htm (last visited June 8, 2011).

129. COLO. CONST. art. X, § 20; BELL POLICY CTR., TEN YEARS OF TABOR: A STUDY OF COLORADO'S TAXPAYER BILL OF RIGHTS (2003), http://bellpolicy.org/sites/default/files/PUBS/annual/2003/TABOR10.pdf.

and into the 2000s, the lingering effect of TABOR is being felt rather acutely.[130]

Both Colorado and California enacted severe tax and expenditure limitations (TELs) through initiative constitutional amendments. Both proposals were designed to cabin expansive state and local spending and keep taxes at manageable levels. The most prominent recent study of the effect of these TELs, however, suggests that Colorado is somewhat anomalous in that these restrictions actually had the effect desired by the voters.[131] The principal explanation is that the political climate in Colorado reinforced the voters' instincts. To put it in terms of the logic of incommensurability, the principles embedded in the Colorado Constitution ran in roughly consistent directions: Voters and their elected representatives reflected a generally consistent set of values, values which preferred comparatively modest increases in spending for social services.[132] "Even though it was externally imposed by a citizen initiative, TABOR set limits that subsequent state lawmakers would want to follow . . . ."[133] California voters and legislators, by contrast, struggled to pursue ambitious spending initiatives in the face of a TEL which restricted their ability to do so. The result, not surprisingly, was efforts at circumvention (implicating the "infidelity" problem described above), accommodation to additional restraints, and ultimately a tug-of-war, very much ongoing, between incommensurate constitutional goals.

This conflict in goals and policy making strategies illustrates a key problem in modern governance. Constituents want active government—though, to be sure, disagreeing upon what exactly activism means in one or another context—but resist protocols which make it possible for officials to raise and spend money for such initiatives. As Donald Lutz puts it, "we invariably want many things and not just one. . . . [T]he value complexity inherent in human hopes leads us to want a state of affairs characterized by many values, not just one, and these values are often contradictory in theory and in practice."[134]

The relative ease with which state constitutions can be reconfigured in order to cement certain political goals, however, makes these docu-

130. *See* BELL POLICY CTR., *supra* note 129, at 6–7.

131. *See* Thad Kousser et al., *For Whom the TEL Tolls: Can State Tax and Expenditure Limits Effectively Reduce Spending?*, 8 ST. POL. & POL'Y Q. 331, 352–54 (2008).

132. This broad and enduring support for TABOR is reflected in the title of a recent *Denver Post* article: Barry W. Poulson, Op-Ed., *TABOR Amendment Has Saved Colorado*, DENVER POST, Oct. 9, 2009, at B11. This is not to say that TABOR lacks vigorous critics. *See* IRIS J. LAV & ERICA WILLIAMS, CTR. ON BUDGET & POL'Y PRIORITIES, A FORMULA FOR DECLINE: LESSONS FROM COLORADO FOR STATES CONSIDERING TABOR (2010), http://www.cbpp.org/files/10-19-05sfp.pdf (last updated Mar. 15, 2010).

133. Kousser et al., *supra* note 131, at 345–52, 354 (analyzing data for twenty states with TELS and finding that only in Colorado did TELs have a significant effect).

134. LUTZ, *supra* note 42, at 213.

ments particularly susceptible to hardwiring and, therefore, entrenches these incommensurable objectives. The paradox is that TELs seem rather easy to get into state constitutions but truly difficult to get out. As the story of Proposition 13 illustrates, it is one thing to resist efforts to raise taxes at one time and for one purpose, while it is another to hamstring government authorities from making taxing and spending decisions when they are undertaken in the service of the contemporary policy preferences of a large majority of citizens.[135] Likewise, it is one thing to push elected representatives to enact a particular policy, for instance, earmarking a significant chunk of the current state budget for K–4 education or for stem cell research, while it is another to add conditions to the state constitution which entrench these policy choices against change through ordinary political processes.[136]

There is yet another constitutional principle at stake in the struggle over fiscal discretion, one that illustrates this problem of incommensurability well. TELs at the state level restrict not only the state legislative and executive branches, but also local governments who make and implement policy under the rubric of the state constitution. In many states, these restrictions are congruent with the basic structure of state and local governance. Local governments, being creatures of state government, exercise delegated powers, while the states can and do circumscribe the scope of local power through various actions. Indeed, local governments are often constrained through legislative nonaction, that is, the absence of delegated power, and, depending upon the contours of the state's preemption doctrine, through some form of field preemption.

Incommensurability becomes a problem in those states which have a structure of state and local governance which follows the constitutional or *imperium in imperio* model of home rule. Under this model of home rule, local governments have a sphere of immunity from state control.[137] The sphere is defined by the courts in interpreting what is or is not a local affair. Municipal home rule is an innovation of the Progressive Era, an innovation designed to entrust localities with major policy decisions, including the basic structure of fiscal decision making.[138] Devolving authority to local governments through constitutional home rule is a delib-

135. *See, e.g.*, Revan Tranter, *Cities, Counties, and the State—From Prop. 13 to 218*, *in* GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE 63, 68–82 (Gerald C. Lubenow & Bruce E. Cain eds., 1997) (describing the aftermath of Proposition 13 and tensions between spending and taxing decision making).

136. *See* Ellwood & Sprague, *supra* note 112; McCubbins, *supra* note 113.

137. *See generally* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337, 1339, 1374–1424 (2009) (describing home-rule provisions in the fifty state constitutions).

138. *See* KRANE ET AL., *supra* note 86, at 11–12; Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057, 1080–1119 (1980); Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 392–431 (1985).

erate strategy to create opportunities for local governments to employ their "local knowledge" to make innovative policy. Although the costs of such innovation on statewide priorities and goals are real, constitutional home rule contemplates that, in the main, these costs will be worth bearing in order to secure the advantages of local discretion.[139] In sum, constitutional home rule reshapes the fiscal relationship between state and local governments. In doing so, it takes away a core part of state constitutionalism, that is, the state legislature's plenary authority.[140] Taxing authority has typically been treated as a power within the discretion of localities under home rule.[141]

At the same time, this state and local governance structure is undermined in fundamental ways in states which have adopted significant TELs.[142] What these devices have introduced, at bottom, is incommensurability between the goals of local discretion, reflected in their home rule guarantees and the statewide goals of circumscribed fiscal authority. Whether or not a thumb on the scale in favor of local discretion may be warranted,[143] the constitutional failure emerges from a state constitutional structure with two deeply irreconcilable objectives: on the one hand, centrally imposed restraints on taxing and spending by local governments and, on the other, fiscal localism.

The problem of incommensurability presents more than an abstract philosophical difficulty in evaluating constitutional mechanisms. The fact of inconsistent goals is not the main issue. Rather, incommensurability (like incorrigibility discussed earlier) raises significant governance problems. It reflects a deep structural deficit in the capacity of a constitution, fairly interpreted and implemented, to accomplish the twin goals of stability and workability. There are, of course, many other problems of constitutional design which I do not dwell on—for instance, the absence of certain individual rights which we may believe vital, the absence of institutions which might help assist in governance objectives, or controversial arrangements such as a judiciary selected through partisan elections. My focus on certain structural deficits is purposive; however, I am interested in how specific constitutional arrangements can sow the seeds of constitutional failure. The twin problems of incorrigibility and

139. These considerable costs help explain, of course, why such a large number of states have eschewed this "imperium in imperio" model. *See generally* FRUG & BARRON, *supra* note 84; Barron, *supra* note 84; Briffault, *Our Localism, Part I—The Structure of Local Government Law*, *supra* note 84; Briffault, *Our Localism, Part II—Localism and Legal Theory*, *supra* note 84.

140. *See* KRANE ET AL., *supra* note 86, at 12–18.

141. *See* Baker & Rodriguez, *supra* note 137, at 1363–64.

142. *See supra* text accompanying notes 131–134.

143. *Compare* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2259–60 (2003) (promoting local sovereignty), *with* Briffault, *Our Localism, Part I—The Structure of Local Government Law*, *supra* note 84, at 85–86 (sketching a more skeptical view of local prerogatives).

incommensurability are serious precisely because they create conditions for—although I want to stop short of saying *cause*—constitutional failure.

I turn next to a set of problems organized under the somewhat loose label of dysfunctionality. These kinds of problems, well explored in the literature on constitutional design and performance, likewise damage and perhaps even doom constitutional objectives. The reader might pine for a longer list of dysfunctionalities; and, because the constitutional arrangements are offered here as merely key examples of the phenomenon, I would acknowledge that there are severe problems not mentioned. The basic point, however, is that their structures, whose intrinsic dysfunctionality confounds governance, thus undermine state constitutional goals.

C. Dysfunctionality

Certain constitutional rules and structures are deeply dysfunctional.[144] With them, the state constitution is kept from effectively working on behalf of the governed. There are a number of examples which illustrate the problem of dysfunctionality. In some senses, this problem subsumes the rest; we can say about the preceding structural examples that they reveal dysfunctionalities in state constitutional performance. What I have in mind, however, is something more specific. Dysfunctional schemes are those which are not in any discernible way inconsistent with general constitutional objectives. Rather, they represent the efforts by constitutional framers to pursue governance goals in a particular fashion. Insofar as a key criterion for successful performance is that the scheme basically work—that, to oversimplify the matter, the benefits of the arrangement outweigh its costs—then we should look critically upon institutional structures and rules that are dysfunctional.[145]

Let us consider as an example of this problem a key structural element of nearly all state constitutions, the so-called plural executive. In contrast to the national Constitution's assignment of power to the president as leader of the executive branch,[146] most state constitutions distrib-

144. *See* LEVINSON, *supra* note 1.

145. In writing about the national Constitution, Sanford Levinson has this general notion in mind when focusing on the discrepancies between the democratic ideals of the U.S. Constitution and the instruments embodied in the Constitution to implement these ideals. Although the ideals I have sketched in the state constitutional context are different—or, to equivocate somewhat—they supplement in key ways the objective of democratic decision making. I am interested in the same basic question as he: whether and to what extent there is a serious mismatch between institutional arrangements and constitutional goals. Dysfunctional rules, structures, and arrangements are significant evidence of this mismatch.

146. U.S. CONST. art. II, § 1.

ute executive power among different political officials.[147] These officials are typically elected separately. This "unbundled" executive power creates a very different architecture of incentives and strategies.[148]

In making the case for the divided executive, Christopher Berry and Jacob Gersen describe how voters can address serious agency problems by choosing a mix of good officials, depending upon their cluster of qualities. "In the single completely bundled regime, voters must select one candidate who is either an average good type or who is a good type on some dimensions . . . ."[149] But in an unbundled regime, Berry and Gersen explain that voters can "better match expertise, ability, and other characteristics . . . ."[150] This analysis has an appealing logic; however, there is little empirical evidence that voters are making the sort of fine-grained determinations as skillfully as the theory predicts. Moreover, the improved voter choice forecast by unbundling is far outweighed by the inefficiencies of inadequate management and supervision of officers exercising key executive power.[151] The principal problem is not with the myopia of the voters but with the structure of political and legal authority wielded by these separately elected officials.

This problem is especially severe in two separate governance contexts: law enforcement and fiscal policy. Law enforcement presents an intriguing puzzle in state public policy making. We expect the basic criminal law decisions to be made at the state level, however, the structure of implementation is typically decentralized, with key decisions—indeed, primary implementation decisions—being made by district attorneys and other local decision makers.[152] At the very least, the successful management and control of what is an intricate arrangement requires dependable supervision at the state level. Such control generally falls to

147. *See generally* Thad Beyle, *The Executive Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 67 (G. Alan Tarr & Robert F. Williams eds., 2006).

148. *See* Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008).

149. *Id.* at 1394.

150. *Id.*

151. To be fair, Berry and Gersen describe their analysis as an extended thought experiment. They do not purport to offer a comprehensive defense of the structure of plural executives under U.S. state constitutions. In any event, I share entirely their intuition that scholars and constitutional reformers have been disserved by focusing reflexively on the federal model of executive power thereby neglecting to carefully consider some of the distinct features of state constitutional governance.

152. The basic difficulty in managing a multi-institutional criminal justice system has been described ably in the federal context by leading criminal procedure scholars. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Dan M. Kahan, *Reallocating Interpretive Criminal-Lawmaking Power Within the Executive Branch*, L. & CONTEMP. PROBS., Winter/Spring 1998, at 47; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087 (2009); *see also* Stephen J. Schulhofer, *Criminal Justice Discretion As a Regulatory System*, 17 J. LEGAL STUD. 43 (1988).

the attorney general to provide.[153] What is lacking, however, in a structure of a plural executive is accountability which runs to an elected official (the governor) who has a firm hand in both the lawmaking and the law implementation process. Although Berry and Gersen celebrate the advantages of plurality for (among other situations) law enforcement officials on the grounds so that voters can reward and punish multiple agents, what goes missing is the fact that these different officials (the governor on the one hand and the attorney general on the other) are accorded very different prerogatives and functions within the general constitutional structure. Unless we are to accord wider functions to the attorney general, functions which include working directly with the legislature to make and remake criminal laws and also to collaborate on the budget, then the attorney general will always be responsive, if indirectly, to gubernatorial choices. What the plural executive entrenches, therefore, is the worst of both worlds: separately elected executive officials have some degree of independence from one another so that there is, as Berry and Gersen cleverly note, opportunities for greater responsiveness through unbundling. Voters, however, must be incredibly savvy in making their separate choices about these two law enforcement decision makers given that, any way one slices it, the attorney general has less real authority, discretion, and, well, political muscle, than does the governor.

Likewise, separately electing executive officials who wield fiscal authority can have similar effects. True, there are some accountability and responsiveness advantages, at least in theory, to unbundling, say, the governor from the state treasurer. The scope and sphere of these two officials' control, however, are distinct. By any measure, the governor has more practical authority and his or her fiscal role will be more systematically important in implementing fiscal decisions. This will be true along all important dimensions, including the submitting of the budget, the deployment of real budgetary authority through the line item veto, the appointment of certain intrastate officials who manage budgetary matters, and the general oversight of the fiscal processes within the state.[154]

Consider as a second example of dysfunctionality, the system of direct lawmaking in U.S. constitutional government.[155] The initiative and

153. *See generally* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

154. On the other hand, directly elected executive officers can flex their muscles as well, as Governor Schwarzenegger of California learned painfully when he found himself cross ways with Controller John Chiang. *See* Vikram David Amar, *Lessons from California's Recent Experience with its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469, 477–78 (2009).

155. For general overviews, see THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL (1989); RICHARD J. ELLIS, DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA (2002).

referendum is a product of late nineteenth century Progressive Era constitutional reforms, all of which were directed for the most part to the aim of cabining legislative power.[156] The extreme version of this reform was a system of direct democracy which assigned to state citizens direct power to enact statutes and amend the constitution without legislative intervention or checks of any sort.[157]

The myriad difficulties with the structure and performance of initiative lawmaking have been amply described in the literature.[158] The resort to initiative lawmaking has a distortive effect on representative democracy. Initiatives empower a cluster of interest groups outside the legislative process.[159] Legislators have limited capacity to cabin the actions of the people and, knowing that, the people seek policy change—occasionally changes of a radical sort—through the initiative system. Social science studies of initiative lawmaking reach different judgments about its efficacy.[160] Therefore, we are in an imperfect position to reach certain judgments about what this process does or does not do to the lawmaking process. We can, however, reach some tentative judgments based principally on what we know about the nature of the policy making process. First, the availability of initiative lawmaking affects legislative decision making and does so in ways that can undermine sensible policy analysis.[161] For example, lawmakers acting within the legislature are able to make tradeoffs, both with regard to cross policy considerations,[162] and with regard to judgments about specific policy areas over time during the required appropriations process.[163] These tradeoffs are considered within

156. *See, e.g.*, JON C. TEAFORD, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT 87 (2002) ("Direct legislation . . . [is] a legal expression of the people's lack of faith in their chosen representatives. This skepticism about the state legislature was, in fact, a continuing feature of the twentieth century . . . ."); *see also* Thomas Goebel, *"A Case of Democratic Contagion": Direct Democracy in the American West, 1890–1920*, 66 PAC. HIST. REV. 213 (1997).

157. For an interesting analysis of which states have adopted one version of direct democracy or another, see Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States*, 102 AM. POL. SCI. REV. 333 (2008).

158. *See, e.g.*, DANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA (Larry J. Sabato et al. eds., 2001); Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143 (1995); Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 OKLA. L. REV. 227 (2006); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988).

159. The leading study is ELISABETH R. GERBER, THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION (1999).

160. In addition to the studies cited in the previous notes, see JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004); DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004).

161. On legislative responses to initiatives, see Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996).

162. *See, e.g.*, PHILIP L. DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS (1998).

163. *See, e.g.*, Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 646–81 (2001) (discussing the distinctions between strategic processes in legislative and initiative lawmaking).

a legislative process that is transparent and thus enables legislators to make enforceable deals (logrolls).[164] This is not possible in initiative lawmaking where votes cannot be discerned and in which policies cannot be assessed against one another through, say, a structured appropriations process.[165] Second, initiative lawmaking is prone to relentless influence peddling and the large expenditure of money to get proposals onto the ballot and to support or defeat qualified initiatives.[166] The problem is not merely one of waste, but one of a seriously distorted policy-making process.[167]

The preceding discussion has given us some reasons to believe that state constitutions contain mechanisms which contribute to, if not insure, constitutional failure. We should put this global assessment in some perspective, however, by remembering that constitutions are inevitably imperfect documents. Judging constitutional performance requires some clarity about our expectations. How high are our hopes and dreams for our state constitutions? To what extent are these expectations filtered through informed predictions about government capacity, skill, and motivations?[168]

164. By "enforceable," I simply mean that legislators will be held accountable, in whatever fashion their colleagues deem appropriate, for their votes on certain legislative proposals.

165. *See, e.g.*, Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 703–05 (2005) (discussing the appropriations process and its comparative advantages in facilitating tradeoffs).

166. *See, e.g.*, ELISABETH R. GERBER ET AL., STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY (2001).

167. *See, e.g.*, Shaun Bowler et al., *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 W. POL. Q. 559 (1992); Elizabeth Garrett, Commentary, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005).

168. In an extended riff on David Hume and rational choice perspectives on constitutional design, Adrian Vermeule urges us, usefully, to look to the idea of "second-best constitutionalism," that is, the notion that a constitutional structure can produce, in its departures from the governance optimum, "compensating adjustments that ensure constitutional equilibrium." Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003). There are two distinct senses in which this second-best constitutionalism can illuminate the question at hand. First, we could imagine, plausibly, that state constitutions embed and entrench institutions which provide purposively for "compensating adjustments;" a workable system of checks and balances is perhaps the most obvious example of such a schema. To some extent, this idea does resonate with the architecture of state constitutions. Three of the four problems described above, however—incorrigibility, incommensurability, and dysfunctionality—belie the notion that state constitutional structure accomplishes even a second-best constitutionalism. The second, and more fruitful sense, in which second-best constitutionalism may help shape our sense of constitutional failure and its consequences is the careful strategy of courts in constitutional adjudication to deploy these "adjustments" in order to compensate for governance pathologies. This is an intriguing line of inquiry and one which jibes with the tradition of process-improving theories of constitutional adjudication. As my task is the more limited one of illuminating the general question of state constitutional failure, I will leave to another day the implications of this perspective on second-best constitutionalism. But I just highlight the optimism built into the insight; perhaps courts can deal with some of the performance pathologies revealed above.

IV. FLAWS, FAILURE, AND REFORM

The literature on constitutional design is largely iconographic. Constitutions and constitutionalism are considered within the framework of ideal types, as successful manifestation of democratic impulses, created in profound moments of citizen self-reflection. And even where constitutions are criticized as inadequate, a critical assumption is that constitutions are designed to succeed and that dysfunctional elements can be corrected through careful attention to improving amendments.

This may be deeply misleading when it comes to U.S. state constitutions in modern times. Two reasons for this stand out. First, the governance predicaments faced by state and local governments are acute and likely worsening, and thus there is urgency to considering substantial strategies to alleviate these difficulties. Second, these predicaments reveal not only the turbulence in the national and regional economies, but also defects that are structural, multidimensional, and potentially intractable. Constitutional reform is not a panacea; indeed, it may not be the very first place to start in addressing the current fiscal emergencies. But the performance problems sketched above, when laid alongside the picture of what we expect of our constitutional processes and our political leaders, counsel close attention to the ways in which the flaws and failures in our state constitutions hobble governance. Likewise, the disconnect between the ideal and the real will help illuminate efforts at reform. It is principally to the large issue of reform that I now turn.

The takeaway message from the preceding Part is that several different types of pathologies plague constitutional performance (the problems of incorrigibility, incommensurability, and dysfunctionality) and are the result of errant choices made by constitutional framers and, in the case of direct democracy, by initiative proponents and voters. By way of examples, I have described how various structural features of state constitutions, including supermajority requirements, term limits, tax and expenditure limitations, the plural executive, and initiative lawmaking impede governance and thus contribute to constitutional failure. In short, what makes these structures more than nagging flaws, but defects that contribute to constitutional failure is that they disrupt the ability of the state constitution to accomplish the goals assigned to it by the state's citizens. We should distinguish this enhanced risk of constitutional failure from defects that, while making governance more difficult, have benefits which outweigh the costs. When are constitutional flaws not failures? Or, as Robert Williams helpfully asks, "Is a state's constitution obsolete? This is a fundamentally different question from whether it contains specific defects."[169]

169. *See* WILLIAMS, *supra* note 11, at 359.

One central question, which the preceding analysis has admittedly skirted around, is why not view these structural provisions as contributing in some measure to the complex, and occasionally inconsistent, objectives of state representatives and voters? Are citizens capable of imbedding into their fundamental law rules which are not in tension with one another? As a pure matter of positive law, authorized decision makers may craft incorrigible, incommensurate, and dysfunctional constitutional rules and structures. Whether and to what extent governmental institutions such as state or federal courts should intervene to facilitate sound governance through legal interpretations is an excellent question, but one largely beyond the scope of this Article. Yet I will permit myself one small observation on this dimension. Serious, sustained efforts to combat structures that contribute to constitutional failure require attention to matters of constitutional design. The expectation that state courts will act ambitiously to combat governance pathologies is remote as an empirical matter. Moreover, the normative case for such judicial engineering is problematic for various reasons. Nor ought we to expect much of the federal courts in policing state constitutional structures outside the familiar structure of equal protection and related doctrinal areas.

Our hopes, such as they are, must ultimately be pinned to political officials and state citizens, working in collaboration to address serious obstacles to successful constitutional performance. Reform which undertakes to tackle constitutional failures is not principally about improving an essentially workable document nor is it about correcting flaws. Rather, reform which entails fundamental revisions of the constitutional structure of a state is designed and implemented on the basis of a studied judgment of *whether* and *why* the state constitution has fundamentally failed. The overarching goal of failure-sensitive reform is to reconfigure the constitutional structure of governance in order to address large- and medium-size failures by addressing the pathologies that plague constitutional performance, undermine governance objectives, and threaten constitutional stability and progress. The connection between failure and reform strategies should frame our approach to constitutional experimentation and the choice among alternative constitutional processes.

The distinction between structural deficiencies and constitutional failure is a critical one, even if we are uncertain, as is inevitable, about exactly where the line between these two predicaments should be drawn. Constitutions can often stand to be improved; moreover, to say that a constitution has become obsolete merely frames the improvement project around the dichotomy between structures which are modern and those which are out of date. By contrast, a constitution that has *failed* is one that cannot and will not work on behalf of the citizenry—regardless of whether the structures are new or old fangled. The plural executive, for example, is in many ways a novel institutional apparatus; the problem

is not that it is anachronistic, but that it is deeply dysfunctional. What the framework sketched in the discussion of constitutional performance in Part III was intended to accomplish was to provide a more organized way to think about the pathologies of governance and, ultimately, the matter of constitutional failure. From this perspective, we can think more coherently about the tall task of constitutional reform. Keeping in mind "the benefits of a spirited return to basics,"[170] this inquiry into constitutional failure suggests some principles to be kept in mind in undertaking reform.

First, structural change should account for four considerations previously discussed: the requirement that constitutions be self-enforcing, with incentive-compatible institutions; the proper match among governance institutions and objectives; and attentiveness to the various pathologies that plague constitutional performance. Moreover, the task of constitutional reform is to reconfigure rules and institutions in order to address the problems that scuttled governance objectives. What circumstances often call for is both new wines and new bottles. This may or may not, however, require starting over or even rethinking the basic principles of constitutional government within the particular state in issue. Constitutional failure need not be synonymous with the failure of the state, nor does it mean that the principles are bad. The larger problems which need addressing may well be problems of matching the architecture of governance with the principles agreed upon by the citizenry and its governors.[171]

Second, we should be aware of the ubiquitous matter of path dependence, that is, the basic idea "that where we go next depends not only on where we are now, but also upon where we have been."[172] Constitutions do not emerge fully formed as from the head of Zeus. Nor are they properly analogized to a chain novel. They are accretion of devices, structures, and policies. Many of these structures are path dependent; they reflect circumstances and conditions which time has often made anachronistic or, in any event, unsuitable to modern needs. The relative ease of state constitutional amendment may be a double-edged sword.

170. ELKINS ET AL., *supra* note 12, at 12.

171. Compare with Elkins et al., who argue that "[g]iven the possibility of a suboptimal starting point and the existence of powerful inertial forces, one can make a case in favor of forcing the polity to *re*-engage with fundamental principles." *Id.* at 15 (emphasis in original). This strikes me as a context-dependent matter. It may be that these same forces interfere with this process of re-engagement, thus debilitating efforts to fix the basic processes of governance. On the other hand, we should credit the more basic point that it is always fruitful to consider anew the value of the fundamental principles in light of new circumstances, information, and exigencies.

172. Stan J. Liebowitz & Stephen E. Margolis, *Path Dependence*, *in* 1 ENCYCLOPEDIA OF LAW & ECONOMICS 981, 981 (Boudewijn Bouckaert & Gerrit De Geest eds. 2000); *see also* Oona A. Hathaway, Essay, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001); Scott E. Page, *Path Dependence*, 1 Q.J. POL. SCI. 87 (2006).

Constructive constitutional reform may be more possible given the flexibility of the constitution, but it is that flexibility that has enabled certain arrangements to become entrenched in the document and, given political considerations, difficult to change.

Furthermore, the consideration of path dependence obliges us to expand the scope of our theoretical inquiry into the nature of state constitutionalism. Without doubt, much of the analysis in this Article has rested on models of political economy in which the expectation is that rational decision makers will make sensible choices about the configuration of institutions and constitutional forms to realize aims that both they and we will find Pareto optimal.[173] We ought not to believe that these assumptions represent a *deus ex machina* lying in wait for constitutional difficulties to be corrected, however. As Paul Pierson reminds us in his informative examination of path dependence and "politics in time,"[174] the new institutional economics "is unlikely to provide a sufficient basis for theories of institutional origins and change in politics."[175] There is simply too much going on, including the time horizons of political actors, social movements, cognitive limits, economic shocks, and particular changes which, however rational, yield unintended consequences. Constitutional failure raises the urgency of constitutional experimentation, given its attendant risks, however, it also raises the stakes. What is required all along the way is close consideration of path dependence and, more generally, focused historical research that takes measure of the "dynamic processes" and multiplicity of factors that go into constitutional successes and failures.[176]

Finally, comparative analysis, particularly in the form of empirical analysis, can contribute constructively to the reform project.[177] Comparisons for state constitutional purposes are everywhere we look. The grand constitutional failures of U.S. constitutional history, including the demise of the Articles of Confederation, can provide some lessons for constructing suitable mechanisms for effective legislative power in the

173. *See supra* notes 17–20 and accompanying text.

174. PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004).

175. *Id.* at 130 (discussing the "limits of institutional design").

176. *See id.* Alternative methodological traditions, some sociological and others broadly historical, will assist reformers—and those of us whose scholarship is essentially reformist in orientation—in tracking some of the complex elements of constitutional system building and experimentation. *See, e.g.*, JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, *in* THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT, AND DEMOCRACY 15 (Andrew Reynolds ed., 2002).

177. On the value of comparative constitutional analysis more generally, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 3–17 (2008); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003).

face of multiple spheres of authority and influence. The tragic flaws embedded in the pre-Reconstruction U.S. Constitution can likewise inform strategies for ensuring equality and fair process. Moreover, the failures of non-U.S. constitutions, particularly over the last half century or so, can shed light on what *not* to do in crafting governance mechanisms.[178]

The most relevant comparisons will be the episodes of constitutional failure and reconstruction in U.S. states, however. The replacement of Pennsylvania's first constitution in 1790 and California's constitutional convention in 1878–1879 are two examples, albeit remote in time, of major constitutional revision borne of a collective judgment that these constitutions had indeed failed. Twentieth century revisions, some successful, as in Florida (1997), Georgia (1982), Illinois (1970), Michigan (1962), Montana (1972), New Jersey (1947), Virginia (1970); and some unsuccessful, as in Alabama (mid-1990s), California (mid-1990s), New York (mid-1990s) and Texas (early 1970s), can help shape ongoing thinking about the contours and pitfalls of major constitutional reform.[179]

In Part I's examination of the conditions for constitutional stability and progress, I described the importance of adaptive efficiency and incentive capability in dealing effectively with the "altered reality" that constitutions face as they tackle governance matters over time.[180] The predicaments faced by state governments in present circumstances suggest that some significant adaptations are required to confront the most serious dilemmas. Although not all of these dilemmas can or even ought to be confronted by *constitutional* adaptations, there are some matters that can be tackled successfully only by ambitious constitutional reforms.[181]

Before leaving the general topic of state constitutional experimentation, let me close with a thought about what state constitutions cannot do. After all, to understand the nature and dimensions of constitutional failure, and to further understand the consequences of failure for state governance, it is important to have in mind the limited domain of state constitutionalism. State constitutions, like other constitutions, establish the ground rules for policy making and for politics, but they are not iden-

178. *See* ELKINS ET AL., *supra* note 12, at 150–202; *see also* Ran Hirschl, *The "Design Sciences" and Constitutional "Success,"* 87 TEX. L. REV. 1339, 1358–63 (2009) (describing various design defects in non-U.S. constitutional contexts); Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627 (2009).

179. *See generally* WILLIAMS, *supra* note 11, at 364–79 (describing pattern of twentieth century constitutional reform efforts); *see also* TARR, *supra* note 11, at 150–61.

180. Mittal & Weingast, *supra* note 17, at 4.

181. Donald Lutz reminds us that experimentation is not valuable for its own sake. He writes:

> 'Beneficial innovation' is not to be confused with a notion of progress where more is always better. Nor is it to be confused with innovation per se. What is beneficial can only be determined by a freely interacting citizenry reflecting on the nature of the citizens' own personal and human needs and hopes.

LUTZ, *supra* note 42, at 24.

tical to policy making. State constitutions frame the political order for governing on behalf of the state citizenry, but political choice proceeds mostly in accordance with other sources of direction, of influence and, ultimately, of quality. As Donald Lutz shrewdly puts it:

> In the end, constitutional design can take into account the structure of interests and the probable structure of factional alignments, but it cannot resolve these differences. That is what politics is all about, and only the people living under the constitution have a right to decide the eventual outcomes. The job of constitutional design amounts to avoiding the unfair advantaging or disadvantaging of any major, identifiable faction.[182]

So, as we move ahead to consider the question of constitutional failure in light of this baseline sketched above, we should remember that a constitutional failure need not be identical to a governance failure. Suboptimal governance may be a problem in its own right and for reasons other than constitutional predicaments.

V. CONCLUSION

Desperate times, shouts the blogosphere, call for desperate measures.[183] Constitutional reform, often of a fairly comprehensive sort, is relatively high on the agenda of those concerned with the predicament of state politics and intractable difficulties of governing. Of course, the form these reform efforts take will matter greatly. New times may call for new institutions, or they may call for reworking of existing institutions in order to better implement modern schemes of governance.

This Article has journeyed from a fairly stylized depiction of constitutional design and function, through an example-laden analysis of constitutional performance, and ultimately to what is a resolutely practical end. Motivated by an interest in improving constitutional governance in U.S. states, I set out to interrogate the undertheorized and neglected issue of state constitutional failure. Though the expression of this thesis has meandered over a large terrain of institutional analysis, political economy, and judicial doctrine, the basic idea can be simply expressed: state constitutions fail when the rules, structures, and institutions cannot effectively manage the task of facilitating the collaborative work of public officials and constituents in governing the state. While we could address the central problem by revisiting our objectives, we might do better by revisiting our constitutional architecture. Given the severe condition of state and local governance, we have precious little to lose and much to gain by the undertaking.

182. *Id.* at 208.
183. *See supra* notes 2–6 and accompanying text.