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Should the Dead Bind the Living? Perhaps Ask the People: An Examination of the Debates Over Constitutional Convention Referendums in State Constitutional Conventions

John J. Liolos

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**SHOULD THE DEAD BIND THE LIVING? PERHAPS ASK
THE PEOPLE:* AN EXAMINATION OF THE DEBATES
OVER CONSTITUTIONAL CONVENTION REFERENDUMS
IN STATE CONSTITUTIONAL CONVENTIONS**

John J. Liolos[†]

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* This formula, like the issue of constitutional precommitment itself, is likewise fraught with paradox. The dead do not bind the living if the living are asked for consent, or otherwise have the ability to change their circumstances and acquiesce to the constitutional commitments of the dead by simple majority. They do, however, bind the living minority opposed to those commitments. See, e.g., Jeremy Waldron, *Disagreement and Precommitment*, in *Law and Disagreement* (1999). Further, in a constitutional order there must necessarily be a preexisting rule for constitutional change, whether express or implied. Any preexisting rule, such as recurrent recourse to the people for conventions, presupposes that the rule was established at a prior time and, thus, the “dead” bind the living to a degree.

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I. INTRODUCTION

Should the United States of America have a constitutional convention? Although the Constitution of the United States of America has been exceptional in most respects over the course of its journey, it has required substantial modification throughout the various epochs in American history. Today, a significant group of prominent scholars, led by Sanford Levinson, repeatedly call for a second constitutional convention.¹ Other scholars have purported to demonstrate the U.S. Constitution's declining influence around the world.² Even Justice Ruth Bader Ginsburg is on record stating, "I would not look to the U.S. Constitution if I were drafting a constitution in the year 2012."³ These insights suggest improvements might be made.

According to Professor Levinson, "[w]e need a new constitutional convention, one that could engage in a comprehensive overview of the U.S. Constitution and the utility of many of its provisions to twenty-first century Americans."⁴ Chief among Levinson's criticism is the rigid nature of Article V, which "makes it functionally impossible to amend the Constitution with regard to anything truly important."⁵ For Levinson, a convention would, among other things, provide a vehicle for

1. See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 391 (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION WENT WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 11 (2006); see also LARRY SABATO, *A MORE PERFECT CONSTITUTION* (2007); Lawrence Lessig, *Republic, Lost* (Nov. 16, 2011), <https://www.youtube.com/watch?v=Ik1AK56FtVc> [<https://perma.cc/DSD8-7K92>]; *America's Constitution: If It Ain't Broke*, *THE ECONOMIST* (Nov. 8, 2007), <http://www.economist.com/node/10097645> [<https://perma.cc/E2CK-NQ5J>] (referencing quotes by Larry Sabato).

2. See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 *N.Y.U. L. REV.* 762 (2012).

3. *Id.*; *The Middle East Media Research Institute TV Monitor Project, U.S. Supreme Court Justice Ruth Bader Ginsburg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the U.S. Constitution*, MEMRITV (Jan. 30, 2012), <https://www.memri.org/tv/us-supreme-court-justice-ruth-bader-ginsburg-egyptians-look-constitutions-south-affica-or-canada> [<https://perma.cc/RL67-42SS>].

4. LEVINSON (2012), *supra* note 1, at 391.

5. *Id.* at 338.

comprehensive constitutional revision, including of Article V itself, which he deems desirable.

None other than Thomas Jefferson would agree. Jefferson was a notable proponent of the idea that constitutions should expire at the end of each generation, because the earth belongs to the living and the dead should not bind the living. James Madison famously disagreed with Jefferson's proposal, deeming stability in a constitution and its various effects to be of primary practical importance over Jefferson's theoretical objections.⁶ Moreover, Madison argued that Article V struck the appropriate mean between two problematic extremes of immutable rigidity and facile mutability.⁷

Their rich exchange did not end this fascinating debate—it continued on the floor of state constitutional conventions myriad times over the course of American constitutional history.⁸ As one scholar noted, “[a]lthough we usually think of Madison's vision as victorious and Jefferson's advice as unheeded, this myth is largely the result of our scholarly emphasis on the U.S. Constitution.”⁹ Indeed, 18 states have, at various points, included in their constitutions provisions mandating either the holding of a future constitutional convention at a specified time or the requirement that the question whether to hold a convention be submitted to the people for referendums. Fourteen states continue to submit this question to the people at regular, periodic intervals; New York submitted the question on the ballot in November 2017.¹⁰

6. This is an introductory simplification of their more robust positions, which I flesh out in Part II.

7. See THE FEDERALIST NO. 43 (James Madison) (Article V “guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”).

8. Many distinguished scholars have also considered this and related questions of constitutional precommitment in great theoretical depth. See, e.g., CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000); Jeremy Waldron, *Disagreement and Precommitment*, in *LAW AND DISAGREEMENT* 254 (1999); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (ELSTER, JON & SLAGSTAD, RENE, eds.) (1988).

9. LAURA J. SCALIA, *AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS 1820–1850* 5 (1999).

10. See Jesse McKinley, *New York Voters Reject A Constitutional Convention*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/nyregion/new-york-state-constitutional-convention.html> [<https://perma.cc/Z9TT-XJYN>]; Eleonora Bottini, *Who Is Afraid of the Constitutional Convention? The Rejection of Constitutional Change in the State of New York*, I-CONNECT BLOG (Nov. 22, 2017), <http://www.iconnectblog.com/2017/11/who-is-afraid-of-the-constitutional-convention-the-rejection-of-constitutional-change-in-the-state-of-new-york> [<https://perma.cc/T3NS-4EGV>] (The measure was resoundingly defeated).

Several scholars have written on this fascinating aspect of state constitutional history,¹¹ but none to my knowledge have studied intensively the debates on this issue across the various state conventions.¹² In this article, I begin that project. But why do so? Considering these automatic question provisions, Professor Levinson asks whether it is “a source of pride or lament that the U.S. Constitution includes no such provision?”¹³ False dichotomy aside, the question is worthy of reflection.

States are often heralded the “laboratories of democracy.”¹⁴ State constitutions, then, provide interesting “visions of potential federal reform,” insofar as they diverge from the federal Constitution.¹⁵ Because state constitutions share so strongly in the basic American model of republican government embodied in the federal Constitution, they may be more apt sources of comparative constitutional study with an eye to improving the federal constitution than a foreign source that does not share in many of these same basic norms.¹⁶ State theory and practice, therefore, may inform federal theory and practice.¹⁷

11. See, e.g., Robert F. Williams, *Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 ARK. L. REV. 553, 569–70 (2016); John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 399 (2010); Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People’s Right to Reform Their Government*, 31 OHIO ST. L.J. 421, 455 (1970). See also JOHN DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006); WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 48–54 (1970).

12. Authors have examined the debates on this issue at particular conventions. See, e.g., Amy K. Trask, *A History of Revision: The Constitutional Convention Question in Hawai’i, 1950-2008*, 31 U. HAW. L. REV. 291, 300 (2008). Professor Dinan examined several of the twentieth century convention debates in brief in his wonderful book *State Constitutional Tradition* (2006). DINAN, *supra* note 11, at 58. No one, to my knowledge, has undertaken the full comparative examination at the level of depth that is the subject of this paper.

13. LEVINSON, *supra* note 1 at 343 (2012).

14. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

15. AKHIL R. AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 463, 467 (2012) [hereinafter AMAR II] (“[C]ertain proposals to amend the federal Constitution will be taken seriously if comparable proposals have already been adopted and road-tested at the state level.”).

16. See *id.* at 466 (“[T]his Basic American Model defines the boundaries of realistic constitutional reform in America. Proposed federal amendments based on state variations *within* the Basic American Model described above are much more likely to be taken seriously than amendment proposals originating outside of this Basic American Model—proposals that are apt to be viewed as “foreign,” “alien,” or “un-American.”).

17. *Id.* at 467 (“[C]ertain proposals to amend the federal Constitution will be taken seriously if comparable proposals have already been adopted and road-tested at the state level.”).

In 1787, James Bryce observed that “[i]t has been truly said that nearly every provision of the federal Constitution that has worked well is one borrowed from or suggested by some state constitution; nearly every provision that has worked badly is one which the Convention, for want of a precedent, was obliged to devise for itself.”¹⁸ Further, states reconsidering their own fundamental law undoubtedly benefit from the study of other state practices. Thus, in considering ways to address in American constitutional practice what has been termed the “paradox of democracy”¹⁹—whether the dead may bind the living—states that have done so through these “automatic question”²⁰ provisions are a rich and invaluable resource for study.

The goal of this work is neither to embark on an empirical investigation of the operation of these provisions in state constitutional practice nor to advance a normative argument in support of either side. Rather, I seek to explore descriptively and analytically the debate between Jefferson and Madison as it has been extended, developed, and refined in American constitutional practice. Many distinguished scholars have considered this and related questions of constitutional precommitment in great theoretical depth at a conceptual level.²¹ Their studies are illuminating and inform this work. My focus here, however, is the debate in constitutional practice: I investigate the arguments advanced by political actors within the context of constitutional conventions in the American constitutional tradition, with all the biases, interests, and passions that context entails.

A professor of the state constitutional tradition, John Dinan, has claimed with respect to twentieth-century constitution-makers adopting these provisions that “the resulting debates generally serv[ed] as a reprise of the exchange between Jefferson and Madison on the issue.”²² Although true to some extent, the debates in the state conventions both built on the considerations of Jefferson and Madison and pressed far beyond the points those two had considered. The state debates raised new issues attendant to this question in both theory and practice.

18. 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 31 (1889). I am indebted to Jon Elster for this reference.

19. ELSTER, *supra* note 8, at 115; JON ELSTER, *ULYSSES AND THE SIRENS* 93 (1984).

20. I refer to these provisions largely as “automatic question” provisions throughout this work for ease of use. In a certain sense, “mandatory” rather than “automatic” may be the appropriate adjective, because some state formulations depend on the legislature to initiate the vote and convene the convention. Nevertheless, I find “automatic question” to be easier on the reader.

21. See, e.g., SUNSTEIN, *supra* note 8; ELSTER, *supra* note 8; Waldron, *supra* note 8; Holmes, *supra* note 8.

22. DINAN, *supra* note 11, at 58.

The central thesis here is just that: the debates in state conventions pushed beyond the scope of the debate between Jefferson and Madison and we have much to learn from their discussions—both in their examination of themes raised by Jefferson and Madison and in their raising of new issues. My aims here are primarily descriptive and analytic, rather than normative or explanatory. I seek to expand the spectrum of voices contributing to this rich debate that echoes and endures across the American Constitutional tradition. As Akhil Amar notes, “America’s Constitution deserves careful study and still has much to teach us, if we would but listen.”²³ The same must be said for the American state constitutional tradition—state constitutions and their conventions are a rich, ongoing source in the tradition of American constitutionalism, particularly on this enduring question.

Accordingly, in Part II, I examine the genesis of the debate between Jefferson and Madison over whether to adopt a procedural precommitment to regular, periodic constitutional conventions. In Part III, I provide a brief overview of the states that have adopted such provisions and provide some context to the state constitutional landscape on this question. In Part IV, I examine the central debates on this issue among the various conventions at which it was considered.²⁴ Finally, I offer some concluding remarks and observations.

II. FRAMING THE DEBATE: THE JEFFERSON–MADISON EXCHANGE

As the debate between Jefferson and Madison merely sets the stage for the substance of this work, my treatment here will not exhaust the depths of this very rich exchange that challenges several of the fundamental principles of constitutionalism. More comprehensive treatments are available.²⁵ The Jefferson–Madison debate is, however, the quintessential exchange on the issue at the heart of this work and did inform a number of the state convention debates on the topic. Thus, an examination of their arguments is in order.

I start with Jefferson’s first prominent letter to Madison on the issue, move to Madison’s rebuttal letter along with Madison’s prior thought in the *Federalist*, and conclude this section with Jefferson’s later letter

23. AKHIL R. AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 471 (2006) [hereinafter AMAR I].

24. The conventions considered in this work are those of states in which such provisions have been adopted. A point of further research would be to investigate which state conventions considered, but never adopted, such provisions and the debates that ensued therein.

25. *See, e.g.*, Holmes, *supra* note 8.

reiterating his position with the benefit of reflection from “forty years’ experience in government.”²⁶

A. *Jefferson’s Letter in Support of the Doctrine of Periodic Revision*

Thomas Jefferson’s formulation of the idea to consider the revision and amendment of constitutions at regular periodic intervals appeared prominently in his letter to James Madison of September 6, 1789, on the topic of “whether the earth belongs to the living.”²⁷ Other political thinkers, such as Thomas Paine,²⁸ had expressed similar sentiments against the binding of majority will, but a full articulation of the idea to utilize periodic constitutional conventions as a corrective for that tension appears to have arisen with Jefferson.²⁹ Jefferson had also referenced the idea in his *Notes on the State of Virginia*, but his September 1789 letter to Madison was his first full exposition of the doctrine.

In that letter, Jefferson took up “[t]he question Whether one generation of men has a right to bind another.”³⁰ He noted that “it is a

26. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) in *THE PORTABLE THOMAS JEFFERSON* 559 (Merrill D. Peterson ed., 1975). I faced the question whether to organize this section conceptually or more chronologically. I opted for the latter, as it provides the benefit of considering the thinker’s positions over time and adds a bit of dramatic flair by providing a sense of the exchange as it occurred.

27. 1 *THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON 1776–1826*, 632 (James M. Smith ed., 1995). Notably, Jefferson did not send the letter to Madison until January 9, 1790, almost two and one-half years after the conclusion of the Philadelphia Convention and when all states but Rhode Island had ratified the Constitution, rendering the Constitution effective. See U.S. CONST. art. VII.

28. See generally THOMAS PAINE, *COMMON SENSE* (1776). Paine’s fullest articulation of the idea came in his *Rights of Man*, which he published in 1791, after Jefferson’s 1789 Letter. See THOMAS PAINE, *RIGHTS OF MAN* (“[A]s government is for the living, and not for the dead, it is the living only that has any right to it.”). James Wilson also expressed related sentiments in peons to popular sovereignty. AMAR I, *supra* note 23, at 297 (“The people may change the constitution[] whenever and however they please. This is a right of which no positive institution can ever deprive them. . . . A majority of the society is sufficient for this purpose.”).

29. At least two pieces of evidence demonstrate that Jefferson had thought deeply on this topic. First, he drafted the September 6, 1789 letter as a means to articulate his idea without any immediate intention to send it to Madison, as he wrote:

I sit down to write to you without knowing by what occasion I shall send my letter. I do it because a subject comes into my head which I would wish to develop a little more than is practicable in the hurry of the moment of making up general dispatches.

Smith, *supra* note 27, at 631. Next, in the January 9, 1790 cover letter with which Jefferson sent the pivotal letter to Madison, he noted his continued rumination, writing: “[a]fter so long lying by me, and further turning the subject in my mind, I find no occasion to alter my mind. I hazard it therefore to your consideration.” *Id.* at 648. Moreover, there is evidence to suggest that, earlier in 1789, Jefferson had tried to persuade Marquis de Lafayette to include a principle about the “rights of succeeding generations” in his draft of the Declaration of the Rights of Man. See *id.* at 631 n.35.

30. *Id.* at 631–32.

question of such consequences as not only to merit decision, but place also, among the fundamental principles of every government.”³¹ Jefferson thought that this principle was “capable of proof” and he set out to do so.³²

The fundamental premise of Jefferson’s argument was “‘*that the earth belongs in usufruct to the living*’: that the dead have neither powers nor rights over it.”³³ Jefferson grounded this idea in his conception of unoccupied land as held in common by society such that it reverted to the living upon the death of the prior possessor.³⁴ The succession laws, Jefferson noted, were positive rather than natural in character and, thus, were determined by society. He wrote that “no man can, by *natural right*, oblige the lands he occupied, or the persons who succeed him in that occupation, to the payment [sic] of debts contracted by him.”³⁵

From here, Jefferson risked the fallacy of composition by stating that “[w]hat is true of every member of the society individually, is true of them all collectively since the rights of the whole can be no more than the sum of the rights of the individuals.”³⁶ To demonstrate the applicability of his idea that the earth belongs to the living as a political community, Jefferson relied on actuarial tables to estimate the length of each particular generation, which he calculated at around 19 years. At this interval, each generation “would . . . come on, and go off the stage at a fixed moment, as individuals do now.”³⁷ No generation, then, could “contract debts greater than may be paid during the course of it’s [sic] own existence,”

31. *Id.* at 632.

32. *Id.*

33. *Id.*

34. Here, among other places, Jefferson likely owes a debt to Locke. See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT, ch. V, § 27 (“[T]he earth, and all inferior creatures, be common to all men . . .”).

35. Smith, *supra* note 27, at 632. Jefferson continued: “For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.” *Id.* at 632. In ultimate irony, Jefferson died in substantial debt that was born by his grandson, Jefferson Randolph, for much of his life. Thankfully, we need not appraise the merit of an idea on the consistent practice of its originator, given Jefferson’s penchant for binding posterity in his personal life.

36. *Id.* at 632–33. Although such inferences are fertile grounds for error, political theorists have utilized arguments of composition and division for the political community vis-à-vis individuals since the inception of the field. See, e.g., PLATO, REPUBLIC. Indeed, Jefferson did note some “material difference . . . between the succession of an individual, and that of a whole generation,” namely that individuals are subject to the succession and inheritance laws of the whole society. SMITH, *supra* note 29, at 632–33. Here, however, he neglects to consider whether his argument may be extended, in the same way, such that a generation should be subject to the constitutional constraints of the whole polity or “people” across time.

37. *Id.* at 632.

because “the earth belongs to each of these generations, during it’s [sic] course, fully, and in their own right.”³⁸

Crucial to the considerations of this article, Jefferson then argued that his conception of each generation’s right to the unencumbered use of the land applied to the fundamental political order of society:

On a similar ground it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. . . . The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. **Every constitution then, and every law, naturally expires at the end of 19 years.** If it be enforced longer, it is an act of force, and not of right.³⁹

Thus, for Jefferson, because the members of the deceased generation have no natural right beyond their deaths to bind posterity, each generation’s positive laws and constitutions must expire with them as well, as the constitution’s legitimating source has ceased to be. That legitimating source is the consent of the people who are the very font of the constituent power.⁴⁰

Anticipating a critique, Jefferson considered whether the succeeding generation’s power of repeal, such as that embodied in Article V, sufficed to overcome the difficulty he exposed. Jefferson concluded that it did not, because “the power of repeal is not an equivalent” to natural expiration due to the practical impediments of the political process, and certain failures he saw inherent in a representative democracy. Natural expiration:

might be indeed [an equivalent] if every form of government were so perfectly contrived that the will of the majority could always be obtained fairly and without impediment. But this is true of no form. The people cannot assemble themselves. Their representation is unequal and vicious. Various checks are opposed to every legislative proposition. Factions get possession of the public councils. Bribery corrupts them. Personal interest lead them astray from the general interests of their constituents: and other impediments arise so as to prove to every practical man that a law of limited duration is much more manageable than one which needs a repeal.⁴¹

38. *Id.*

39. *Id.* at 634 (emphasis added).

40. *See, e.g.,* LOCKE, *supra* note 34, at ch. VII, § 119.

41. Smith, *supra* note 27, at 634–35.

Jefferson did not, however, expressly consider the notion of *tacit* assent, which figured prominently in Locke's writings,⁴² and which Madison would use to rebut Jefferson quite effectively. Nor did Jefferson consider the fact that people may not lend if debts were not necessarily to be assumed by succeeding generations.

Toward the end of his argument, Jefferson articulated one of his motivations for this principle: its assumed effect as a prophylactic against tyranny. Jefferson wrote that "it will exclude at the threshold of our new government the contagious and ruinous errors of this quarter of the globe, which have armed despots with means, not sanctioned by nature, for binding in chains their fellow men."⁴³

Jefferson's concern with these issues was not confined to mere constitutional theory. He expressed a genuine desire to implement these concepts as a matter of constitutional practice, perhaps during the coming struggle over the initial amendments to the Constitution. Jefferson urged Madison to:

Turn this subject in your mind, my dear Sir, and particularly as to the power of contracting debts; and develop it with that perspicuity and cogent logic so peculiarly yours. Your station in the councils of our country gives you an opportunity of producing it to public consideration, of forcing it into discussion. At first blush it may be rallied, as a theoretical speculation: but examination will prove it to be solid and salutary.⁴⁴

Madison did not seem to agree.

B. *Madison's Letter in Opposition*

Madison responded to Jefferson in a letter dated February 4, 1790.⁴⁵ In that letter, Madison weaved together several lines of argument to rebut Jefferson's points to, in the words of one scholar, "devastating effect."⁴⁶ At the outset, Madison noted that, while Jefferson's points raised "many interesting reflections" as theoretical matters, he was not persuaded the idea was "in *all* respects compatible with the course of human affairs" and

42. See LOCKE, *supra* note 34, at ch. VII, § 119.

43. Smith, *supra* note 27, at 635.

44. *Id.* at 635.

45. As noted, although Jefferson's substantive letter was dated September 6, 1789, he did not send it to Madison until much later, with a cover letter dated January 9, 1790. The two had even met at Monticello in December 1789 as Jefferson notes that he "mentioned [the September letter] to you when I had the happiness of possessing you at Monticello, but still forgot to give it to you." *Id.* at 638–41, 648.

46. ELSTER, *supra* note 8, at 102 n. 32.

that “the doctrine . . . seems liable in practice to some very powerful objections.”⁴⁷ Before setting out his objections, Madison stated that he understood Jefferson’s central argument to be: “As the earth belongs to the living, not to the dead, a living generation can bind itself only.”⁴⁸

Central themes of Madison’s objections include the benefits of stability in the constitutional order, whether the living owe any duty to the dead, and the Lockean notion of tacit assent. I will also consider here Madison’s earlier writings in the *Federalist*, in which he first espoused some of his ideas on this matter that likely informed his arguments here.

Madison began the objections in his letter by noting that “[t]he acts of a political Society may be divided into three classes. 1. The fundamental Constitution of the Government. 2. Laws involving stipulations which render them irrevocable at the will of the Legislature. 3. Laws involving no such irrevocable quality.”⁴⁹ In the American tradition, constitutional provisions rather than legislative laws seem also to apply to this second category, as a legislature cannot irrevocably bind a future legislature.⁵⁰ Madison himself appeared to count debts as among the second category. The third category appears to denote merely positive laws enacted by a legislature.

1. Stability and its Benefits for Constitutional Order

The first theme Madison invoked in his “endeavor to sketch the grounds of [his] skepticism” to Jefferson was the notion of constitutional stability and its myriad attendant benefits.⁵¹ Madison argued that stability in government over time produces a veneration among the people for the government with consequent beneficial effects, as he wrote: “Would not a Government so often revised become too mutable to retain those prejudices in its favor which antiquity inspires, and which are perhaps a

47. Smith, *supra* note 27, at 650.

48. *Id.* Madison’s full paraphrase of Jefferson’s argument is as follows:

As the earth belongs to the living, not to the dead, a living generation can bind itself only: In every society the will of the majority binds the whole: According to the laws of mortality, a majority of those ripe at any moment for the exercise of their will do not live beyond nineteen years: To that term then is limited the validity of every act of the Society; Nor within that limitation, can any declaration of the public will be valid which is not *express*.

Id.

49. *Id.*

50. See, e.g., Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997) (Legislative entrenchment “is inconsistent with the democratic principle that present majorities rule themselves.”).

51. Smith, *supra* note 27, at 650.

salutary aid to the most rational Government in the most enlightened age?"⁵² Here, Madison reiterated an idea that he had previously developed in a *Federalist Paper* almost two years prior.

In *Federalist* 49, Madison had considered the notion of appealing to the people through a constitutional convention as a method of guarding against the encroachments of a department of government, which Jefferson previously had alluded to in his *Notes on the State of Virginia*.⁵³ There Madison wrote that: "as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest government would not possess the requisite stability."⁵⁴

It should be noted that the formulation of this idea in his 1790 letter to Jefferson may be a slight permutation of the idea as articulated in *Federalist* 49, as Madison's assumption that each appeal to the people carries an implication of defects in governments was not fully expressed in the latter letter. It is unclear whether Madison maintained this assumption that an appeal to the people implied some defect in government when the appeal was made not as a medium of checks and balances, but in the broader context of a regular, periodic appeal, whether corrective or not. Perhaps the notion remained implicit; a precommitment to recurrent constitutional conventions necessarily implies an acceptance of the current or future possibility of defects in government, broadly defined. Nevertheless, the core of Madison's thesis remained: the stability of a constitution over time would increase the veneration for it among the people, with all the attendant benefits that such stability and veneration entails.⁵⁵

52. *Id.* at 650–51. For a discussion of the deep entrenchment of present veneration of the U.S. Constitution, see LEVINSON (2012), *supra* note 1, at 336–38.

53. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 124–25, 221 (U.N.C. Press 1982). Here, Jefferson also raised relevant issues including endorsing frequent conventions in order to assess how well the constitution was working, and noting that conventions may fix defects in the constitution. *Id.* at 118 ("This constitution was formed when we were new and unexperienced, in the science of government. It was the first too which was formed in the whole United States. No wonder then that time and trial have discovered very capable defects in it.")

54. THE FEDERALIST NO. 49 (James Madison).

55. Madison touched on some effects of this veneration in *Federalist* 49, alluding to a stability feedback loop as the people's reverence for the laws increased over time: "When the examples which fortify opinion are *ancient* as well as *numerous*, they are known to have a double effect. In a nation of philosophers, this consideration ought to be disregarded. A reverence for the laws would be sufficiently inculcated by the voice of an enlightened reason. But a nation of philosophers is as little to be expected as the philosophical race of kings wished for by Plato." *Id.*

This argument also has interesting implications when considered from the modern perspective of constitutional veneration. See, e.g., PAUL KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON

Returning to the 1790 letter: Madison further argued that, along with the salutary effects stability may have on public opinion, the certainty produced by stability in the laws had beneficial effects for property and improvements.⁵⁶ Madison noted that Jefferson's proposals would induce a lack of certainty and all its salutary effects, along with the possibility of anarchy. Madison expressed concern that "all rights depending on positive laws, that is, most of the rights of property would become absolutely defunct; and the most violent struggles [ensue]." ⁵⁷ Recognizing the connection between the rule of law and property value, Madison painted a dismal picture regarding this potential for anarchy:

The possibility of an event so hazardous to the rights of property could not fail to depreciate its value; that the approach of the crisis would increase this effect; that the frequent return of periods superseding all the obligations depending on antecedent laws and usages, must be weak[en]ing the reverence for those obligations, co-operate with motives to licentiousness already too powerful; and that the uncertainty incident to such a state of things would on one side discourage the steady exertions of industry produced by permanent laws, and on the other, give a disproportionate advantage to the more, over the less, sagacious and enterprising part of the Society.⁵⁸

Another central effect Madison highlighted was the possibility for the emergence of factions, either malevolent in effect or in themselves, that would not otherwise arise without the regular, periodic occurrence of

THE CONCEPT OF SOVEREIGNTY 14 (2011) ("At the center of our civil religion is the 'priesthood' of the Court, guarding the sacred text of the constitution.").

Further, this argument is subject to objections: namely the harmful effects of rigid entrenchment. If, by this long stability and veneration, a constitution becomes too difficult to amend when a change is needed, it may produce harmful effects and even become a "suicide pact."

56. Here, Madison considered Jefferson's proposal with respect to his "3d. class of acts," namely the positive laws revocable at the will of the legislature. Smith, *supra* note 27, at 651.

57. Smith, *supra* note 27, at 651. From the perspective of merely changing a constitution at periodic intervals, an objection might be made to Madison's point here. Distinguishing between the fundamental laws articulated by the constituent power and the subordinate laws articulated by the constituted power and the common law, general laws and rights of property may largely endure across constitutional regimes. The common law, and indeed many related institutions such as the Supreme Judicial Court of Massachusetts, endured from the colonial through the revolutionary period, the Articles of Confederation and the Constitution. This, though is far from certain. And in fairness to Madison, Jefferson did advance this principle with respect to all laws and Madison here explicitly considered the effect on the positive laws of the legislature. Perhaps the implication, then, is that Jefferson's proposal is not as bad in some applications (merely to constitutions, excepting positive laws) as it is in others (to both constitutions and positive laws, simultaneously). Nevertheless, there may be a disincentive to long-term planning if there's a threat of changes in the positive laws, even if the property regime does in fact remain the same.

58. See Smith, *supra* note 27, at 651-52.

constitutional conventions. Madison questioned whether “such a periodical revision” would not “engender pernicious factions that might not otherwise come into existence?”⁵⁹ Recurring constitutional conventions might provide an impetus for the emergence of malignant factions that may not otherwise coalesce to exert power where higher hurdles existed prior to the convening of the constituent power, namely the power of “the people” to establish or modify their form of government.⁶⁰ Further, emergent factions need not have malevolent intent to be destructive. In *Federalist* 49, Madison noted that frequent recourse to constitutional conventions would create a situation in which “[t]he passions . . . not the *reason*, of the public would sit in judgment.”⁶¹

Worse yet, for Madison, this propensity for faction and lack of continuity could facilitate a fundamental lapse in constitutional order: “Would not . . . a Government depending for its existence beyond a fixed date, on some positive and authentic intervention of the Society itself, be too subject to the casualty and consequences of an actual interregnum?”⁶² As Madison convincingly articulated, Jefferson’s proposal raises the risk of a failure to maintain the continuity of both constitutional order and the

59. *Id.* Stephen Holmes notes:

Here, as elsewhere, Madison revealed his indebtedness to Hume: ‘were one to choose a period of time, when the people’s consent was the least regarded in public transactions, it would be precisely on the establishment of a new government. In a settled constitution, their inclinations are often consulted; but during the fury of revolutions, conquests, and public convulsions, military force or political craft usually decides the controversy.

Holmes, *supra* note 8, at 217 n.78 (quoting DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 461 (1963)).

60. This argument is susceptible to the objection there may not be such a large divide between the factions, interests, and passions present in ordinary politics and those at work in a constituent assembly itself. Constituent assemblies may even be *more* factional and polarized. See, e.g., Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 347 (2000).

61. THE FEDERALIST NO. 49, *supra* note 54 (James Madison). There, Madison also expressed concern over “[t]he danger of disturbing the public tranquility by interesting too strongly the public passions.” *Id.* This point is intriguing given that scholars have since noted that constitutions are often written in times of high passion, contrary to the conventional belief that they are “Peter sober legislating for Peter drunk.” Jon Elster, *Don’t Burn Your Bridge Before You Come to It*, 81 TEX. L. REV. 1751, 1768–69 (2003) (citing JED RUBENFELD, *FREEDOM AND TIME* 130 (2001)); see also ELSTER, *ULYSSES UNBOUND*, *supra* note 8, at 89 (citing FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 180 (1960)); *Id.* at 159 (“[T]he premise of a sober Peter may not be fulfilled in reality. It is an overwhelming empirical regularity that constitutions tend to be written in times of turbulence and upheaval in which passions tend to run high.”). Perhaps, though, a Jeffersonian arrangement of recurrent conventions at a set interval would mitigate this tendency to convene conventions only in times of high passion, as a mandatory convention may occur in times of relative calm.

62. Smith, *supra* note 27, at 651. Akhil Amar notes that Madison properly criticized Jefferson for his proposal that “replaces the product of earlier popular deliberation with anarchy.” Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1074 (1988).

laws—a harm to be avoided in any political society committed to the rule of law.

2. A Living Duty to the Dead

Another distinct line of argument Madison raised sounds in deontology: the living owe a duty to the dead because they enjoy the fruits of the dead's improvements.⁶³ As Madison wrote:

If the earth be the gift of nature to the living their title can extend to the earth in its natural State only. The *improvements* made by the dead form a charge against the living who take the benefit of them. This charge can no otherwise be satisfied than by executing the will of the dead accompanying the improvements.⁶⁴

Thus, in obtaining the benefit of the improvements left for posterity, present generations also acquire the obligation of adhering to the prior generation's will with respect to the improvements.⁶⁵ Their adherence is consideration for the benefit received.

Taking up Jefferson's points about the debts incurred by one generation, Madison argued that the benefits of the debts themselves may accrue to future generations. He wrote:

Debts may be incurred for purposes which interest the unborn, as well as the living: such are debts for repelling a conquest, the evils of which descend through many generations. Debts may even be incurred principally for the benefit of posterity: such perhaps is the present debt of the U. States, which far exceeds any burdens which the present

63. Madison addressed this line of argument to those laws in his "2d. class," namely "[l]aws involving stipulations which render them irrevocable at the will of the Legislature." Smith, *supra* note 27, at 650.

64. *Id.* at 651 (emphasis added).

65. This argument, too, is amenable to objections on numerous grounds, including the epistemic issue of how to discern a "will of the dead accompanying the improvements," if one exists or existed. It is also unclear how long that will must be enforced (as long as the improvements exist?) and the breadth of the will's binding scope (i.e. if the "improvements" are the Constitution, the very foundations of political order, this implies binding commitments throughout all of political life). In defense of Madison's point, Steven Holmes writes: "True, future generations are seldom asked if they wish to accept a benefit (say, the defeat of Hitler) in exchange for assuming a debt. But if all civilized contracts required copresence then each generation would be reduced to a separate nation, that is, would be calamitously deprived of the advantages resulting from cooperating across time in which partners cannot, in principle, encounter one another. Practical considerations alone suggest that, in such cases, we should override the formal principle that no obligations can be incurred without express consent." Holmes, *supra* note 8, at 219.

generation could well apprehend for itself. The term of 19 years might not be sufficient for discharging the debts in either of these cases.⁶⁶

As the benefits of the debts incurred are enjoyed across generations, the burdens should be borne across generations in proportion to those benefits.⁶⁷ Madison eloquently summarized his argument on this point:

There seems then to be a foundation in the nature of things, in the relation which one generation bears to another, for the *descent* of obligations from one to another. Equity requires it. Mutual good is promoted by it. All that is indispensable in adjusting the account between the dead and the living is to see that the debits against the latter do not exceed the advances made by the former. Few of the incumbrances entailed on nations would bear a liquidation even on this principle.⁶⁸

But how to overcome Jefferson's likely objection that the living neither took a role in forming nor provided their consent to the constitution and the laws under which they live? Madison proposed the notion of tacit assent.

3. Tacit Assent

Implicit in and related to the deontological argument is Madison's constructive proposal to overcome the tensions Jefferson exposed: the "received doctrine [of] tacit assent."⁶⁹ The people, by their use and enjoyment of the establishments and improvements of prior generations, tacitly consent to the duties attendant to those improvements, the fulfilment of which constitutes the present generation's consideration binding them to the previous generation's will. Further, the people's failing to change the constitution or laws when they have the means to do so by amendment bolsters this notion of tacit assent to the present state of affairs. As Madison stated the principle, "a tacit assent may be given to established Constitutions and laws, and that this assent may be inferred, where no positive dissent appears."⁷⁰

66. Smith, *supra* note 27, at 651.

67. See Holmes, *supra* note 8, at 219.

68. Smith, *supra* note 27, at 651.

69. *Id.* at 652. This point also may overcome the problem in Madison's contractual argument that there was no offer/acceptance agreement between the dead and the living for the improvements by which the living benefit. Tacit assent may indeed be a stronger grounding than a quasi-contractual unjust enrichment theory.

70. *Id.* Madison, here, neglects to consider that, if it is difficult to amend the Constitution, positive dissent may not "appear," given the difficult nature of successfully organizing and achieving the desired amendment.

Madison argued that, between Jefferson's proposal and the adoption of tacit assent, the balance of harms fell in favor of tacit assent:

It seems less impracticable to remedy, by wise plans of Government, the dangerous operation of this doctrine, than to find a remedy for the difficulties inseparable from the other. May it not be questioned whether it be possible to exclude wholly the idea of tacit assent, without subverting the foundation of civil Society?⁷¹

Madison sought to address this question by asking “[o]n what principle does the voice of the majority bind the minority?”⁷² He held that here, contrary to Jefferson, that “[i]t does not result I conceive from the law of nature, but from compact founded on expediency. . . . Prior then to the establishment of this principle, *unanimity* was necessary; and strict Theory at all times presupposes the assent of every member to the establishment of the rule itself.”⁷³ Thus, tacit assent conjoined with majority rule are sufficient to overcome Jefferson's objections.

Without a principle of tacit assent, persons daily reaching the age of majority would not “be bound by acts of the Majority.”⁷⁴ Thus, “either a *unanimous* repetition of every law would be necessary on the accession of new members, or an express assent must be obtained from these to the rule by which the voice of the Majority is made the voice of the whole.”⁷⁵ Here, Madison exposed the unworkable nature of Jefferson's proposal in practice. The notion of a generation on which Jefferson's argument so heavily relies is a veritable fiction. Of course, there are not clear divisions between generations such that Jefferson's generation-based formula may apply. Rather, generations blend seamlessly into each other across an uninterrupted temporal plane.

After this biting and comprehensive critique, Madison softened his tone with his friend. He noted that “it is so much easier to espy the little difficulties immediately incident to every great plan, than to comprehend its general and remote benefits.”⁷⁶ Madison also reiterated his insistence that Jefferson's ideas were interesting in theory, but that Madison's objections were rooted in the consequences of their practical implementation:

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

The observations are not meant to impeach either the utility of the principle in some particular cases; or the general importance of it in the eye of the philosophical Legislator. On the contrary it would give me singular pleasure to see it first announced in the proceedings of the U. States, and always kept in their view, as a salutary curb on the living generation from imposing unjust or unnecessary burdens on their successors. But this is a pleasure which I have little hope of enjoying.⁷⁷

Madison noted that did not believe he would see the view implemented because of the lofty principles necessary to Jefferson's reasoning were beyond the present perspective of political actors, writing:

The spirit of philosophical legislation has never reached some parts of the Union, and is by no means the fashion here, either within or without Congress. . . . [O]ur hemisphere must be still more enlightened before many of the sublime truths which are seen thro' the medium of Philosophy, become visible to the naked eye of the ordinary Politician.⁷⁸

Thus, Madison did not believe that the people or their representatives were, in large part, sufficiently enlightened to responsibly implement Jefferson's principle.

Madison's view of the practical possibility of Jefferson's proposal appears very much shaped by the turbulent times in which he wrote. After the fears aroused by Shay's Rebellion and the disjunction under the Articles of Confederation, as well as the great struggle Madison had recently endured both to draft the Constitution at Philadelphia and in the ratification debates, Madison was acutely aware of the difficulties of forging constitutional consensus in turbulent circumstances. He also did recognize that "all the existing [state] constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an *enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government . . .*"⁷⁹ But, with respect to Jefferson's proposal for, what Madison described as, "a frequent reference of constitutional questions to . . . the whole society," Madison maintained that "[t]he danger of disturbing the public tranquility by interesting too strongly the public passions" was too great.⁸⁰ Thus, in both theory and practice, Madison

77. *Id.*

78. *Id.*

79. THE FEDERALIST NO. 49, *supra* note 54 (James Madison) (emphasis added).

80. *Id.*

maintained that recurrent recourse to constitutional conventions brought more harm than good.

C. *Jefferson's Rebuttal*

Jefferson did not directly respond to Madison's February 1790 letter. Jefferson did, however, take up the matter again twenty-six years later in a letter of July 12, 1816 to Samuel Kercheval, a Virginia attorney and friend. Here, Jefferson lamented that "[s]ome men look at Constitutions with sanctimonious reverence, and deem them like the arc [sic] of the covenant, too sacred to be touched."⁸¹

Jefferson did display, however, that the fervor of his position on the issue may have been mitigated by experience and, perhaps, reason, as he wrote: "I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be born with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects."⁸² Nonetheless, Jefferson maintained the core of his views on the periodic revision of a constitution. Here, Jefferson grounded his firm conviction in the idea of periodic revision in an Enlightenment ideal of rational human progress, writing:

I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors. It is this preposterous idea which has lately deluged Europe in blood.⁸³

In keeping with his notion of progress, he sought "to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-

81. Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 26, at 558–59.

82. *Id.* at 559. An argument may be made that this reserved position was always Jefferson's view. One commentator noted that the Declaration of Independence, drafted by Jefferson, argues for dissolving political associations only when "it becomes *necessary*" to do so. Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 B.Y.U. L. REV. 819, 864 (2014). Nonetheless, Jefferson's September 6, 1789 letter to Madison expresses his position fervently and does not contain the reserved caveats of his July 12, 1816 letter to Kercheval. See Letter from Thomas Jefferson to Samuel Kercheval, *supra* note 26.

83. *Id.*

meaning councils. And lastly, *let us provide in our constitution for its revision at stated periods.*"⁸⁴

As to the question of "[w]hat these periods should be," Jefferson returned to his conviction that "nature herself indicates." Maintaining his reliance on his generational theory, Jefferson wrote:

Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness; consequently, to accommodate to the circumstances in which it finds itself, that received from its predecessors; and it is for the peace and good of mankind, that a solemn opportunity of doing this every nineteen or twenty years, should be provided by the constitution; so that it may be handed on, with periodical repairs, from generation to generation, to the end of time, if anything human can so long endure.⁸⁵

Jefferson also attempted to rebut at least one of Madison's critiques of his position, namely the deontological claim of the dead upon the living. In implicit response to Madison's contractual argument that the living must carry out the will of the dead that accompanied the improvements made by the dead, Jefferson asked who had "the right to hold in obedience to their will" the majority of citizens:

The dead? But the dead have no rights. They are nothing; and nothing cannot own something. Where there is no substance, there can be no accident. This corporeal globe, and everything upon it, belong to its present corporeal inhabitants, during their generation. They alone have a right to direct what is the concern of themselves alone, and to declare the law of that direction; and this declaration can only be made by their majority. That majority, then, has a right to depute representatives to a convention, and to make the constitution what they think will be the best for themselves.

Unfortunately, Jefferson did not here rebut other of Madison's numerous critiques. Thus, no direct inferences may be drawn with respect to their exchange besides the fact that the practical experience of "forty years in government" did not persuade Jefferson that his view of periodic revision was impracticable, which was the foundation of Madison's critique.

Jefferson did identify a problem with his theory: how to discern the will of the people. Jefferson's solution involved voting in municipal ward divisions through which "the voice of the whole people would be thus

84. *Id.* at 559–60 (emphasis added).

85. *Id.*

fairly, fully, and peaceably expressed, discussed, and decided by the common reason of society.”⁸⁶ Jefferson was concerned, however, that:

[i]f this avenue be shut to the call of sufferance, it will make itself heard through that of force, and we shall go on, as other nations are doing, in the endless circle of oppression, rebellion, reformation; and oppression, rebellion, reformation, again; and so on forever.⁸⁷

Thus, for Jefferson, recourse to the people and providing them a voice on this question was a means of alleviating the pressures that, if otherwise repressed, could lead to revolution. Indeed, Jefferson ended his letter stating that if Kercheval should “approve and enforce” his opinions, “they may do some good.” If he did not approve of them, he should keep them to himself “as the effusions of withered age and useless time.”

Notably, nowhere in this letter does Jefferson call for the natural expiration of the constitution and laws, as he had in his 1789 letter on the topic. Providing in the constitution “for its revision at stated periods” does not necessarily assume the same discontinuity of political order that naturally expiring constitutions requires. Whether Jefferson intended to soften his position, or did not recognize this distinction, is unclear.

Ultimately, Jefferson’s robust rejection of the idea of *tacit* assent appears to be the primary cleavage in the unbridgeable gap between his and Madison’s views. The rejection of tacit consent also forms the foundation of Jefferson’s call for recurring conventions, which are necessary to ensure positive consent from each generation. Although Jefferson may have been persuaded by experience or reason to soften his stance on natural expiration of a constitution, he explicitly maintained his call for its periodic revision.

Despite no success with his aim at the federal level and the widespread impression that Madison “won” the debate, myriad individual United States have implemented Jefferson’s vision. Thus far, eighteen states have adopted Jefferson’s principle in their constitutions at different periods. I next provide a general overview of the various states that have adopted such provisions and brief histories of their adoption and invocation.

86. *Id.* at 561.

87. *Id.*

III. THE LABORATORIES IN ACTION: STATES THAT HAVE IMPLEMENTED AUTOMATIC QUESTION PROVISIONS

Throughout the history of state constitutions, 18 states have at some point adopted a provision either mandating a convention be held or mandating future referendums on whether to hold a convention. At present, 14 states retain “automatic question” provisions mandating a referendum on whether to hold a constitutional convention be submitted to the people at regular, periodic intervals.⁸⁸ States have adopted these provisions relatively consistently across the course of American constitutional history, with several states adopting automatic question provisions in each of the 18th, 19th, and 20th centuries. In the subsections that follow, I provide very brief overviews of the state constitutional histories with respect to these questions. Recognizing that state surveys induce groans from readers (and writers alike), I present only skeletal sketches to orient this conversation.⁸⁹

A. 18th Century Constitutions

Three states adopted such provisions in the 18th century: Massachusetts, New Hampshire, and Kentucky. Massachusetts was the first to adopt a mandatory question provision in its 1780 Constitution, which is widely noted for its unprecedented democratic elements, both in constitutional substance and ratification method.⁹⁰ This provision required that “[i]n order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary,” the legislature must call in 1795 for a vote of the qualified voters from the various municipalities “for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution, in order to amendments.”⁹¹ If two-thirds of those voters answered in favor of revisions, the provision called for a constitutional

88. See, e.g., Williams, *supra* note 11 at 569–70.

89. A full history of each particular state’s constitutional history with respect to automatic call provisions would be a fascinating and fruitful endeavor, but is beyond the scope of this work.

90. John Adams prepared the first draft of this constitution, and he noted that he “had the honor to be principal engineer.” LOUIS ADAMS FROTHINGHAM, A BRIEF HISTORY OF THE CONSTITUTION AND GOVERNMENT OF MASSACHUSETTS 26 (1916) (citing 4 C.F. ADAMS, LIFE AND WORKS OF JOHN ADAMS 216). I need to perform further research to discern, if possible, if the mandatory call provision was in his draft of the constitution. Nonetheless, it is a point of some interest that Jefferson, an obvious proponent of such a provision, and Adams, the “principal engineer” of the first constitution to adopt such a provision, were two of the most leading statesmen absent from the Philadelphia Convention.

91. MASS. CONST. pt. 2, ch. 6, art. X (superseded 1821 by MASS. CONST. pt. 2, ch. 6, art. IX).

convention to assemble.⁹² That vote was held as scheduled in 1795. Although a majority voted in favor of a convention, that simple majority did not cross the two-third threshold and a convention was not held.⁹³ Though this provision of the 1780 Constitution of Massachusetts existed at the time of Jefferson and Madison's exchange, it is curious that neither made reference to it. A draft of a revised constitution from an 1853 Massachusetts convention contained an automatic question provision, along with numerous other proposed amendments, but that revised constitution was rejected by the people of that Commonwealth.⁹⁴ The 1780 Constitution, with dozens of amendments, remains in force.

New Hampshire has demonstrated the most robust commitment to the principle of periodic conventions. In its 1784 Constitution, New Hampshire adopted a *mandatory convention* provision, requiring that a convention be called seven years after that Constitution's adoption with no prior vote of the people or legislature required.⁹⁵ The 1792 convention convened and replaced that provision with an automatic question provision requiring that a vote on whether to call a constitutional convention be submitted to the people every seven years in perpetuity.⁹⁶ Thus, New Hampshire became the first state to adopt the Jeffersonian principle of automatic, recurrent recourse to the people. Until a 1964 amendment to allow the legislature to propose amendments, a constitutional convention was the only means of amending the New Hampshire constitution and many were held under the provision.⁹⁷

In its 1792 constitution, Kentucky adopted another unique implementation of the principle. That constitution required that the question whether to hold a convention be automatically submitted to the people in 1797 and, if approved by a majority, resubmitted to the people again in 1798.⁹⁸ If approved by a majority a second time, a convention would convene.⁹⁹ Kentuckians voted in the affirmative in both elections

92. *Id.*

93. See Dinan, *supra* note 11, 71 MONT. L. REV. at 399; Martineau, *supra* note 11, at 439 (recording votes of 11,386 in favor, and 10,867 opposed).

94. FROTHINGHAM, *supra* note 90, at 53–59.

95. N.H. CONST. pt. 2, art. 99 (1784) (superseded 1792 by N.H. CONST. pt. 2, art. 99); Dinan, *supra* note 11, 71 MONT. L. REV. at 399.

96. N.H. CONST. pt. 2, art. 99 (1784) (repealed and superseded 1980 by N.H. CONST. pt. 2, art. 100); Dinan, *supra* note 11, 71 MONT. L. REV. at 399.

97. SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION: A REFERENCE GUIDE 17 (2004).

98. KY. CONST. art. XI (1792) (superseded 1799 by KY. CONST. art. IX).

99. *Id.*

and convened a convention in 1799.¹⁰⁰ The constitution that emerged from that convention did not contain an automatic question provision.

B. 19th Century Constitutions

In the 19th century, 7 states adopted automatic call provisions: Indiana, New York, Michigan, Maryland, Ohio, Iowa, and Virginia. In its inaugural Constitution of 1816, Indiana adopted New Hampshire's model, except with a 12-year interval between automatic calls.¹⁰¹ Notably, this provision attempted to limit future conventions with respect to the issue of slavery or involuntary servitude, which the language of the provision sought to prohibit in perpetuity.¹⁰² Notwithstanding the conceptual problems with attempts to bind both future conventions and the constituent power generally, this provision is an interesting testament to Indiana's heritage as a state from the Northwest Territory. The Northwest Ordinance prohibited slavery in this fashion.¹⁰³

Indiana held a subsequent convention resulting in the Constitution of 1851. The document did not include an automatic question provision, which has thus far spelled an end to the Jeffersonian experiment in this state.¹⁰⁴ Indiana was one of two states to eliminate its automatic question provision in a subsequent convention, the other being Virginia. The 1851 constitution remains in force.¹⁰⁵

100. Dinan, *supra* note 11, 71 MONT. L. REV. at 399.

101. IND. CONST. art. VIII (1816) (superseded 1851 by IND. CONST.). The provision read: Every twelfth year, after this constitution shall have taken effect, at the general election held for Governor there shall be a poll opened, in which the qualified Electors of the State shall express, by vote, whether they are in favour of calling a convention, or not, and if there should be a majority of all the votes given at such election, in favour of a convention, the Governor shall inform the next General Assembly thereof, whose duty it shall be to provide, by law, for the election of the members to the convention, the number thereof, and the time and place of their meeting; which law shall not be passed unless agreed to by a majority of all the members elected to both branches of the General assembly, and which convention, when met, shall have it in their power to revise, amend, or change the constitution. But, as the holding any part of the human Creation in slavery, or involuntary servitude, can only originate in usurpation and tyranny, no alteration of this constitution shall ever take place so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes, whereof the party shall have been duly convicted.

Id.

102. *See id.*

103. *See* AMAR I, *supra* note 23, at 260; WILLIAM P. McLAUGHLAN, THE INDIANA STATE CONSTITUTION: A REFERENCE GUIDE 4 (1996).

104. *See* IND. CONST. art. 16; *see* Dinan, *supra* note 11, 71 MONT. L. REV. at 399.

105. *See, e.g.,* McLAUGHLAN, *supra* note 103, at 1.

New York adopted the automatic question in its 1846 constitution. New York's provision calls for the submission of the question every 20 years and remains in force.¹⁰⁶ As one commentator noted, “[t]he provision legitimized the extraconstitutional tradition of the legislature, submitting the question of the calling of a constitutional convention to the people.”¹⁰⁷ Moreover, New York was the first state to adopt the automatic question in conjunction with a legislative method of amending the constitution—prior to New York, the states adopting the automatic question had done so as the sole means of amending their constitutions.¹⁰⁸ The New York provision has thus far resulted in six conventions, some of which have amended the provision slightly for non-material date updates.¹⁰⁹ Most recently, the people of New York voted on whether to hold a convention in November 2017, and voting overwhelmingly against holding one.¹¹⁰

Michigan followed by adopting an automatic call provision in 1850.¹¹¹ As one commentator noted “Michigan has heeded Jefferson’s advice . . . [and] made reconsideration of the constitution a regular feature of Michigan politics.”¹¹² Notably, the provision was amended in the 1908 constitution to alter the way in which the majority vote was counted. That constitution counted the majority of voters voting on the

106. N.Y. CONST. art. XIX, § 2. It reads:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question “Shall there be a convention to revise the constitution and amend the same?” shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. . . .

Id.

107. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 280 (1990).

108. Dinan, *supra* note 11, 71 MONT. L. REV. at 400.

109. *Id.* at 403 tbl.1.

110. See McKinley, *supra* note 10; Bottini, *supra* note 11.

111. MICH. CONST. of 1850, art. 20, § 2. It reads:

At the general election to be held in the year one thousand eight hundred and sixty-six, and in each sixteenth year thereafter, and also at such other times as the Legislature may by law provide, the question of the general revision of the constitution shall be submitted to the electors qualified to vote for members of the Legislature, and in case a majority of the electors so qualified, voting at such election, shall decide in favor of a convention for such purposes, the Legislature, at the next session, shall provide by law for the election of such delegates to such convention. All the amendments shall take effect at the commencement of the year after their adoption.

Id.

112. SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 239 (1996).

question, rather than at the election, as sufficient to convene a convention.¹¹³ The present provision calls for a referendum on the question every 16 years.¹¹⁴

Maryland adopted an automatic question provision in 1851.¹¹⁵ The original provision, which required that the legislature discern the “sense of the people” every ten years with respect to holding a convention, was amended in 1867 to extend the duration to every twenty years.¹¹⁶ A constitutional convention has never been called under this provision, although Maryland has held three conventions since its adoption, in 1864, 1867, and 1967–68.¹¹⁷ Interestingly, when the question was posed to the people in both 1930 and 1950, small majorities of the voters approved the holding of a convention on both occasions. The legislature, however, declined to call a convention, reasoning that the provision required a “majority of voters at such election,” rather than a majority of voters voting on the question, and the “yes” vote in both years fell short of that mark.¹¹⁸

113. Compare MICH. CONST. of 1850, art. 20, § 2 (“voting at such election”) with MICH. CONST. of 1908 (“a majority of the electors voting on the question”).

114. MICH. CONST. art. 12, § 3. It states:

At the general election to be held in the year 1978, and in each 16th year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state. If a majority of the electors voting on the question decide in favor of a convention for such purpose, at an election to be held not later than six months after the proposal was certified as approved

Id.

115. See Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. BALT. L. REV. 217, 266 (2007). The current provision reads:

It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year nineteen hundred and seventy, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by Law for the assembling of such convention, and for the election of Delegates thereto. Each County, and Legislative District of the City of Baltimore, shall have in such Convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called. But any Constitution, or change, or amendment of the existing Constitution, which may be adopted by such Convention, shall be submitted to the voters of this State, and shall have no effect unless the same shall have been adopted by a majority of the voters voting thereon.

MD. CONST. art. XIV, § 2.

116. DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 262–63 (2006).

117. *Id.* at 263.

118. *Id.*; Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 530 n.6 (1999).

Ohio also adopted an automatic question provision in its 1851 Constitution.¹¹⁹ In a 1912 convention, Ohioans amended the provision to make a majority of those voting on the question, rather than a majority of those voting at the election, sufficient to convene a convention, thereby preempting the issue that arose in Maryland.¹²⁰ Still, the only time voters have called for a convention under this provision was in 1871.¹²¹

Iowa included an automatic question provision in the document emerging from its third constitutional convention in 1857.¹²² The provision remains in force, although no convention has been convened under it since the provision was adopted more than 160 years ago.¹²³ Interestingly, Iowa voters approved of holding a convention in the vote under this provision in 1920, but the legislature failed to convene a convention and one was not held.¹²⁴ This raises interesting constitutional issues of the legislature's failure to abide by the constitutional provision that are, unfortunately, beyond the scope of this work. Whether to involve the legislature in the submission of the question and in the convening of a

119. The pertinent part of the present provision reads:

At the general election to be held in the year one thousand nine hundred and thirty-two, and in each twentieth year thereafter, the question: "Shall there be a convention to revise, alter, or amend the constitution," shall be submitted to the electors of the state; and in case a majority of the electors, voting for and against the calling of a convention, shall decide in favor of a convention, the general assembly, at its next session, shall provide, by law, for the election of delegates, and the assembling of such convention, as is provided in the preceding section . . .

OHIO CONST. art. XVI, § 3.

120. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, 1912, REPORTED BY C. WALKER, (Columbus: F.J. Herr Printing 1912); see also STEVEN H. STEINGLASS & GINA J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE 323 (2004).

121. STEINGLASS, *supra* note 120, at 323.

122. See IOWA CONST. art. X, § 3; JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE (1998). Iowa held prior conventions in 1844 and 1846. STARK, at 2–3. The pertinent portion of the provision reads:

At the general election to be held in the year one thousand nine hundred and seventy, and in each tenth year thereafter, and also at such times as the general assembly may, by law, provide, the question, "Shall there be a convention to revise the constitution, and propose amendment or amendments to same?" shall be decided by the electors qualified to vote for members of the general assembly; and in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention, and for submitting the results of said convention to the people, in such manner and at such time as the general assembly shall provide . . .

IOWA CONST. art. X, § 3.

123. STARK, *supra* note 122, at 10.

124. Dinan, *supra* note 11, 71 MONT. L. REV. at 403; BENJAMIN F. SHAMBAUGH, THE CONSTITUTIONS OF IOWA 281–82 (Historical Socy. of Iowa 1934).

convention was, however, a significant point of debate in many conventions as discussed below. Notably, the Iowa legislature's failure was not litigated.¹²⁵

Virginia presents a curious case: Virginians adopted an automatic question provision in their 1870 Constitution but did away with it in 1902. As we shall see, there is evidence to suggest that delegates to the 1902 Virginia convention were acutely concerned with restricting the suffrage of African-Americans.¹²⁶ Given the anti-democratic sentiment prevailing at Virginia's 1902 convention, it is perhaps unsurprising that the highly democratic automatic question provision was eliminated. Virginia has not subsequently reinstated an automatic question provision, despite two prominent constitutional revisions in 1928 and 1971, and two "limited" conventions in 1945 and 1956.¹²⁷ It remains one of only two states to have eliminated the automatic question provision after adopting a recurring call on the issue, the other being Indiana.

C. 20th Century Constitutions

The 20th century witnessed a third wave of adoptions of automatic question provisions, with 8 states adopting such clauses: Oklahoma, Missouri, Hawaii, Alaska, Connecticut, Illinois, Montana, and Rhode Island. Oklahoma was the first state in the 20th century to adopt an automatic question provision in its inaugural constitution of 1907. Interestingly, the provision has not been strictly enforced or regularly submitted to the people every 20 years. This requirement is, apparently, "routinely ignored."¹²⁸ Proposals for calling a convention were submitted to and rejected by voters in 1926, 1950, and 1970.¹²⁹ The proposal has not been submitted to the people since 1970, despite the every 20-year submission requirement remaining in the Constitution.¹³⁰ Oklahoma's

125. STARK, *supra* note 122, at 154.

126. *See, e.g.*, JOHN DINAN, *THE VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE* 15 (2006).

127. *See id.* at 18–24.

128. DANNY M. ADKISON & LISA MCNAIR PALMER, *THE OKLAHOMA STATE CONSTITUTION: A REFERENCE GUIDE* 9, 18, 299 (2001) (also suggesting without citation that the voters repealed this requirement in 1994, but the constitutional text remains as is); *see also* Sanford V. Levinson & William D. Blake, *When Americans Think About Constitutional Reform: Some Data and Reflections*, 77 OHIO ST. L.J. 211, 215 (2016); John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 33 (2016).

129. *Id.* at 18.

130. *See* Levinson & Blake, *supra* note 128, at 215; *see also* OKLA. CONST. art. XXIV, § 2. ("Provided, That the question of such proposed convention shall be submitted to the people at least once in every twenty years.").

constitution still retains means for calling a convention through the legislature, but the state has not held a convention since its first in 1907.

Missouri adopted an automatic call provision in 1920 through the highly democratic mechanism of constitutional initiative, both submitted and approved by voters.¹³¹ Thus, the issue was not debated in a convention prior to adoption. Missouri voters have called two conventions under mandatory votes, in 1922 and 1943.¹³²

Connecticut adopted an automatic call provision in 1965, after its prior two constitutions of 1818 and 1955 lacked provisions for convening constitutional conventions.¹³³ The provision remains in force, but no convention has been called under it.

Hawaii adopted an automatic question provision in its 1959 inaugural state constitution.¹³⁴ Hawaii has held two constitutional conventions since then, one in 1968 and one in 1978. Hawaii maintains this provision and continues to submit the referenda question whenever nine years has elapsed since the last submission.¹³⁵

Alaska also adopted an automatic question provision in its 1959 inaugural state constitution. The Alaska provision specifies the referendum requirements in detail. It provides that the lieutenant governor must place the referendum question on the ballot and articulates the specific wording of the question on the ballot.¹³⁶ This specificity

131. Dinan, *supra* note 11, 71 MONT. L. REV. at 399; Martineau, *supra* note 11, at 453–54 n.54.

132. Dinan, *supra* note 11, 71 MONT. L. REV. at 403.

133. CONN. CONST. art. XIII, § 2; WESLEY W. HORTON, THE CONNECTICUT CONSTITUTION: A REFERENCE GUIDE 162 (1993). The provision reads:

The question “Shall there be a Constitutional Convention to amend or revise the Constitution of the State?” shall be submitted to all the electors of the state at the general election held on the Tuesday after the first Monday in November in the even-numbered year next succeeding the expiration of a period of twenty years from the date of convening of the last convention called to revise or amend the constitution of the state, including the Constitutional Convention of 1965, or next succeeding the expiration of a period of twenty years from the date of submission of such a question to all electors of the state, whichever date shall last occur. If a majority of the electors voting on the question shall signify “yes”, the general assembly shall provide for such convention as provided in Section 3 of this article.

CONN. CONST., art. XIII, § 2.

134. HAWAII CONST. art. 17, § 2. The provision reads in part:

The legislature may submit to the electorate at any general or special election the question, “Shall there be a convention to propose a revision of or amendments to the Constitution?” If any nine-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

Id.

135. See *id.*; League of Women Voters of Hawaii v. Doi, 552 P.2d 1392, 1393 (1976); Trask, *supra* note 12, at 291, 320.

136. ALASKA CONST. art XIII, § 3. The provision reads:

generated controversy. In 1970, the question whether to hold a convention received an affirmative vote 34,911 to 34,472.¹³⁷ The referendum language used, however, was more expansive than language mandated by the Constitution, which called for the question, “Shall there be a Constitutional Convention?” The Lieutenant Governor, however, included a preface, reading, “As required by the Constitution of the State of Alaska,” prior to the question on the ballot. The election was challenged which brought the issue of the meaning of the clause to the Alaska Supreme Court. The court found that the referendum language used by the Lieutenant Governor was misleading in that it suggested that the constitution required that a convention be held, rather than merely a vote. The Court noted that the “referendum ballot so far departed from the constitutionally prescribed form of ballot that the electorate’s right to vote on the question was impermissibly infringed.”¹³⁸ The Court struck down the election results and called for a new vote on the issue at the next election, where the question was defeated.¹³⁹

Illinois included an automatic question provision in its constitution in 1970, which requires submission of the question every 20 years.¹⁴⁰ The state has never called a convention under this provision.¹⁴¹ Montana adopted an automatic question provision in its 1972 Constitution.¹⁴²

If during any ten-year period a constitutional convention has not been held, the lieutenant governor shall place on the ballot for the next general election the question: “Shall there be a Constitutional Convention?” If a majority of the votes cast on the question are in the negative, the question need not be placed on the ballot until the end of the next ten-year period. If a majority of the votes cast on the question are in the affirmative, delegates to the convention shall be chosen at the next regular statewide election, unless the legislature provides for the election of the delegates at a special election. The lieutenant governor shall issue the call for the convention. Unless other provisions have been made by law, the call shall conform as nearly as possible to the act calling the Alaska Constitutional Convention of 1955, including, but not limited to, number of members, districts, election and certification of delegates, and submission and ratification of revisions and ordinances. The appropriation provisions of the call shall be self-executing and shall constitute a first claim on the state treasury.

Id.

137. GERALD A. MCBEATH, *THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE* 215 (1997).

138. *Boucher v. Bomhoff*, 495 P.2d 77, 78 (1972).

139. *Id.*; MCBEATH, *supra* note 137, at 215.

140. ILL. CONST. art. XIV, § 1 (“(b) If the question of whether a Convention should be called is not submitted during any twenty-year period, the Secretary of State shall submit such question at the general election in the twentieth year following the last submission.”).

141. *See Dinan, supra* note 11, 71 MONT. L. REV. at 403.

142. *See* MONT. CONST. art. XIV, § 3. (“Periodic Submission. If the question of holding a convention is not otherwise submitted during any period of 20 years, it shall be submitted as provided by law at the general election in the twentieth year following the last submission.”); LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 206 (2001).

Voters have rejected holding a convention under this provision in the two times a call has issued, which it submits every 20 years.¹⁴³

Rhode Island included an automatic question provision in its Constitution of 1973.¹⁴⁴ Interestingly, this provision was adopted despite exceeding the substantive scope of the 1973 convention. The 1973 convention was convened as a limited convention to consider only certain topics, and neither amendment procedures nor constitutional convention calls were specified in its mandate. Two delegates to the convention, William E. Powers and Prof. Patrick T. Conley, relied on a constituent power theory to assert that the subject of convening future conventions was within that convention's power because the proposals would then be submitted to the electors for approval.¹⁴⁵ The convention adopted an automatic question provision that requires the secretary of state to submit the convention question to the people if it has not been submitted at any point during the prior ten years, and the people adopted this proposal.¹⁴⁶

Fourteen states continue to maintain these provisions. Five state provisions call for a vote on the question every 10 years: Alaska, Hawaii, Iowa, New Hampshire, and Rhode Island. Eight state provisions call for a vote every twenty years: Connecticut, Illinois, Maryland, Missouri, Montana, New York, Ohio, and Oklahoma. Finally, Michigan's Constitution calls for a vote on the question every 16 years.

IV. THE STATE CONVENTION DEBATES

I now proceed to flesh out the principle arguments in the many constitutional conventions that have taken up the debate between Jefferson and Madison and extended it on the floors of their convention halls.¹⁴⁷ Striking themes emerge across these conventions. Many of the

143. *Id.*

144. R.I. CONST. art. XIV, § 2 (“If the question be not submitted to the people at some time during any period of ten years, the secretary of state shall submit it at the next general election following said period.”).

145. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 34–35 (2007); THE PROCEEDINGS OF THE RHODE ISLAND CONSTITUTIONAL CONVENTION OF 1973, App’x A (Conley, ed.) (1973) [hereinafter RHODE ISLAND 1973]. This issue engendered litigation, with a delegate challenging the attempted restrictions on the convention’s agenda. The Rhode Island Supreme Court later ruled the issue was moot because the convention did not consider itself bound by the restrictions on its agenda and the convention had concluded. *Malinou v. Powers*, 333 A.2d 420, 422 (R.I. 1975).

146. CONLEY & FLANDERS, *supra* note 145.

147. First, an important note on the sources used in this endeavor. Although there have been 18 states that have, at certain points, included an automatic call provision in their constitutions, unfortunately we lack sources that capture the debates of numerous constitutional conventions in which such provisions were discussed and adopted. Many of the conventions choose not to record

conventions witnessed discussion of the same fundamental issues that Jefferson and Madison debated, for example: the paramount importance of the central question; the tension between popular sovereignty and constitutional precommitment; notions of constitutional stability; a Madisonian fear of recourse to the people; and questions over how to discern the people's will, among other themes. Other convention deliberations pressed beyond the debate between Jefferson and Madison to consider novel issues of both theory and practice, such as: the distinction between an automatic convention and automatic referendum; the desire to obviate the interests of the legislature when making recourse to the people; the pedagogical effects of recurring convention votes on the general civic education; concerns over how to count the voting on a referendum question; concerns over convention costs, and many other issues.

Given the extensive scope of this comparative exercise, much of the historical context of particular conventions and debates regrettably must be left out. As such, this effort provides limited insight into the lives and roles of the individual delegates, as well as the many personal biases and interests they undoubtedly had. The goal here is merely to explore central themes of these debates as they emerged in constitutional practice, particularly those issues that attracted delegates at multiple different conventions across the states and centuries.¹⁴⁸

their debates. Others prepared only journals, rather than transcripts of the proceedings. We do, however, have useful sources for conventions in 12 of these states, namely: New Hampshire, New York, Michigan, Maryland, Ohio, Iowa, Virginia, Hawaii, Connecticut, Illinois, Montana, and Rhode Island. Professor Dinan provides a wonderful comprehensive record of the available sources for the study of state constitutional conventions. See DINAN, *supra* note 11, at 279–85. Unfortunately, there are not records of pivotal conventions discussing automatic call provisions for the following states: Massachusetts, Kentucky, Indiana, Oklahoma, Missouri, and Alaska. Thus, the following discussion of arguments from constitutional conventions derives from a review the records from numerous constitutional conventions in these 12 states dating from the New Hampshire Convention of 1792, through to the Rhode Island Convention of 1973. For a full breakdown of the conventions with sources, see DINAN, *supra* note 11, at 279–85.

148. A further note on the sources. Given that much of the debate on this specific issue within a convention is heavily situated within conversations among delegates on this and many other issues, it is appropriate to be quite limited in my aims. Strains of argument concerning this issue were interspersed in many discussions of other issues. Thus, I spent considerable effort attempting to isolate thought on this particular issue, while still attempting to provide some context of the overall discussion where pertinent. Laura J. Scalia, who reports doing work on the convention records, describes the experience working with these sources particularly well:

[M]ost individual speeches are not as ideologically coherent as the presentation might suggest. Rather than give prepared texts, delegates usually responded ad hoc to the views and proposals offered daily on the floor. Speeches usually cannot be read in isolation, for politicians were trying to speak *to* each other, to build upon the arguments of their colleagues and counter the positions of their adversaries. Some offered detailed cases to

I examine first a number of issues that were expressly considered by either Jefferson, Madison, or both, and that were elaborated upon in the state conventions. I next consider issues that piqued the interest of convention delegates but were largely unexplored by Jefferson and Madison. This division is loose and imprecise, as the concepts discussed often relate and overlap. Nevertheless, some analytical distinctions must be made, and I believe this organization helps to frame the discussion.

A. *The Jefferson–Madison Debate Embellished*

Professor Dinan’s observation is correct that much of the debate that occurred on the floors of these conventions was an extension of the conversation between Jefferson and Madison. At least 6 of the major themes that emerged across conventions speak to this fact, and I consider them in the sections that follow.¹⁴⁹

1. The Importance of the Question

One issue on which almost every delegate appeared to agree across the conventions was that the question whether to convene a convention to alter the fundamental constitutional law was an issue of profound importance. Many delegates across conventions explicitly stated that the issue was one of the most important provisions of the respective constitutions.¹⁵⁰

For example, in Iowa, one delegate framed the debate in these terms: “I look upon this question as one of the most important that can come before this Convention, involving, as it does, the rights of the people to a

support their points of view, but most of them selected bits and pieces of arguments already given, echoing the conclusions of their more articulate peers. This means that expositions were usually scattered and disorganized, not categorically broken into specific, disparate themes To reproduce full speeches might give a fuller picture of how particular individuals argued [on this issue under study,] but it would lead the reader in many directions simultaneously.

SCALIA, *supra* note 9, at 20–21.

149. Of course, I cannot here discuss every single argument arising in conventions in each of these states over the course of almost 200 years. I merely pursue the strains of argument I found to be either fundamental, pervasive across conventions, or both.

150. *See, e.g.*, THE THIRD CONSTITUTIONAL CONVENTION OF THE STATE OF CONNECTICUT: PROCEEDINGS [1965] 1087 (Hartford: Connecticut State Library, 1966) [hereinafter CONNECTICUT 1965] (“I sincerely hope that this very important Resolution will prevail in this Convention.”); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, 1950, 768 (Honolulu: State of Hawaii, 1961) [hereinafter HAWAII 1950] (“The proposal for constitutional amendment, as I indicated before, was one of the most important provisions of the Constitution.”).

greater extent than any question that has been or can be presented here.”¹⁵¹ Similarly, a delegate to the Ohio Convention of 1873 noted that the “important provision . . . is not a question of policy, but it is a fundamental question, and goes to the foundation of government.”¹⁵²

For a New York delegate of 1846, the provision “asserted a great principle that all power was inherent in the people and that once in 20 years they might take the matter into their own hands.”¹⁵³ Another New Yorker in 1867 stated that “it is . . . a very grave question whether a Convention shall be called, whether the Constitution shall be revised and amended.”¹⁵⁴ Thus, many delegates considering the issue shared an understanding of the gravity of the points under consideration. In doing so, they exhibited a Jeffersonian perspective on the magnitude of the issue and fulfilled Madison’s desire for the prospect to remain in the mind of the philosophical representative.¹⁵⁵

2. Specific Reference to the Principle as Jeffersonian

In several of the conventions, delegates made specific reference to Thomas Jefferson in connection with this principle. A delegate in the Ohio Convention of 1873 explicitly tied the principle to Jefferson’s ideas, stating that the automatic question provision:

is in accordance with the principle laid down by Mr. Jefferson in discussing this question as to the right to bind future generations, and he speaks of this as a necessary safety-valve, as established to prevent a resort which has taken place, in some States, to revolution . . .¹⁵⁶

Commenting on the amendment process more generally, a delegate to the Hawaii Constitutional Convention of 1950 recalled that “Jefferson said a

151. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA [1857] 604, W. Blair Lord, Reporter (Davenport: Luse, Lane, 1857) [hereinafter IOWA 1857].

152. See, e.g., 2 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO [1873] pt. 3, 2851 (Cleveland: W.S. Robison, 1873–74) [hereinafter OHIO 1873].

153. DEBATES AND PROCEEDINGS IN THE NEW YORK STATE CONVENTION FOR THE REVISION OF THE CONSTITUTION, 1846, 794, reported by S. Croswell and R. Sutton (Albany: Office of the Argus, 1846) [hereinafter DEBATES OF NEW YORK 1846].

154. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK HELD IN 1867 AND 1868, 3826, reported by Edward F. Underhill (Albany: Weed, Parsons and Company, 1868) [hereinafter NEW YORK 1867].

155. Smith, *supra* note 27, at 652.

156. OHIO 1873, *supra* note 152, at 2846. Notably, it is unclear why merely an easy amendment provision, rather than a periodic convention provision, would not suffice to alleviate the concerns of this delegate that posterity be bound too tightly.

good many years ago ‘a revolution every twenty years is a good thing,’ and that’s still good political philosophy.”¹⁵⁷

A delegate to the Maryland Convention of 1967 not only invoked Jefferson’s name in support of the automatic question provision in that state, he also employed Jefferson’s methodology for attempting to calculate the duration of the interval between votes, stating:

Thomas Jefferson has often been quoted on this floor, so I take the liberty of citing him once more. It was the opinion of that great statesman that the people should have a chance once every generation to vote on their fundamental law. I have tried through the Maryland Planning Commission to find out how long a generation lasts in the State of Maryland. The nearest figure I can come to is nineteen years.¹⁵⁸

Thus, in several conventions, the delegates exhibited their direct debt to Jefferson as the father of the idea they were pursuing.

3. Popular Sovereignty & Progress

Pervasive across debates on the automatic question provisions in many conventions was a robust notion of popular sovereignty as the font of constitutional power. Many delegates agreed that “the constitutional convention was the people’s function in government.”¹⁵⁹ A delegate to the Maryland Convention of 1851 “regarded this as a most sacred right, and desired a provision engrafted in the Constitution authorizing the people to vote every ten years, as to the propriety of holding a convention.”¹⁶⁰

An Ohio delegate in 1850–51 was pleased that they had “cast off the shackles of the past, when it was deemed unsafe to submit such questions to the people.”¹⁶¹ A delegate to the Iowa Convention of 1857 nicely elaborated on this sentiment:

157. HAWAII 1950, *supra* note 150, at 762.

158. DEBATES OF THE [MARYLAND] CONSTITUTIONAL CONVENTION OF 1967–68, 2600 (Annapolis: Hall of Records Commission, 1982) [hereinafter MARYLAND 1967]. Not all delegates were so infatuated with citations to the exalted name of Jefferson. Speaking in opposition to the delegate cited in the text above, another Maryland delegate stated: “I do not know who said it, I am sure it was not Thomas Jefferson or Justice Holmes or anybody, but over home we have a saying, even a blind hog can root out an acorn every once and a while.” *Id.* at 2601.

159. MONTANA CONSTITUTIONAL CONVENTION, 1971–1972: Verbatim Transcript 472 (Helena: Montana Legislature, 1981) [hereinafter MONTANA 1971].

160. DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION [1851] 360 (Annapolis: W. M’Neir, 1851) [hereinafter MARYLAND 1851].

161. 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, 435 J.V. Smith, Official Reporter to the Convention (Columbus: S. Medary, 1851) [hereinafter 1 OHIO 1850].

[I]f the people are safe to be trusted; if we act upon the principle that our government is predicated upon the will of the people, and that our sovereign power traced back to its source, rests upon the individual, capable of self-government. . . I ask. . . where there can be a valid objection to this provision in the constitution, to allow the people at any time, upon the shortest notice, the privilege of altering the constitution when they have found it to fail to meet their wants, or to cease to provide for their interests? Can there be any objection to placing the question directly before the people, and giving them the opportunity to make a change?¹⁶²

This penchant to submit the issue to the people was often combined with a sense of the overwhelming progress of mankind, and a need for the fundamental law of the various states to accord with this progress. A New York delegate in 1846 exhibited a Jeffersonian spirit of progress and lack of “sanctimonious reverence” for the existing constitution, stating:

This was a day when Constitutions and long established principles were being subjected to investigation and scrutiny by the people, and gentleman who were so tenacious of holding on to doctrines that prevailed half a century ago, would learn that there was a spirit of intelligence and advancement abroad among the people, which must and would be obeyed. And he was not willing to put his judgment against the judgment of the sovereign people of his State.¹⁶³

A similar notion of progress arose in the Illinois Convention of 1969–1970, as one delegate stated:

In this day of fast-moving changes in the state government to meet our ever changing society, . . . it was our reassigning that the least we could do was to offer an opportunity for the citizens of Illinois to be able to decide if they saw a need for a Constitutional Convention every twenty years, realizing that if the first twenty years there was no need, then surely there would be a need in forty years, or at least every generation or third or half we would have an opportunity to take another look at our constitution. . . .¹⁶⁴

Thus, for some delegates, an overwhelming sense of progress in society warranted recourse to the people in connection with a reconsideration of

162. 1 IOWA 1857, *supra* note 151, at 608–09.

163. REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK, 1846, 245, reported by William G. Bishop and William H. Attree (Albany: Office of the Evening Atlas, 1846) [hereinafter REPORT OF NEW YORK 1846].

164. RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, DECEMBER 8, 1969 TO MAY 21, 1970, at 478 (1972) [hereinafter, ILLINOIS 1969].

the fundamental law, to examine whether it was fit for their times. The next issue I consider, constitutional precommitment, is intimately connected to these notions of popular sovereignty and progress.

4. Precommitment, the Binding of the People, & Stability

The central question of the Jefferson–Madison debate—may the dead bind the living?—arose and invigorated debate at many conventions. A Virginia delegate in 1901–02 explained that “[a] Constitution in its nature, is an instrument which ties the hands of the people. The whole object of a Constitution is for the people to take away from themselves powers that they would otherwise have.”¹⁶⁵ Should the dead, then, preemptively seize the power of the living and entrench constitutional norms behind super-majority amendment thresholds?

A delegate to the Ohio Convention in 1850–1851 framed the issue of precommitment in distinctly Jeffersonian terms, stating:

We are engaged in the creation of a government which is not only for ourselves but which we proudly say is to be handed down to our posterity to be a rule of action for them. Yet posterity have no hand in making this government. They are not parties to the compact. They give no assent to its provisions. Is it not justice then to declare that when we deliver it into their hands, they shall have the privilege to say whether or not they will be bound by it? . . . Believing in the doctrine, that free government rests upon the voluntary consent of the governed, I hold that it is the duty of every man, in framing the organic law, to leave it so open to change, that it never can become anything else than the free, voluntary consent of the people.¹⁶⁶

Although this delegate did not expressly consider the notion of tacit assent, he clearly evinced a desire that the consent of the people be free and voluntary. Many delegates in favor of automatic question provisions across conventions shared this Jeffersonian sentiment and reticence to bind posterity too strictly.¹⁶⁷

165. 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA JUNE 12, 1901 TO JUNE 26, 1902, at 2615 (Richmond: Hermitage Press, 1906) [hereinafter VIRGINIA 1901–02].

166. 1 OHIO 1850, *supra* note 161 at 430–31.

167. See, e.g., OHIO 1873, *supra* note 152, at 2846 (discussing the “fundamental principle . . . which is sustained by authority, that every generation ought to govern itself; that we ought not to undertake to make a government which should bind future generations in such a way that they could not relieve themselves except through the mere machinery of existing government. There ought to be some safety-valve in this matter . . .”).

Several of the delegates to certain conventions pressed the idea of constitutional precommitment further than either Jefferson or Madison had developed in their exchange. For example, one delegate to the New York Convention of 1846 articulated the conception that making a procedural precommitment to periodically reevaluate the constitution on stated occasions would free the legislature from the consistent burden of considering constitutional amendments. He noted that “[w]ithout this provision, the legislature might be continually tormented with applications to amend.”¹⁶⁸ Freeing the legislature of this burden by providing for a periodic convention referendum would allow the legislature to focus on its other responsibilities of sound policymaking.

To the contrary, however, many delegates across conventions embraced Madison’s notion of the importance of stability in a constitution. A delegate to the New York Convention of 1846 expressed his concerns with frequent changes to the constitution that an automatic question provision may engender, admitting: “that all power was inherent in the people and the people could exercise their power through their representatives; but changes should not be continually made. Love of change was peculiar to man, but the public mind should be pervaded with the necessity for change, before it should be acceded to.”¹⁶⁹

Similarly, a Montana delegate phrased his resistance to calling a convention in a colorful simile: “Constitutional conventions should never be held unless there’s a crying need demonstrated. It occurs to me that it is something like a person taking castor oil every Friday at 9:00 p.m. whether he needs it or not.”¹⁷⁰ A delegate to the Illinois Convention of 1969–1970 sounded purely Madisonian in stating that the automatic question provision “[c]reates the possibility that a Convention could be called every twenty years, and in so doing it creates a sense of instability. I suggest to you that stability and the sense of stability is essential to a sound constitution. I, therefore, feel that this provision is dangerous and unnecessary.”¹⁷¹

168. DEBATES OF NEW YORK 1846, *supra* note 153, at 794. Stephen Holmes has articulated a related idea on the notion of constitutional precommitment as liberating from the burdens of constant lawmaking. See, e.g., Holmes, *supra* note 8, at 228–30.

169. DEBATES OF NEW YORK 1846, *supra* note 153, at 794.

170. 3 MONTANA 1971, *supra* note 159, at 462. A similar argument appeared in the debates of the French Constituent where the deputy Salle argued against having conventions at regular intervals, stating: “if they were declared to be periodical, they would believe themselves necessary by the very fact of existing; **they would want to act even when they have nothing to do**; they would finish by upsetting everything.” See JON ELSTER, SECURITIES AGAINST MISRULE 182–83 (2013) (emphasis added).

171. ILLINOIS 1969, *supra* note 164, at 489.

Some delegates also raised the issue that it was easier to tear down constitutions and institutions than it was to build them up. Terming the proposed provision the “self-denying ordinance,” a delegate to the Ohio Convention of 1850–1851 stated that “in early life, I learned that it was easier to pull down than to build up; therefore I am disposed to be satisfied with our institutions as long as they are enduring.”¹⁷² Similarly, a delegate to the Maryland Convention of 1851 was “prepared [to] endure much political evil before [consenting to another convention]. Conventions . . . are beautiful to talk about for young and aspiring . . . sweet in the mouth but bitter . . . in the belly.”¹⁷³

Not all delegates agreed with these stability-based objections. One Montana delegate even argued that a recurring examination of the constitution *enhances* stability, noting that “periodic consideration strengthens rather than weakens a constitution and a government, as it builds into the Constitution a remedy for changing times.”¹⁷⁴ Other Jeffersonian voices of progress echoed through convention halls:

It is obvious that we are going to experience a very rapid growth in the complexity of our society and the concomitant increasing involvement and changing pattern of the relationship of government to society and it is every more obvious that there needs to be a revision of our basic structure of government to keep pace with that increasingly complex society which will grow by geometric proportions, surely disproportionately with the past. Therefore, our constitution probably will not and should not last anything near a hundred years. As I said, it is and should be a living document reflecting current feelings and attitudes. It will not necessarily reflect those attitudes fifty years from now.¹⁷⁵

This 1967 Maryland delegate’s idea of a living document reflecting current attitudes is particularly striking. Thus, the tensions between stability and progress identified by the Founders echoed through the halls of the subsequent state conventions.

In addition to Madisonian notions of stability, some delegates exhibited a Madisonian reticence to put the issue of a convention repeatedly in the hands of the people. For example, an Ohio delegate in the 1850–1851 Convention was concerned that “there are a great many

172. 1 OHIO 1850, *supra* note 161, at 432.

173. MARYLAND 1851, *supra* note 160, at 365.

174. 3 MONTANA 1971, *supra* note 159, at 462.

175. MARYLAND 1967, *supra* note 158, at 2601.

other things you might have, that you do not now dream of, if you would call a new convention and make another constitution.”¹⁷⁶

Others evinced more faith in the people. A New York delegate in 1867 argued for trusting the people with the decision: “we have no apprehension that a Convention will, at any time, be called when in reality there is no occasion for holding one; that the intelligent electors of the state will not fail to properly settle that question whenever presented.”¹⁷⁷ Similarly, an Ohio delegate in 1873 argued: “I do not see where is the danger of intrusting to the people, under suitable limitation, the right to say for themselves without legislative permission”¹⁷⁸ Another Ohio delegate at the next convention in 1912 mocked attempts to “‘safeguard’ the people so that they can’t vote for what they want.”¹⁷⁹ Thus, an exchange over whether or not to bind or to trust the people repeatedly with this question arose at many of the conventions.

5. How Will the People Express their Desire?

A particularly interesting issue concerned how the people would express their desire for a convention if there was not a periodic referendum on the question. Jefferson raised the notion of the difficulty of how to discern the will of the people in his 1816 letter, and issues over how disparate individuals may exercise a corporate, collective sovereign will of “the people” have long plagued political theory.¹⁸⁰ As a delegate in Illinois phrased the issue: “If we don’t have a provision in the constitution for the automatic placing of the issue . . . how would the people express their desire if they have that desire to call a Constitutional Convention from time to time?”¹⁸¹ A delegate in the Iowa Convention of 1857, expressed a similar sentiment arguing that “[t]here must be an authentic mode of ascertaining the public will, somehow and somewhere. . . . I say that the will of the people must prevail, but that there must be some mode of finding out that will.”¹⁸² For many delegates, the referendums precipitated by the mandatory question provisions were the answer to discerning the people’s will.

176. 1 OHIO 1850, *supra* note 161, at 432.

177. 4 NEW YORK 1867, *supra* note 154, at 1858.

178. OHIO 1873, *supra* note 152, at 2847.

179. 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO, 1912, at 1913 (Columbus: F.J. Heer Printing, 1912) [hereinafter OHIO 1912].

180. *See, e.g.*, JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Johnathan Bennett ed., 2017) (1762); Letter to Kercheval, *supra* note 26.

181. ILLINOIS 1969, *supra* note 164, at 487.

182. 1 IOWA 1857, *supra* note 151, at 624.

Others disagreed, believing the people could make their voices heard sufficiently through representative democracy and the legislative process.¹⁸³ A Maryland delegate in 1851 believed that “a legislative act was necessary, in the future, to procure legal proof of the will of the people”¹⁸⁴ A delegate in Ohio in 1850 asked a related question: “Why . . . force upon the people, once in twenty years, the necessity of voting on this question, when they do not ask it? The voice of the people, when they require a revision of the organic law can be heard through their representatives, and there is no danger that it will be unheard.”¹⁸⁵ In 1873, another Ohio delegate expressed the principle: “I think you should not disturb the fundamental law for slight reasons . . . if the people desire to have a Constitutional Convention called, they can very readily elect a Legislature with that view.”¹⁸⁶ Thus, whether the legislature was sufficient to capture the will of the people on this issue or whether a mandatory question provision was necessary, was a theme of debate across conventions.

Delegates at some conventions raised the point that allowing people to vote on whether or not to hold a convention would allow them to voice an endorsement of the existing constitution through a “no” vote at the periodic referendum. A delegate to the New York Convention of 1846 stated that the provision “was intended to give the people an opportunity to endorse their Constitution once in every twenty years, if they were satisfied with it; and if they were not, they might have it revised and amended, by calling a convention.”¹⁸⁷ The automatic question could institutionalize a means for the people to voice their satisfaction with the current state of affairs. Madison would no doubt interpret the failure to invoke the provision as assent to the current order.

6. What Is the Proper Interval Between Convention Referendums?

Although Jefferson maintained that “nature herself determined” the proper interval for the recurrence of constitutional conventions, the experience of the automatic question in practice raised some unanticipated difficulties.¹⁸⁸ Indeed, the notion of a “generation” embraced by Jefferson

183. ILLINOIS 1969, *supra* note 164, at 487.

184. MARYLAND 1851, *supra* note 160, at 361.

185. OHIO 1850, *supra* note 161, at 429.

186. OHIO 1873, *supra* note 152, at 2847.

187. REPORT OF NEW YORK 1846, *supra* note 153, at 1038.

188. Interestingly, a study by Tom Ginsburg and Zach Elkins suggests Jefferson’s intuition may be prescient. In their book, these scholars studied national constitutions over the past two centuries and found that the average length of those constitution’s endurance was 18 years. TOM GINSBURG,

is undoubtedly a fiction, as one generation obviously does not neatly expire and pass the baton to the next.¹⁸⁹ Rather, “generations” bleed together and overlap—one generation lives among both the previous and the subsequent generations at any given time. What interval should suffice, then? One delegate noted that there was no “magic number” but thought that 20 years was sufficient “for political changes and their relationship to the Constitution to be clearer,” while “a longer period may breed dangerous stagnation into the body politic.”¹⁹⁰

A delegate to the Ohio Convention of 1850–1851 evinced a distinctly Jeffersonian method of determining the interval: “We calculate that a generation of men passes away about once in twenty years, and this therefore is the period that has been fixed upon, for the laws of one to pass into the hands of another.”¹⁹¹ Another delegate at that convention thought the 20-year period struck the appropriate mean, believing “that while the ability to amend should be brought within the proper distance, it should not be brought too near. Once in twenty years would be frequent enough.”¹⁹²

Some intervals were a result of compromise. A member of the drafting committee in the Michigan Convention of 1850 explained that as the draft was being drawn up, “he found some members of the committee in favor of ten years, and some favored twenty years. They thought it better, however, to take a medium course and say fifteen years.” Not all in the general assembly of that convention agreed. Arguing for a shorter interval, a delegate wanted “to get at this constitution again in ten years, if I should happen to live.”¹⁹³ Another delegate argued for a shorter period due to his overwhelming sense of progress:

I think that ten years should be sufficient; for, within the last ten years, such rapid improvement in mechanical arts, the scientific professions, the mechanical telegraph, together with California coming into the

ZACH ELKINS & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* (2009). Notably, however, this study has been the subject of criticism, as the data appears over-inclusive, as they included a substantial quantity of “sham” constitutions.

189. Jefferson essentially admits as much when constructing the thought experiment. SMITH, *supra* note 29, at 632 (“To keep our ideas clear when applying them to a multitude, let us suppose a whole generation of men to be born on the same day, to attain mature age on the same day, and to die on the same day, leaving a succeeding generation in the moment of attaining their mature age all together.”).

190. MONTANA 1971, *supra* note 159, at 463.

191. 2 OHIO 1850, *supra* note 161, at 430.

192. *Id.* at 436.

193. 1 REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION TO REVISE THE CONSTITUTION OF THE STATE OF MICHIGAN, 1850, at 466 (Lansing: R.W. Ingals, 1850) [hereinafter MICHIGAN 1850].

Union, &c., that in my opinion, this period would be best. And another reason: because these things must necessarily, within the next ten years, revolutionize not only this whole nation, but the entire world. I hold that in the next ten years we are going to have an improvement much greater than we have already had in the science of government and the condition of society. I believe that fifteen years is too long . . . I believe that we shall have to alter it in five years, in view of the social revolution which is about to take place throughout the civilized world.¹⁹⁴

Despite this forceful rhetoric, that convention ultimately settled on the compromise of every 16 years, which is the interval at present.¹⁹⁵

A ten-year interval caused issues in Hawaii. The 1978 Hawaii convention appears to have resulted in part because of this automatic question provision but was not called under it. The text of the relevant clause directed the lieutenant governor to place the question on the ballot every ten years, but the 1978 general election was scheduled several days prior to the elapse of the full ten-year period since the adoption of the 1968 Constitution. Based on a literal reading of the text, the attorney general advised against asking the question, but the League of Women Voters sued, resulting in the legislature agreeing to place the question on the ballot. This uncertainty motivated the delegates to the 1978 convention to specify a nine-year, rather than a ten-year period, in which the absence of legislative action on the question would require the lieutenant governor to place the question on the ballot at the election held in the tenth year after voters had last considered the question.¹⁹⁶

In New Hampshire, the 7-year interval proved problematic when, in 1876, the state changed from annual to biennial elections for the legislature “on the ground that it would be cheaper to have biennial sessions than it was to have annual sessions.”¹⁹⁷ This change in the frequency of voting on the legislature had the unintended effect of preventing the automatic question from issuing on the constitutionally decreed seven-year schedule, as the biennial general elections fell on different years as the referendum question should have. As one delegate to the 1918 Convention noted, the automatic question “part of the Constitution has, by common consent and necessity, become a dead letter.

194. *Id.* at 466–67.

195. *See* MICH. CONST. of 1850, art. 20, § 2.

196. ANNE FEDERLEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE 200 (1993); Task, *supra* note 135, at 308.

197. CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION, JUNE 1918, at 206 (Manchester: John B. Clarke, 1918) [hereinafter NEW HAMPSHIRE 1918]; MARSHALL, *supra* note 97, at 17.

The legislature, at times when it sees fit, takes the sense of the voters as to whether there shall be a Convention called or not.”¹⁹⁸ In 1948, one delegate proposed that the question “has to come on an even year and we cannot use the seven-year interval any more; it has to be every eighth year or some other even year.”¹⁹⁹ It was not until 1964, however, that the provision was amended to require an automatic question every ten years, where it stands today.²⁰⁰ Thus, the proper length of the interval between automatic calls proved to be an interesting issue in a number of the conventions, both for theoretical questions over what constitutes a generation, and practical issues of application to other constitutional provisions.

B. *State Delegates Press Beyond the Jefferson–Madison Debate*

The framing of the issue in the context of the conventions, as well as the opportunity for extended consideration with the input of many different sources, teased out many profound questions raised by this concept, both theoretical and as applied, that did not emerge during the Jefferson–Madison exchange. These concerns included different methods by which to apply the Jeffersonian principle; whether it is desirable to obviate the legislature when making recourse to the people; the effect on civic education produced by considering the fundamental law; issues that arose within conventions themselves due to the presence of an automatic question provision in the constitution; how to count the votes cast in favor of a convention; and other interesting considerations. I explore these and other issues in the sections that follow.

1. Distinction Between Automatic Convention and Automatic Referendum

One distinction teased out in the state processes that Jefferson and Madison did not make express was a consideration of two forms of implementing the Jeffersonian principle: a provision automatically convening a *convention* and a provision providing for an automatic *referendum*. Besides the original provisions in New Hampshire in 1784, no state has since adopted an automatic convention provision.

198. *Id.* at 205.

199. JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION, MAY 1948, at 184 (Manchester: Granite State Press, 1948) [hereinafter NEW HAMPSHIRE 1948].

200. JOURNAL OF THE CONVENTION TO REVISE THE [NEW HAMPSHIRE] CONSTITUTION, MAY 1964, 116 (Concord: Evans Printing, 1964) [hereinafter NEW HAMPSHIRE 1964]; N.H. CONST., pt. 2, art. 100.

A proposal was, however, introduced in the Maryland Convention of 1967–1968 to require conventions to be held automatically at least once every fifty years.²⁰¹ A delegate spoke in favor, noting that “it may be desirable to impose an outside date at which a constitutional convention must convene if none of the provisions provided for the calling of one prior to that are utilized. . . . I submit fifty years is reasonable”²⁰² Another delegate spoke out fervently against this provision as “defeating the wishes of the people” because, “notwithstanding whatever the people may do at this next general election approving or rejecting [a] constitutional convention, that there shall be automatically a new convention in fifty years, seems to me is putting a term ceiling on the life of what we are doing here today.”²⁰³ This argument won out and the provision was defeated.

A delegate to the Illinois convention of 1969–1970 wanted to be clear on this point: “I want simply to make sure that everybody understands what this does. This does *not*—I repeat does *not*—provide that we shall have a Constitutional Convention every 20 years. It does only one thing: It provides that at least once every twenty years the people of Illinois will be given the question [to vote on]”²⁰⁴ Thus, discussion in several conventions considered various applications of the Jeffersonian principle, and virtually all adopted its more mild application in the form of automatic question referendums, rather than automatic conventions.

2. Cost of Convention

The alleged exorbitant cost of holding conventions that these provisions might inflict was a recurrent theme of objectors to automatic question provisions. As a delegate to the Michigan Convention of 1867 stated, “I think it is unnecessary to have frequent revisions to the Constitution. It is a very costly experiment.”²⁰⁵ At the Ohio Convention of 1912, a delegate stated that he did “not believe there is a necessity, or ever will be, for another constitutional convention to cost the people of this state \$2,000,000, which will be the cost of this Convention by the

201. DINAN, *supra* note 11, at 59.

202. MARYLAND 1967, *supra* note 158, at 2595.

203. *Id.* at 2601.

204. ILLINOIS 1969, *supra* note 164, at 483.

205. 2 THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN OFFICIAL REPORT BY WM. BLAIR LORD AND DAVID WOLFE BROWN 607 (1867) (Lansing: John A. Kerr, Printers to the State) [hereinafter MICHIGAN 1867].

time these proposals are submitted”²⁰⁶ Delegates expressed similar concerns at other conventions.²⁰⁷

By contrast, in the New Hampshire Convention of 1964, one delegate disagreed with the notion that Conventions were costly means of amending. Arguing that amendments in the legislature could prove just as costly, he stated:

It has been mentioned here . . . that there would be a substantial savings in dollars, by giving up Conventions or by having fewer Conventions; I cannot agree with that . . . [Debates in the legislature] will be costly and the costs will be hidden. We will not find it.”²⁰⁸

That delegate further argued that the cost of printing and submitting the legislature’s amendment proposals to the people piecemeal as they arose would be more expensive than the conventional method of submitting proposals all at once. Thus, the dual amendment method was too costly and conventions were the economical choice.²⁰⁹

Another delegate at that New Hampshire convention noted there would be “some substantial savings involved if Constitutional Conventions are called once every 10 years instead of once every 7 as presently provided.”²¹⁰ Whether this reasoning was persuasive or not is unclear, but New Hampshire did change the interval to 10 years at this convention.

A delegate at the Illinois Convention of 1969–1970 had even changed his mind on the desirability of the automatic question provision in light of the expense and his experience, stating:

I have now come full-circle. Having gone through this experience—and I use that word—I could use others—(laughter)—and having talked to some of the delegates who have also gone through this and heard 100 years, I think perhaps the legislators were more wise than we perceive in holding this experience from the people. You are talking now—I guess we are going to spend some-where in the area of \$10,000,000, one way or the other, and it is not much if you say it fast. Now someone says 14,000,000; that isn’t even much if you say it fast. I am now of the opinion that this matter should be left to the legislators. I am not sure that I would ever vote for a Constitutional Convention again.²¹¹

206. OHIO 1912, *supra* note 179, at 1911.

207. *See, e.g.*, MARYLAND 1967, *supra* note 158, at 2954.

208. NEW HAMPSHIRE 1964, *supra* note 200, at 113.

209. *Id.*

210. *Id.* at 110.

211. ILLINOIS 1969, *supra* note 164, at 3601–02.

Thus, the cost of conventions due to an automatic call was a substantial concern to some delegates.

3. Convention In the Hands of the Government or the People?

A central concern across many of the conventions was whether or not to involve existing organs of government, most often the legislature, in the process of convening a convention. This issue arose on two different levels: first, whether there should be recourse to the people at all or whether leaving the power of calling a convention with the legislature was sufficient; and, second, whether the legislature should be involved in the process once the automatic question provision was adopted. The earlier Jefferson writings in *Notes on the State of Virginia* and Madison's *Federalist* 49 did touch on these ideas of recurrent recourse to the people as a means of correcting abuses in government, but the second issue of whether to involve the organs of government in the process of calling for a vote or convening a convention was novel and widely discussed.

a. Trust the Legislature or Make Recourse to the People?

A major issue across conventions was the threshold question over whether the people need be consulted at all with respect to holding a constitutional convention, or whether leaving the power in the hands of the legislature would suffice. Would the legislature call for a convention when needed, even though legislators may have institutional or personal interests against holding a convention? A delegate to the Montana Convention of 1971–72 framed the question well:

It seems to me that you have one of two philosophies with regard to the Constitutional Convention. One would put the emphasis on the Legislature, and the other would put the emphasis on the people. . . . Any effort in any way to put some other time or bring up some other way the fact that the basic political right of the people is to call a convention, I would resist very strongly.²¹²

Delegates at some conventions argued for the legislative approach. These arguments largely advocated for placing trust in the legislature. In response to the question, “Can I trust the legislature?” one Illinois delegate stated: “Yessiree. That’s to coin a phrase. Our system [of government] requires that under the separation of powers we trust each branch of government almost entirely.”²¹³ An Iowa delegate at that state’s 1857

212. MONTANA 1971, *supra* note 159, at 472.

213. ILLINOIS 1969, *supra* note 164, at 501.

convention framed the issue of the people's role more bluntly: "If I understand what democracy is—I mean American democracy—it is based upon the constitution and the laws, and it does not wish to leave anything for the people to do, when they are acting under the laws, that shall affect the interests of the country. That is what I understand by American democracy."²¹⁴

Other delegates remained skeptical of the legislative approach.²¹⁵ Another Iowa delegate thought that "[t]he legislature may have some outside pressure, and may not represent the wishes of the people; or we may have a governor who will veto a provision of that kind, and defeat the wishes of the people."²¹⁶ In Hawaii, a delegate pointed out that "if you just leave it up to the legislature as it has been said, there is a possibility that the legislature may not act for 20, 30 or 40 years."²¹⁷ Similarly, in Virginia, a delegate questioned: "Suppose a Legislature gets into power in this State and willfully will not submit that question to the people when the people demand it[?]"²¹⁸ I take up this issue in the next section.

b. Involve the Legislature in the Referendum and Convention Process?

Can the legislature be trusted to put the referendum question on the ballot as required by an automatic question provision? Can it be trusted to convene and fund a convention if the people voted in the affirmative?²¹⁹ Due to concerns over the legislature's potential inaction on the issue, many delegates sought to make the automatic question provisions "as self-executing as possible."²²⁰ Delegates across conventions expressed the belief that a "[l]egislature should have nothing to do with calling a

214. 1 IOWA 1857, *supra* note 151, at 625.

215. See, e.g., ILLINOIS 1969, *supra* note 164, at 478 ("Citizens of Illinois should not be deprived of an opportunity to review periodically—every twenty years—an opportunity to rewrite their constitution."); 1 IOWA 1857, *supra* note 151, at 605 ("I hold that the people have an inherent right to change their fundamental law at any time without their representatives or any other body interfering with that right. . . . I favor the proposition that the people should have the right to amend their constitution at any time, independent of the Legislature.")

216. 1 IOWA 1857, *supra* note 151, at 640.

217. HAWAII 1950, *supra* note 150, at 748.

218. VIRGINIA 1901–02, *supra* note 165, at 2623.

219. Madison had noted in *Federalist* 49 that an appeal to the people would likely come from the executive or judiciary given that the "tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments." THE FEDERALIST NO. 49 (James Madison).

220. HAWAII, 1950, *supra* note 150, at 747; see also John P. Wheeler, Jr., *Changing the Fundamental Law* 58–59, in SALIENT ISSUES OF CONSTITUTIONAL REVISION (WHEELER, JR., JOHN P., ed., 1961).

convention.”²²¹ A New York delegate in 1846 wanted “simply to bring the constitution in review by the people once in twenty years, without the intervention of any other body.”²²²

On the federal level, this concern over state legislatures standing in the way of the people’s invocation of their constituent power animated the Founder’s construction of Article V of the United States Constitution. As Professor Amar notes: “in order to avoid the danger that self-dealing state legislatures might thwart needed reforms limiting their own powers or shifting additional authority to the central government, Article V allowed Congress to bypass these bodies in favor of special state ratifying conventions.”²²³ Concerning the federal legislature itself, Amar notes that “in order to prevent a self-dealing Congress from simply bottling up needed reforms that might limit its own powers, Article V offered an alternative amendment-proposal system that would not depend on congressional will.”²²⁴ This alternative amendment-proposal system is the ability to call a federal constitutional convention. Thus, state delegates considering the automatic question as a means of obviating legislative authority had federal precedent to look to.

Some delegates at state conventions observed a particular danger of pernicious factional influences arising from the legislature and impacting the will of the people. As a delegate to the Alaska Convention of 1955–56 discussed: “history has shown . . . that when the time approaches that the referendum is due . . . those that hold the actual political power . . . will find ways and means of advising against it and in such a way influence the otherwise free will of the people.”²²⁵ An Ohio delegate in 1850–51 wanted to ensure the people had a means to declare their will without appeal to a “cabal of interested politicians.”²²⁶ At this Ohio convention, there existed a shared sentiment among many delegates that the automatic question was a useful means of combating the interests of entrenched corruption in government.²²⁷

While debating the automatic question in Iowa, delegates to the 1857 Convention addressed the issue of an actual instance of perceived

221. MARYLAND 1851, *supra* note 160, at 363.

222. DEBATES OF NEW YORK 1846, *supra* note 153, at 794.

223. AMAR I, *supra* note 23, at 290.

224. *Id.*

225. RECORDS OF THE ALASKA CONSTITUTIONAL COVENTION OF 1956, at 1264–65, <http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Day%2044%20-%20January%2005%201956%20-%20Pages%201218-1320.pdf> [<https://perma.cc/V8NT-DYPM>].

226. 2 OHIO 1850, *supra* note 161, at 431.

227. *See Id.* at 432–33.

legislative inaction. As one delegate stated, it was a “well known fact to every individual who has been a resident of the State for that length of time, that the people of this State have endeavored . . . to get a constitutional convention called; and it is also a well known fact that, in two instances, at least, the will of the people, as expressed repeatedly upon this subject, has been thwarted through their representatives in the legislature”²²⁸ Here, the delegate is likely referencing the “widespread,” prevalent discontent with the 1846 Iowa Constitution and the lack of a convention call for years despite public pressure.²²⁹ Thus, some delegates at the 1857 Convention sought “to put some provision into the constitution to prevent the legislature from assuming the right to deprive the people of the right to say when and where and how they will amend their constitution.”²³⁰

One delegate warned that revolution could be the result of the inability of the people to address perceived defects in the constitution. Citing the then relatively recent unrest in Rhode Island, the delegate stated:

I desire to have the question so shaped that the people can have a Convention, without the Legislature having anything to do about it. I wish to refer gentleman for a moment to the Rhode Island case, which was carried up to the Supreme Court of the United States and there decided. The question involved there was, whether the people, by any means, could amend their constitutional law without the consent of the Legislature unless they incorporated into the constitution in the first place a provision giving them that right. It was decided by Judge Taney, that there was no other way for the people to amend their Constitution but by revolution, unless the right to amend it was reserved to them by the Constitution itself. That principle carried out here will produce the same result, unless we reserve that right to the people.²³¹

Here, the delegate referenced Dorr’s Rebellion, which was a violent conflict between factions in Rhode Island arising due to the lack of constitutional amendment provisions of its then-governing document, the royal charter granted by King Charles II in the 1660s.²³² Political tensions resulting from the governing charter’s unamendability lead to a political

228. IOWA 1857, *supra* note 151, at 605.

229. STARK, *supra* note 122, at 4.

230. IOWA 1857, *supra* note 151, at 607.

231. *Id.* at 605.

232. See AMAR I, *supra* note 23, at 369–71. The struggle lead to a Supreme Court decision, *Luther v. Borden*, in which Chief Justice Taney articulated the Court’s position that this was a political question Congress both should and must determine to guarantee each State a republican government. *Id.* at 370.

and military struggle between two rival regimes each claiming to be the lawful government of Rhode Island.²³³

To prevent such a circumstance, a delegate argued that the people should have the “right to reach the fundamental laws of their land without being compelled to ask it as a privilege from the hands of any legislative body.”²³⁴ Further, “[u]nless we provide in the constitution some such method as I have suggested, by which the people will retain the right to amend the constitution without the consent of the legislature, there will be no way to amend it unless they go through the legislative form for that purpose, except by revolution, and they would then become amenable in every effort to amend it, as they did in Rhode Island, to the charge of treason.”²³⁵ Another delegate was “willing to place to the greatest extent the control of the fundamental law, the foundation of all the law of our State, in the hands of the people, and independent of any power of the legislature to control their will.”²³⁶ Despite these sentiments, this Iowa convention ultimately adopted a provision that relied on the legislature to convene a convention if the people voted in the affirmative on the question.²³⁷

This issue was also widely discussed in connection with perceived legislative inaction at the Hawaii Convention of 1959. Many delegates wanted to ensure “that the thing is kept out of the hands of the legislature,” because “people ought to have the opportunity, apart from the proviso based on whether the legislature wants it or not, to vote on the question periodically.”²³⁸ That delegate elaborated on the point:

The language ought to be mandatory. It should not be left to the legislature to authorize such State officer to act. . . . The legislature may do nothing about it, and I think it should be mandatory that the constitutional convention be called every so often. I think that with all the changing times, it’s necessary that the people review their Constitution every so often, and if we adopt that amendment, we won’t

233. *See id.*

234. IOWA 1857, *supra* note 151, at 609.

235. *Id.* at 624.

236. *Id.* at 609.

237. *See* IOWA CONST. of 1857, art. 10, § 3 (“At the general election to be held in the year one thousand eight hundred and seventy, and in each tenth year thereafter, and also at such times as the General Assembly may, by law, provide, the question, “ Shall there be a Convention to revise the Constitution, and amend the same? “ shall be decided by the electors qualified to vote for members of the General Assembly; and in case a majority of the electors so qualified, voting at such election for and against such proposition, shall decide in favor of a convention for such purpose, the General Assembly, at its next session, shall provide by law for the election of delegates to such Convention.”).

238. HAWAII 1950, *supra* note 150, at 748.

have that opportunity if the legislature will conduct itself as it has in the past”²³⁹

Further, a delegate sought to ensure “this provision is meant to be self-executing. We don’t want any more situation where, as at present, for 50 years the legislature fails to do something that is supposed to be done.”²⁴⁰ This delegate referenced the fact that the Hawaii Convention met among issues of reapportioning representation among the various islands of Hawaii. There had been discontent over the state of apportionment for years, as referenced, but some, particularly inhabitants of outer islands, felt the legislature had not taken meaningful action to address the grievances.²⁴¹ Keeping the automatic question out of the hands of the legislature, then, may provide a remedy if such circumstances were to develop on issues in the future.

Not all at this Hawaii Convention agreed that the legislature could not be relied upon. One delegate noted that “the legislature, if it feels that the question of revision or amendment to the Constitution is important enough, that they cannot handle by the regular sessions of the legislature . . . then they will take it upon themselves to prescribe the method by which we will have a constitutional convention”²⁴² Ultimately, however, the state adopted language that relied on the lieutenant governor, rather than the legislature, to place the measure on the ballot if there had not been a vote on the issue in the preceding 9 years.²⁴³

A delegate to the Illinois Convention of 1969–70, cited the example of Maryland’s legislature failing to put the vote on the ballot when the people voted in the affirmative on the question, stating: “We know in Maryland, where the question has been submitted to the people, the legislature on two occasions failed to enact the enabling legislation for the calling of the Convention; but we feel and would expect that our legislature would abide by the people’s vote.”²⁴⁴ This fear may have proved persuasive, as Illinois adopted a provision requiring the Secretary of State to submit the question to the people if it had not been submitted within the prior twenty years.²⁴⁵

239. *Id.* at 748.

240. *Id.* at 749.

241. *See, e.g.,* Trask, *supra* note 12, at 302–04.

242. HAWAII 1950, *supra* note 150, at 749.

243. *See* HAW. CONST. of 1950, art. XVII, § 2.

244. ILLINOIS 1969, *supra* note 164, at 486.

245. ILL. CONST. art. 14, § 1.

There may also be a delay in the convening of a convention if left to legislative action. A delegate to the New York Convention of 1894 noted that “the Legislature and the Governnor were unable to agree as to the method by which such Convention should be held. . . the selection of delegates and . . . the time when it should be held and the result is. . . that eight years have elapsed since the people declared that they wished [for] a Convention.”²⁴⁶ The people of the state had overwhelmingly voted in favor of a convention in 1886, but one was not convened until 1894 due to disputes between the legislature and governor.²⁴⁷ Because of this delay in convening the present convention, “[i]t has been deemed prudent to . . . make the declaration of the people . . . self-executing.”²⁴⁸ That convention decided on language that empowered the electors of the state senate district to elect delegates to a convention if approved by the people’s vote.²⁴⁹

Interestingly, and perhaps relatedly, none of the automatic call provisions were adopted through the legislative amendment process in any of these states. All but one were adopted in a constitutional convention, with the exception of Missouri, which adopted its provision by people’s initiative.²⁵⁰

4. Pedagogical Effects on Civic Education

Delegates at some conventions emphasized that regular, recurring consideration of the fundamental law would have salutary benefits on the general level of public civic education. Regular reconsideration of the constitution, whether or not change was deemed necessary, would connect the people closer to the foundational principles of their order.

246. 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK MAY 8, 1894 TO SEPTEMBER 29, 1894, at 7 (Albany: Argus Company, 1900) [hereinafter NEW YORK 1894].

247. See, e.g., REPORT OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, 1938 (New York: Burland, 1938), at 369.

248. NEW YORK 1894, *supra* note 246, at 7.

249. See N.Y. CONST. of 1894, art. XIV, § 2 (“At the general election to be held in the year one thousand nine hundred and sixteen, and every twentieth year thereafter, and also at such times as the Legislature may by law provide, the question, “Shall there be a convention to revise the Constitution and amend the same?” shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then organized, shall elect three delegates at the next ensuing general election at which members of the Assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates at large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed.”).

250. See Dinan, *supra* note 11, 71 MONT. L. REV. at 401.

A delegate at the Montana Convention of 1971–72 advocated for an automatic question provision as a way to combat both voter apathy and ignorance of the substance of the constitution. He noted that there may be a benefit for the people to, “generation after generation, take a hard, questioning, political look at their Constitution—see if there is need for a convention.”²⁵¹ This could combat the problem of “voter apathy” which he thought was fostered by “taking a constitution and putting it on a shelf for 90 years.”²⁵² The delegate continued:

Very few people in the state, I believe, today are aware of what the present Constitution says, and I think that this method of bringing the Constitution before the people will insure that this will not happen again. And I think we want the people of our state to know what’s in the Constitution; otherwise, there’s not much point in having a constitution.²⁵³

Thus, an automatic call provision might combat voter apathy, and foster civic engagement and education.

Similarly, a delegate to the Ohio Convention of 1850–1851 was convinced that:

the discussions which had led to the assembling of this body, and the discussions which had attended their deliberations, were in every respect desirable and advantageous to the people of the state, and that the benefits of some discussion of the principles of the organic law, and of the agitations attendant upon their discussion, should be given and secured to every generation. He believed that the politics of Ohio would attain a **far higher grade** in consequence of the discussions of this body, than they would have attained by avoiding these agitations. . . . [S]uch an appeal to the people, once in twenty years, would have a salutary effect upon their public character.²⁵⁴

Delegates at the Virginia Convention of 1901–02 expressed a different view, claiming that when the question of whether to hold a convention was submitted for a vote, “no attention has been paid to it by the people.”²⁵⁵ Thus, the drafting committee “determined to eliminate it as absolutely useless and ineffective.”²⁵⁶ The statements from this convention, however, may not evince genuine beliefs about the provision.

251. MONTANA 1971, *supra* note 159, at 462.

252. *Id.*

253. *Id.*

254. 2 OHIO 1850, *supra* note 161, at 430 (emphasis added).

255. VIRGINIA 1901–02, *supra* note 165, at 2613.

256. *Id.*

Such statements may merely veil an ulterior motive to restrict black suffrage in the state, which was the prevailing sentiment at that convention and infected the resulting constitution with democracy-restricting provisions.²⁵⁷

5. Issues within the Convention

A number of issues arose within several conventions that concerned the automatic question provision's effects on the work of that present convention. Some delegates thought that the presence of automatic question provisions in the constitutions would impact the work of the convention then underway and may influence the delegates' views towards their own work. Other delegates raised issues concerning attempts to limit the substantive issues a convention was permitted to consider and the possibility of runaway conventions, as well as whether a convention should be partisan or whether the delegates should be independent of party affiliation. I address these issues in turn.

a. Considerations on the Work of Convention

In several conventions, delegates debated whether the automatic question was necessary due to the perception that the constitution created by that convention would endure perpetually. In the Michigan Convention of 1867, a delegate stated: "I hope that when this convention has done its duty, it will give everlasting cheer to the people of Michigan, by the assurance that they will never have to be burdened again by a constitutional convention."²⁵⁸ This sentiment has been identified as the "pridefulness of framers." Namely, their own belief in the quality of their

257. For example, such shameful rhetoric as the following, tinged with the Social Darwinism of the period, occurred on the convention floor:

as sure as there is a God in heaven the African will have to go. The law of survival of the fittest will prevail, and when competition will become fierce and sharp, the white man will not only rule but will drive out the inferior race.

Virginia 1901–02, *supra* note 165, at 3146. Another person railed against the delegates "who cannot adopt a constitution without asking the consent of 146,000 negroes of Virginia, may go and do that if you will. . . . I stand here in opposition to that and represent the whites." *Id.* at 3201.

The issue of restricting constitutional amendment to disenfranchise minorities arose at other conventions in the course of American history. For example, a delegate to the Rhode Island Convention of 1973 recalled that in the 1843 Convention in the same state, "the conservatives who drafted the present Constitution, disenfranchised the Irish-Catholic immigrants to Rhode Island and these nativists felt that the best way to make that discrimination stick was to make the amendment process extremely difficult so that election revision could not take place easily and this downtrodden group would be kept, in an inferior position." RHODE ISLAND 1973, *supra* note 145, at 122.

258. 2 MICHIGAN 1867, *supra* note 205, at 607.

own abilities such that the constitution arising from their work must be good, and the future should not need to interfere with their excellent handiwork.²⁵⁹

Others at this convention disagreed, however: “Judging from the past, we can hardly suppose that our work will be so perfect that it will not need amendment or revision at some future time.”²⁶⁰ Ultimately, that convention produced a restrictive convention provision that eliminated the automatic question, placed the ability to call a convention solely in the hands of the legislature, and prevented any convention call prior to 1885.²⁶¹ That proposed constitution was rejected by the people of Michigan, and they retained the 16-year automatic question in the 1850 Constitution.²⁶²

The humility that won out in Michigan was present in other conventions as well. In Ohio in 1873, a delegate maintained that “[w]e ought not to go to work in this Convention as if we thought that in the instrument we are getting up is contained all the wisdom in the universe, and that wisdom was going to die with us.”²⁶³ Similarly, in Maryland in 1967, a delegate stated: “I doubt that we are sufficiently wise and visionary to create a document which will last forever or even a hundred years as the current constitution has lasted. I think our constitution will and should reflect the thoughts of our time. It should definitely be a living document.”²⁶⁴ Thus, while some delegates to certain conventions believed in the perpetual endurance of the work then underway, a skeptical humility over the duration of the resulting constitution was also present.

b. How the Question Affects the Work of the Current Convention

Relatedly, some delegates were concerned that the presence of an automatic question provision may lessen the quality of the present convention’s work. Given that there was a possibility of revisiting in a short time any difficult issues then under discussion, the automatic

259. See Jon Elster, *Emotions in Constitution-Making: The 2016 Johan Skytte Prize Lecture*, 40 SCANDINAVIAN POL. STUD. 133, 147–48 (2017).

260. 2 MICHIGAN 1867, *supra* note 205, at 608.

261. Proposed MICH. CONST. of 1873, art. XVIII, §2.

262. FINO, *supra* note 112, at 12.

263. OHIO 1873, *supra* note 152, at 2846–47.

264. MARYLAND 1967, *supra* note 158, at 10663; *see also* 2 ILLINOIS 1969, *supra* note 164, at 3601 (“We ought not to fall into the trap of assuming that we have a special brand of wisdom that will transcend the ages. Believe me, we may make some mistakes here.”). These delegates did echo Jefferson’s notion that “it may be proved that no society can make a perpetual constitution, or even a perpetual law.” SMITH, *supra* note 29, at 634.

question may incentivize agreement on less than optimal provisions or agreement to “punt” difficult issues to the next convention.²⁶⁵ A delegate to the Illinois Convention of 1969–70 expressed this sentiment well: “I have a certain nagging doubt about a possible effect of an automatic proposition such as this on the Convention itself. . . . I wonder if a Constitutional Convention, knowing that it’s very likely that their work will be up for total review in twenty years, will pay quite so much attention to avoiding the very topical treatment of subjects that got us into so much trouble in 1870.”²⁶⁶ Another delegate at that convention echoed his concerns: “The more I listen to some of the testimony here this afternoon, the more I am convinced that possibly we are not going to be accomplishing as much at this Convention and that, because of the fact that we’re thinking. . . that should be put off for a subsequent convention.”²⁶⁷

Some delegates expressed a further concern that including an automatic question was a signal to the people that the convention itself was unsure of the work it was submitting to the people. A delegate in Iowa in 1857 thought that including the provision “is saying in substance to the people, you are changeable, and what you do now you will want to undo in ten years.”²⁶⁸ An Illinois delegate had similar concerns: “if you have the automatic call, I say to you what you are saying to the people is that we are not sure about the proposals that we are giving them now. If we are sure. . . we won’t go out and admit defeat from the start.”²⁶⁹

This thinking did not affect all delegates, however. Many maintained the objective of establishing a constitution for the foreseeable future. A delegate in Iowa summarized this sentiment well:

I think it should be the object and pride of every delegate to a constitutional convention, to form such a constitution as would stand the test of time and secure the approval of the wisdom of ages. We do not meet here to make a temporary law. Our object is to establish permanent and fundamental laws.²⁷⁰

Nevertheless, the automatic question provision raised salient issues over its effect on the perspective and ambition of a constitutional convention convened in a state with a commitment to this type of provision.

265. There is, of course, the opposite mechanism that may take effect: a hammer may look for nails.

266. ILLINOIS 1969, *supra* note 164, at 486.

267. *Id.* at 491.

268. IOWA 1857, *supra* note 151, at 623.

269. 4 ILLINOIS 1969, *supra* note 164, at 3603.

270. IOWA 1857, *supra* note 151, at 611.

c. Powers of the Convention

Delegates across numerous conventions confronted the thorny issue of whether a limited convention was possible. Could the constituent power be limited by the mandate that convened the delegates, or by its very nature were those seeking to exercise the constituent power free to consider any substantive revisions?²⁷¹ A delegate to the Iowa Convention of 1857 framed the issue:

[A]lthough a convention may be called together by the people with the intention upon their part that the Constitution shall be amended only in one or two particulars, you will find that when the Convention assembles it will be judged necessary to make a general revision of the whole. You will find that that has been the custom in all the states where conventions have been called for the purpose of revising the Constitution.”²⁷²

That was the custom, indeed, with the federal government, as the Philadelphia Convention was convened merely to revise the Article of Confederation.

A related issue arose in the New York Convention of 1867, concerning whether the legislature could limit the time of the convention. During that convention, it became clear that the delegates would not finish their work in time to submit the proposed revisions to the voters at the next November election, as required by the legislative act that enabled the convention.²⁷³ After citing the legislature’s duty to provide for the election of delegates to a convention after the people voted in the affirmative, a delegate stated:

[W]hen the delegates were elected by the people for the purpose of revision and amendment of the Constitution, then they were clothed with the power to do that duty. I have no doubt in my mind that that power remains after the election day in November next. The Legislature had no power to limit the time during which we should act.²⁷⁴

That convention did not conclude until February 1868, and the draft of the constitution was discussed in the legislature for another year before being rejected by voters in 1869.²⁷⁵ New Yorkers remedied questions over this issue by expressly stipulating in the automatic call provision that a

271. For examples on both sides of this question in other constitution-making contexts, see ELSTER, *supra* note 170 at 194–95.

272. IOWA 1857, *supra* note 151, at 610.

273. REPORT OF THE NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, 1938 (New York: Burland Printing Co., 1938), at 369.

274. 3 NEW YORK 1867, *supra* note 154, at 1965.

275. PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 280 (1990).

convention continued “until the business of such convention shall have been completed.”²⁷⁶ Thus, question of the extent of the constituent power once convened raised a concern for many delegates considering this issue.

d. Concerns Whether a Convention Should Be Partisan

Should a constitutional convention convened under the automatic question be organized by political parties? Or should the delegates be independent of party affiliation? This issue arose at the Illinois convention of 1969–70. One delegate was concerned over the prospect of partisanship in a party-affiliated convention:

I submit that the only way to produce a constitution that is worth submitting and worth adopting is if you have delegates who do not owe their principal allegiance to any party organization, no matter how much in the public interest that party may be. And I submit that both parties try to act in the public interest. We ought to have at a Convention people who do not have special partisan commitments.²⁷⁷

Another delegate to that convention invoked star power to address the same concerns, noting: “Senator Robert Kennedy, when he addressed the ill-fated 1968 New York Constitutional Convention, said on its opening day that there is a place for partisanship and special interests, but that place is not in a Constitutional Convention.”²⁷⁸ The current Missouri provision specifies that “[t]he question shall be submitted on a separate ballot without party designation.”²⁷⁹

This debate raises interesting issues echoing Madison’s concern over factions arising, but considering the question from a particular perspective. Would a partisan convention consider issues that a non-partisan convention would not, or decide the same issues in a different way due to partisan interests? Should an invocation of the people’s constituent power be constructed in an overtly partisan way, with the representative relationship to party and only a faction of the constituency, rather than all the people? On the contrary, perhaps a partisan organization would better represent the constituents in their diversity and interests. These fascinating considerations arose in the context of contemplating the conventions that might arise from the automatic question.

276. N.Y. CONST., art. XIX, § 2.

277. 4 ILLINOIS 1969, *supra* note 164, at 3608.

278. *Id.* at 3610.

279. MO. CONST. art. XII, § 3(a).

6. Effect on the Legislature

Some convention delegates discussed fears over the impact that an automatic question provision might have on the work of the legislature in the future. Such provisions may reduce the incentive for a legislature to take up politically difficult or divisive questions when they could simply leave the issue to a pending constitutional convention vote that may be scheduled in a few short years. The Illinois convention of 1969–70 provides a good example of an exchange on this point, as a delegate gave voice to this concern:

We ought to take a very serious look at this provision, because I now feel that it very well may be rushing us forward into the past. I feel that there can be something very inhibitive about the proposal. I think there is something that can be stifling of the legislature . . . something that will impinge upon that willingness of the legislature to take hold of a bite and to digest it and to come up with what they believe is right.²⁸⁰

In response, however, another delegate disagreed: “[I]t has had the effect on the legislature we earnestly hope ours will, which is to stimulate legislative action. So, it is part of our philosophy that having this provision . . . will perhaps stimulate the legislature to take action on constitutional change, submit questions to the people themselves, and thereby eliminate the need for a constitutional convention.”²⁸¹ The convention ultimately sided with the arguments in favor and adopted the automatic question, but considerations over its potential effects on the legislature raise interesting points.

7. Voting Concerns

One voting issue arising as a concern in some conventions was whether it was inadvisable to hold the vote on a constitutional convention when other significant votes were scheduled. For example, in the New York Convention of 1867, one delegate introduced a motion to change the year of the next automatic question so that the vote was not “in the same year with the presidential election,” reasoning that “we have seen enough of Conventions sitting during intense political contests.”²⁸² A delegate in

280. ILLINOIS 1969, *supra* note 164, at 484.

281. *Id.* at 485. A contemporary commentator has also arrived at this view: “the prospect of a convention vote may encourage legislators, as a matter of self-preservation, to address citizen concerns that could lead them to endorse a convention, lest a new constitution diminish legislative powers and prerogatives.” Robert F. Williams, *Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 ARK. L. REV. 553, 569–70 (2016).

282. 4 NEW YORK 1867, *supra* note 154, at 2813–14.

the New York Convention of 1915 was also conscious of this issue, noting that the year for the next automatic question “ought to be 1935; 1936 will be a Presidential year.”²⁸³

A second major issue that surfaced across a number of conventions was how to count the voting on the automatic question referendums. Would a majority of those voting on the question suffice to call a convention? Or should a state require a majority of those voting in the *election*, for example, for governor, rather than a majority of the votes cast solely on the question of whether to hold a convention? As noted above, this question caused issues in Maryland when the people twice voted in a majority on the question, but not the election generally, and the legislature did not convene a convention.

Also, many states observed the phenomenon of “ballot falloff,” where the number of votes cast on the constitutional convention question was far less than the number of votes cast on other races higher up the ballot.²⁸⁴ Given this phenomenon, how should the votes be counted? Here, the question of Madison’s notion of tacit assent is particularly interesting. May those that did not vote on the question be deemed to have provided assent to the existing state of affairs? The epistemic problem of discerning their intent is particularly salient. A delegate to the Ohio Convention of 1850 believed that “[i]f the people do not need a revision of their organic law, all they have to do is not to vote for it. To refrain from voting is to vote in the negative. This process involves no trouble, and not a cent of expense.”²⁸⁵ But can that assent be assumed of all those failing to vote on the question?

This issue was the subject of extensive rhetoric in the New York Convention of 1867. Arguing for counting the majority of those voting in the election, a delegate questioned: “shall we allow a small fragmentary vote to control? Shall five thousand votes control the question, if there are no more cast, when there are probably nine hundred thousand voters in the State?”²⁸⁶ He continued, noting concern about the effect of passion on a small minority:

We are assembled in extraordinary times, when, as I have said, the world appears to be infatuated. Without conventions nothing can be done. . . . [A]nd I consider it would be wise in us to retain all the barriers regarding and restraining these calls, that the framers of the instrument, under

283. 3 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL SIXTH TO SEPTEMBER TENTH 1915, 3310 (Albany: J. B. Lyon Company, 1916).

284. See, e.g., FINO, *supra* note 112, at 22.

285. 2 OHIO 1850, *supra* note 161, at 430.

286. 4 NEW YORK 1867, *supra* note 154, at 2813.

which we have lived for twenty years, meant should exist. . . . Some excitement may sweep over them. . . temperance, spiritualism or Fenianism, or secession, if you please, which latter I fervently hope we may never see again; and in the excitement of an election the whole question of the Convention would be lost sight of. I think this guard which has been suggested is necessary: that the vote upon the question should be at least equal to a moiety of the vote taken at the same time for the office of Governor. . . .²⁸⁷

Other delegates at this convention opposed this position, arguing that counting a majority of those voting in the election, rather than on the question, unfairly diluted the power of the vote for those who actually engaged with the question. One delegate stated:

We are in the habit, under our American system, of determining questions by votes and not by silence. I think the practice which has been introduced in another section of the country, of determining great questions by staying at home and refusing to vote, should not be adopted here at the North in a Constitution, and as a permanent principle of our constitutional system. . . . [Those votes] should have no weight or influence in the decision of the question.²⁸⁸

Another delegate agreed, arguing that “if there are some so indifferent, so ignorant, so delinquent in the discharge of great public duties, the highest duties of citizenship, as to stay away from the polls on that question, their silence should have no influence upon the decision.”²⁸⁹ These arguments won out, as the constitution proposed by the 1867 New York Convention ultimately counted the majority of those voting on the question for the holding of a convention. Nevertheless, the entire proposed constitution was rejected by the people.²⁹⁰

This issue also raised Madisonian concerns of stability for several delegates across conventions. A delegate to the Maryland Convention of 1867 was concerned over the effects of a small minority of the population successfully voting to convene a convention: “If at that election only one-tenth of the people voting at the election vote on that issue, if a bare majority votes on the issue, they can call a constitutional convention. Rather than having stability and good government, you are adding instability.”²⁹¹

287. 4 NEW YORK 1867, *supra* note 154, at 2812–13.

288. 5 NEW YORK 1867, *supra* note 154, at 3826.

289. *Id.*

290. *Id.* at 3944.

291. MARYLAND 1967, *supra* note 158, at 3147.

One delegate at the New York Convention of 1867 elaborated more fervently on that point:

Stability in our Constitution and laws is of the greatest consequence for the interests of the community. No Convention should be called for the purpose of revising the Constitution, that is, for the purpose of making corrections generally, unless upon the most deliberate and full decision of the people on the question. It is very evident that if the minority of the people only vote upon that question there cannot be such serious evils to be remedied as to require a Convention. For these reasons I have been compelled to dissent from the report of the majority of the committee and to recommend the retention of the present provisions of the Constitution on the subject construed as I have explained.²⁹²

Another delegate to that same convention, however, held a different opinion:

As to requiring a majority of all who vote for officers . . . it is believed that such a requirement would in many, and might in all cases defeat the calling of a convention altogether. Many causes might operate to diminish the vote on that question, irrespective of the merits of the question or the wishes of the people, and it will be found by reference to similar elections, that a much smaller vote has been cast upon such questions than for candidates for the public offices voted for at the same election.²⁹³

Still another delegate to that convention held that “those who neglect their duty—in my judgment, their moral obligation—of voting on a great public issue, should be concluded by the votes of those who do *not* neglect their duty. That is a general principle of republican government.”²⁹⁴

In the Iowa Convention of 1857, one delegate speaking in favor of counting the majority of those voting at the election, rather than on the question, stated that “I think there is more danger in having conventions than in not having them. . . . If they lose their convention once on account of this carelessness, they will be likely to be more careful the next time.”²⁹⁵ Further, if voters are careless, “then it shows that they were indifferent, and that there was no great public demand for a convention.”²⁹⁶ Another delegate thought that “we ought not to provide for the calling of a convention by a minority of the voters of the state.

292. 2 NEW YORK 1867, *supra* note 154, at 1351.

293. *Id.* at 1350.

294. *Id.* at 1351.

295. 2 IOWA 1857, *supra* note 151, at 1031.

296. *Id.* at 1031.

Such a course is not exactly in accordance with my ideas of democracy.”²⁹⁷ These arguments won out, and this convention adopted a provision that required a majority of those voting in the election generally.²⁹⁸ As noted above, this question caused issues in Maryland when the people twice voted in a majority on the question, but not the election generally, and the legislature did not convene a convention.

Of the 14 states that currently have automatic question provisions 12 count the majority of those voting on the question to be sufficient.²⁹⁹ Only Maryland still counts the majority of those voting in the election, rather than on the question.³⁰⁰ Illinois provides two thresholds, requiring a convention be called “if approved by three-fifths of those voting on the question or a majority of those voting in the election.”³⁰¹

8. Effect of the Automatic Question Provision on Other Amendment Provisions

At times, the automatic question was considered in conjunction with other provisions of the amendment process. In some conventions, the automatic question was adopted as a compromise between those who wanted the highly democratic method of amendment by initiative and those who favored a more conservative amendment approach. For example, a delegate from the Hawaii convention noted that “since we have voted against the initiative method of proposing amendments to the constitution, we felt that this was a good concession to the people in general.”³⁰² A delegate in Illinois was blunter: “I for one am scared to death of the initiative procedure and would much prefer this automatic vote.”³⁰³ Such a compromise also occurred in the Michigan Convention of 1907.³⁰⁴

In the Montana Convention of 1971–72, a member of the committee that drafted the provision explained to the general assembly that the “rationale is that the people of Montana do not now have the power to call a convention by the initiative. The committee feels that this is a basic

297. *Id.* at 1032.

298. *See* IOWA CONST. art X, § 3.

299. ALASKA CONST. art XII, § 3; CONN. CONST., art. XIII, § 2; IOWA CONST. art X, § 3; HAW. CONST., art. XVII, § 2; MICH. CONST., art. XII, § 3; MO. CONST. art. XII, § 3(a); MONT. CONST. art. XIV, § 4; N.H. CONST. pt. 2, art. 100; N.Y. CONST. of 1894, art. XIV, § 2; OHIO CONST. art. XVI, § 3; OKLA. CONST. art. XXIV, § 2; R.I. CONST. art. XIV, § 2.

300. MD. CONST. art. XIV, § 2.

301. ILL. CONST., art. XIV, § 1(c).

302. HAWAII 1950, *supra* note 150, at 748.

303. ILLINOIS 1969, *supra* note 164, at 489.

304. FINO, *supra* note 112, at 1442.

political right of the people under a government like Montana's."³⁰⁵ The automatic question provision was, in their view, a means to institutionalize that right.

9. Preempt Questions Over the Legitimacy of the Constituent Body

In several states, the constitution did not provide for the convening of a convention. Despite the fact that the notion of the constituent power vested in the people was a widely accepted fundamental principle of popular sovereignty in America by the end of the 18th century,³⁰⁶ several of the state conventions that convened without a preexisting constitutional provision providing for them faced some questions of their legitimacy. An explicit provision for the convening of a constitutional convention in the future was a remedy to prevent this conundrum. Consideration of an automatic question provision were integral to this discussion in a number of the conventions.

In Connecticut, a delegate thought "this Resolution . . . does fill a notable lack or hole, if you will in our present Constitution. This Convention was itself called midst some comment as to the authority by which it could be brought into being. Our present Constitution as we all know is silent on this subject. The Resolution not only will overcome that deficiency, but will make quite precise the method by which and in general a time schedule on which such Cons may be called."³⁰⁷

In New York, a delegate reflected on questions of legitimacy surrounding a prior New York Convention of 1821:

[I]t has been gravely insisted that the Convention of 1821 was an unauthorized and an unconstitutional body, and that the work of its hands derived its authority solely from the subsequent action of the people, in adopting and ratifying its proceedings, and by general acquiescence therein; the right of revolution successfully carried into effect. It is not the purpose of the committee to enter upon any discussion of such question in this report, but desire to prevent their recurrence in the future. . . . While such questions are, undoubtedly, more theoretical than practical or useful, your committee are well sati[s]fied that the

305. 3 MONTANA 1971, *supra* note 159, at 456.

306. See, e.g., GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 306–343 (1998).

307. CONNECTICUT 1965, *supra* note 150, at 1087–88.

provisions in the Constitution of 1846, both for amendment and revision, are wise and salutary, and ought to be substantially retained.³⁰⁸

Of course, an automatic question provision is only one manner of ensuring the constitution gives positive shape to the latent ability of the people to convene a convention. A constitution may merely articulate that the people or the legislature may vote to convene one at any time. Nevertheless, these provisions were discussed as a means of alleviating those criticisms.

10. Conventions Look to Other State Practice

Convention delegates often looked to other state practice on the automatic question issue, which Jefferson and Madison did not discuss. To be fair, Jefferson and Madison had only Massachusetts and New Hampshire as possible sources of investigation on the question,³⁰⁹ and those states had only implemented but not exercised the provision at the time of the Jefferson–Madison exchange. Given Madison’s practical objections to the idea, however, examining other state practice on the issue is a rich source of information that many of the convention delegates utilized.

For example, in the Ohio Convention of 1873, a delegate remarked “that the provision that has been thus widely copied from the Constitution of New York of 1846, which was originally obtained from the New Hampshire Constitution, should not be disturbed.”³¹⁰ A delegate at the Illinois convention of 1969–70 noted that twelve states then utilized such a provision and that there is “much evidence this type of procedure has been satisfactorily used in other states.”³¹¹

A delegate at the Connecticut convention pointed to the “Model State Constitution,” which contained an automatic question provision.³¹² The Model State Constitution was a document developed by the National Civil League³¹³ that purported to present “an ideal of the structure and contents

308. 2 NEW YORK 1867, *supra* note 154, at 1349–50.

309. The related institution of the Pennsylvania Council of Censors under the Pennsylvania Constitution of 1776 may also have provided a source of inspiration. That constitution convened a body, the Council of Censors, every seven years to review the constitutionality of laws.

310. OHIO 1873, *supra* note 152, at 2846.

311. ILLINOIS 1969, *supra* note 164, at 478.

312. CONNECTICUT 1965, *supra* note 150, at 815.

313. Formerly, the National Municipal League, as founded in 1894. *See, e.g.*, NATIONAL CIVIC LEAGUE, <https://www.nationalcivicleague.org/> [<https://perma.cc/D43R-HZ69>].

of a state constitution.”³¹⁴ Thus, it is noteworthy that this document contained an automatic question provision.

Delegates arguing against the provision counted the small number of states adopting automatic call provisions and pointed to some states that had rejected it. For example, a 1969 Illinois delegate stated: “[O]nly ten states . . . have it. In the same fifty years, four of the states who have held Conventions have rejected it. . . . New Jersey rejected it.”³¹⁵ Thus, the issue of other state practice factored into both sides of the debate over whether to adopt an automatic question provision.

11. The Issue of Revision Commissions

Another important question arising in several states that impacted the automatic question debate was whether there should be a constitutional revision commission “to investigate and determine what methods could be followed to effect constitutional reform” and provide advice to a convention.³¹⁶ Constitutional revision commissions generally took the form of a body appointed to study the constitution and provide a report on its findings of potential defects or improvements that might be made. The question of a commission for constitutional revision has recurred in several states and is a broader debate than on merely the issues considered here. The question did, however, impact the automatic question debates, particularly with respect to providing guidance to a convention and increasing the cost of the convention process.

A delegate at the Montana Convention of 1873 believed that “if the state is going to vote on the question of a constitutional convention, they should have this commission appointed, who should study and who should act and should make recommendations.”³¹⁷ Another delegate thought that “without [a constitutional revision commission], a constitutional convention could prove to be a waste of money.”³¹⁸ Some resisted a commission, noting that its findings “could very well stifle the initiative of a group of people who felt very seriously and very strongly about calling a constitutional convention.”³¹⁹ A delegate to the New York Convention of 1867 even proposed using a commission to generate proposed revisions to the constitution instead of a convention to save

314. See, e.g., Connecticut 1965, *supra* note 150, at 815; ANN BOWMAN & RICHARD KEARNEY, STATE AND LOCAL GOVERNMENT 63 (2011).

315. ILLINOIS 1969, *supra* note 164, at 484.

316. 3 MONTANA 1971, *supra* note 159, at 456.

317. *Id.* at 458.

318. *Id.* at 460.

319. *Id.* at 459.

money.³²⁰ This idea was not adopted in its full form, but New York does utilize a committee to generate a report prior to holding conventions.³²¹ Thus, the issue of revision commissions had repercussions for the automatic question debate in several states.

V. CONCLUSION

As we see, the state convention debates over the Jeffersonian principle of recurrent recourse to the people at regular, periodic intervals raised many novel issues and have much to teach us. In addition to expressing the Jeffersonian spirit of progress and Madisonian notions of stability, delegates debated issues like the effect of an automatic question on the perspective of the current convention, or the legislature thereafter. They considered the effects of the provision on the quality of public civic education and debated how to count the votes on the issue. These are merely some of the themes that emerged at constitutional conventions discussing this fundamental issue, demonstrating how much these rich resources have to teach us if we only look.

What do we make of the curious phenomenon that these several states have rejected Madison's strong arguments in favor of Jefferson's? Furthermore, what do we make of the fact that recent votes under these provisions have been overwhelmingly against holding conventions?

Such provisions have led to more than 25 constitutional conventions over the 237 years of their existence, but votes to hold conventions have cooled in recent years.³²² The last convention held under the affirmative vote from an automatic question was in Rhode Island in 1986. All submissions of the question since then have resulted in negative votes for each state that held a referendum under the provisions, including New York voters rejecting a convention in 2017.³²³ Does this represent satisfaction with the status quo, worry over the prospects of a convention, or something else entirely? Does it show that Madison's fears are overblown and that the people may be trusted with this responsibility?

320. NEW YORK 1867 *supra* note 154, at 25.

321. REPORT AND RECOMMENDATIONS CONCERNING THE ESTABLISHMENT OF A PREPARATORY STATE COMMISSION ON A CONSTITUTIONAL CONVENTION ADOPTED BY THE COMMITTEE ON THE NEW YORK STATE CONSTITUTION, 2015, <https://www.nysba.org/NYSConstitutionReport/> [<https://perma.cc/8QTJ-NF8J>].

322. Dinan, *supra* note 11, 71 MONT. L. REV. at 403.

323. *See id.* at 403–05; Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALBANY L. REV. 1017, 1019–20 (2002); Martineau, *supra* note 11, at 424 & n.14, 439–46.

In a broader sense, are these provisions desirable? Should Jefferson's optimism triumph or are Madison's concerns more sound? There may not be a universally applicable answer to these questions.

Perhaps the automatic question is more apt in some constitutional contexts than in others. For example, federalism may provide a stable foundation against which to invoke such a provision. Perhaps the steady backdrop of a perpetual national constitution is the appropriate framework for the states then to implement the automatic question. Indeed, Madison's stability concern is genuine and profound. What of the danger that an automatic question is issued and a convention approved in a time of high political passion and strife? Then again, constitutional conventions are often held in times of high passion, which seems to have been a necessary precondition politically to convene a convention in many historical contexts.³²⁴ Perhaps a procedural precommitment to regular periodic convention questions may provide the opportunity to hold conventions when passions are not as high as they otherwise would be and in which public reason prevails.³²⁵

Moreover, applying the Jeffersonian principle on the national level raises many deep issues, as Madison pointed out. Madison's notion of the problem of factions in a convention is particularly salient in the current political climate. There are also the problems of reaching compromise on difficult issues, bolstered by the tenuous nature of the original compromise at Philadelphia.³²⁶ Ultimately, it is important to note that only 14 of 50 states, just over one-quarter, adopt the automatic question approach. Thus, the majority reject it.

Returning to Professor Levinson's embrace of the Jeffersonian principle and call for a constitutional convention: in the current political climate, it would seem to result in disaster. There is certainly no prevailing sentiment of bipartisan statesmanship, the quality of public discourse is pitiful, and factional interests consistently squelch public reason. This vindicates the Madisonian view that the events of 1787–89 were a profound historical convergence of unique individuals and forces, unlikely to happen often or even ever again.³²⁷

324. See, e.g., ELSTER, ULYSSES UNBOUND, *supra* note 8, at 159.

325. Of course, passions must be sufficiently high for an affirmative vote on an automatic question, but need not be if a polity commits to an automatic convention provision.

326. See, e.g., AMAR I, *supra* note 23, at 296–99.

327. Of course, Jefferson criticized this notion, admonishing us not to “weakly believe that one generation is not as capable as another of taking care of itself, and of ordering its own affairs.” Letter to Kercheval, *supra* note 28.

Troublingly, Levinson's response to the present state of affairs appears to be to consider a breakup of the Union.³²⁸ Perhaps, however, the answer lies within our existing American constitutional framework and tradition, with a federalist blend of the Madisonian and Jefferson models. Perhaps a solution may be found in a more fervent emphasis on constitutional federalism, with the Madisonian stability the national government provides offering a firm backdrop against which more localized states may embrace all their particularities and preferences in Jeffersonian experiments. A renewed focus on constitutionalism within states and closer to the people with their divergent local interests may be able to accommodate the strain those differing cultural and normative tendencies inflict on politics at the federal level. This is a point for further theorizing.

One point, however, is sufficiently clear: the question over whether to adopt a principle of regular, periodic referenda on constitutional conventions is an important one with which constituent assemblies must grapple. On this question, Jefferson, Madison, and the state constitutional tradition have much to teach us.

328. See, e.g., Sanford Levinson, *The 21st Century Rediscovery of Nullification and Secession in American Political Rhetoric: Frivolousness Incarnate, or Serious Arguments to Be Wrestled With*, in *NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT* (ed., LEVINSON) (2016).