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THE PEOPLE AND THEIR CONSTITUTIONS

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State Constitutional Politics: Governing by Amendment in the American States.
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John Dinan's most recent book is a must-read for anyone interested in American public law and state constitutionalism. Dinan provides a thorough and meticulous examination of state constitutional amendment practice and politics throughout American history. His empirical research is herculean in scope and his theoretical contributions powerfully challenge dominant conceptions of how constitutions should function.

INTRODUCTION

In scholarship and popular conversation about constitutional law, state constitutions are frequently overlooked or discussed pejoratively.[1]

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1. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 1 (2018) (making a similar observation regarding various discussions of American constitutional law); Paul W. Kahn, *A New Generation: State Constitutionalism and the Problem of Fairness*, 30 VAL. U. L. REV. 459, 459 (1996)

"The" constitution, we are told, is the Constitution of the United States of America. But state constitutions play crucial and significant roles in American public governance.[2] State constitutions fill many vital gaps left open by the Federal Constitution.[3] They also address myriad areas of significant public policy with no federal analogs or counterparts.[4] Although they are often overlooked, state constitutions complete our system of constitutional governance and are an integral part of how American public law actually functions.

In *State Constitutional Politics*, John Dinan draws our attention to an especially compelling yet puzzling characteristic of state constitutions: their relative flexibility.[5] Dinan notes that state constitutions are amended much more frequently than the Federal Constitution (over ten times more frequently) and are among the most flexible constitutions in the world.[6] Indeed, existing state constitutions average 1.3 formal amendments every year.[7] Although constitutional amendment has become essentially impossible under the Federal Constitution, state amendments are a regular and significant component of political life in the states.[8]

But what should we make of this "amendomania"?[9] Many scholars have suggested or assumed that state constitutional flexibility is pathological; that it represents the failure of state constitutions to function properly.[10] These accounts assume that constitutions should be

("State constitutionalism has always seemed a poor step-sister to federal constitutionalism.").

2. Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 51 NEW ENG. L. REV. 453, 455 (2017).

3. Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. SOC. SCI. 23 (1988).

4. *Id.* at 32.

5. JOHN J. DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 1 (2018).

6. *See id.* at 1–2, 11–12, 23, 265–66; *see also* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1674–75 (2014).

7. DINAN, *supra* note 5, at 23.

8. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07, 409 n.5 (1932) (Brandeis, J., dissenting) (describing constitutional changes by Congress as "practically impossible").

9. *See* Andrew E. Faust, *Pennsylvania's Voluntary Confession Amendment: Majoritarian Control of Fundamental Rights*, 89 DICK. L. REV. 1003, 1019 (1985) (describing state amendment practices as "amendomania").

10. *See, e.g.*, *id.* at 1028 (concluding that constitutional amendment should "require[] more farsightedness and concern for political minorities than legislators usually display in the ordinary course of their majority-bound business"); Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1475 (1987) ("[C]onstitutional law cannot

deeply entrenched framework documents that are largely immune from change by extant political majorities.[11] On these accounts, state constitutions are deficient because they tend to enable contemporary political preferences rather than provide a check on majorities. These accounts also tend to imply a preference for political change to occur through other avenues besides formal amendment; such as through transformative constitutional litigation and legislation.

Dinan's book provides (among other things) a fresh look at this critique of state constitutions and constitutional change generally. Although other recent scholarship has suggested that state constitutions may reflect an alternative theory of constitutionalism,[12] Dinan provides the first rigorous and exhaustive examination of state constitutional amendment and politics throughout American history. Dinan's empirical research is encyclopedic. He categorizes and catalogues state amendment practice from the eighteenth century until the present.[13] He also places these reforms in their original political and institutional context with an eye towards understanding how state communities and public officials have utilized their constitutions over time. In this regard, Dinan's book is a marvel, an astounding accomplishment, and a momentous contribution.[14]

Dinan's careful empirical research also provides the basis for a nuanced and sophisticated theoretical account of the factors influencing the pathways of state constitutional change. Perhaps most importantly, Dinan finds that state actors are often deliberate and discerning in choosing to pursue reforms through formal amendment.[15] By unearthing and tracing those deliberations, Dinan identifies various

protect individuals from the majority if the majority can (and does) refashion constitutional law at will."); Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 29 (1996) ("State modes of constitutional reform are usually pointed to as . . . making it too easy to effect constitutional change.").

11. *See generally* Versteeg & Zackin, *supra* note 6, at 1699–1702 (describing these theories).

12. *See* Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 658 (2016).

13. *See infra* note 25 and accompanying text (identifying six of Dinan's broad categories from his catalogue).

14. Dinan's contribution in this book is even more important when read alongside his other work. In *The American State Constitutional Tradition*, Dinan collects and catalogs all known state constitutional convention debates. JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 3, 8–9, 27 (2006). Together these two volumes capture the great core of state constitutional law-making throughout American history. In the words of Alan Tarr, "Is there anything that Dinan hasn't read?" DINAN, *supra* note 5, at back cover.

15. DINAN, *supra* note 5, at 265–80.

benefits to formal amendment that dominant theories of constitutional change (which draw mostly from federal constitutional experience) have overlooked. He notes that regular formal amendment can check runaway or unresponsive legislatures and courts,[16] endow momentous reforms with extraordinary legitimacy,[17] and facilitate more robust and inclusive dialogue regarding the meaning of individual rights.[18] Ultimately, Dinan's findings and conclusions suggest that careful study of state constitutional politics can shed new light on how constitutions contribute to the quest for good governance. To be sure, Dinan recognizes that the state approach comes with its own costs, but his plea is for a more balanced and accurate account of the diverse ways that constitutions can facilitate democratic governance.[19] In this regard, Dinan's book provides a fresh but appropriately measured critique of dominant theories of constitution change.

Like any significant piece of scholarship, Dinan's book not only provides novel and compelling answers, but it also raises new questions. One important question flowing from Dinan's book is the complicated interaction between the various pathways of constitutional change. Dominant theories (which again draw primarily from federal constitutional experience) tend to suggest that constitutional change occurs outside of formal amendment processes mostly because formal amendment processes present insurmountable barriers.[20] On these theories, reform by litigation and legislation is mostly the byproduct of impossible barriers to formal amendment. These theories seem to presume that if formal amendment was more regular and accessible, then informal processes of constitutional change would be less pervasive.

Dinan's book brings this claim into sharp relief and challenges us to think about the more nuanced factors that likely influence the trajectory of constitutional change. For example, one way to interpret Dinan's observations about state constitutional flexibility is to infer that with so much formal amendment, informal processes of change will be relatively less frequent and significant. But Dinan's own findings and analysis, as well as other new empirical research, challenge this notion. Dinan observes that state constitutional reformers often consider various likely consequences of pursing change through a

16. *Id.* at 265–73.
17. *Id.* at 277–79.
18. *Id.* at 270–73.
19. *Id.* at 280.
20. *See* Marshfield, *supra* note 2, at 470–78 (summarizing these theories).

particular pathway and frequently select a pathway based on a variety of contextual factors.[21]

In a related vein, I have recently published data showing that several states with the highest formal amendment rates also have the most incidents of informal change through constitutional litigation.[22] When placed alongside Dinan's findings, these data suggest that constitutional change in the states often occurs rigorously and simultaneously through both formal and informal pathways. As James Gardner has observed from my data, state courts seem to remain active in state constitutional governance notwithstanding incredibly high incidents of formal amendment.[23] This more complete picture suggests that state constitutions might have more to teach us about how constitutions, citizens, public officials, and interest groups interact under pressure for public law reform. Dinan's book does much to drive this inquiry (and others) and it will no doubt become a cornerstone in the field. Indeed, it is now hard to imagine how anyone could approach the topic of state constitutionalism—from whatever angle—without reading Dinan's book.

In this review, I first provide a general summary of the great depth and richness of Dinan's empirical research with the aim of drawing attention to his book as an invaluable resource for the future study of state constitutional law and politics. I then explore Dinan's theoretical conclusions. I conclude with a more detailed discussion of how Dinan's work raises new and exciting questions about how constitutions truly operate in structuring of politics.

I. CATALOGUING AND EXPLAINING STATE AMENDMENT PRACTICE AND POLITICS

The bulk of Dinan's book is dedicated to the invaluable task of collecting and cataloging the many amendments that states have made to their constitutions and placing those amendments within their political and institutional context. This aspect of Dinan's book ensures its lasting significance for American constitutional law.[24]

21. *See* DINAN, *supra* note 5, at 273–74.

22. Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 107 (2018); *see also* Marshfield, *supra* note 2, at 489.

23. James A. Gardner, *Active Judicial Governance*, 51 NEW. ENG. L. REV. 547, 549–50 (2017).

24. One of Dinan's great contributions is his exhaustive collection of secondary and primary sources related to state constitutional amendment. His book operates as a one-stop resource for all things related to state constitutional amendments. He has collected

Dinan identifies six general categories of amendments: (1) institutional-authority amendments; (2) rights-defining amendments; (3) court-responsive amendments; (4) policy-constraining amendments; (5) policy-authorizing amendments; and (6) policy-enacting amendments.[25] For each of these categories, Dinan painstakingly traces the specific substantive reforms adopted by amendment and provides contextual explanations for why reformers opted to pursue change through formal amendment. It is, of course, impossible to summarize all of Dinan's research in this review, but a few illustrations are helpful to demonstrate the significance of his empirical contribution.

In his chapter on institutional-authority amendments, Dinan recounts how the states have been active in designing and refining administrative agencies.[26] He notes, for example, that the states have been particularly attentive to the idea that state constitutional amendments are often a preferred method for establishing and reforming agencies because, as compared to statues, amendments can insulate agencies from unwanted political interference and immunize them from separation-of-powers challenges in court.[27] The use of formal amendments to manage the design of administrative agencies has allowed the states to be innovative and responsive in the organization of government. Unlike federal agencies, which have been propped up and legitimated by informal constitutional processes, state agencies generally spring from explicit constitutional language adopted through more direct democratic processes.[28]

Dinan notes, for example, that as early as 1939, states began to adopt provisions allowing legislatures to veto or suspend agency regulations.[29] In 1983, the United States Supreme Court invalidated similar devices enacted by Congress as violating the Presentment Clause and principles of bicameralism.[30] This ruling effectively ended the possibility of a congressional veto power because a formal amendment to undo the holding is near impossible under Article V's procedures. However, when many state courts reached similar rulings

key secondary sources and scholarly commentary and also found and introduced new and obscure primary sources. *See, e.g.*, DINAN, *supra* note 5, at 73–75.

25. *Id.* at 3–4.

26. *Id.* at 47–59.

27. *Id.* at 47–48.

28. *Id.* at 38. Dinan observes that although institution restructuring has occurred for a variety of reasons, "a central purpose has been transferring authority from legislatures to other institutions in cases where legislators have been deemed ill suited to carry out certain functions effectively." *Id.* at 39.

29. *Id.* at 58.

30. INS v. Chadha, 462 U.S. 919, 956–59 (1983).

under their state constitutions, amendments were proposed to reinstate and sometimes redesign the legislative veto.[31] In South Dakota, for example, the constitution was amended to create a joint legislative review committee with the power to suspend agency regulations until the legislature could conduct a full review.[32]

Dinan's chapter on rights-defining amendments is especially compelling and important.[33] He notes that the states have a long and oft-overlooked history of using formal amendment processes to update and enlarge individual rights protections.[34] He identifies two categories in this regard: amendments that enlarge state rights beyond the minimum protections provided under federal law and amendments that constitutionalize rights with no effective analog under federal law.[35] In combing through hundreds of state amendments, Dinan identifies an interesting list of rights-enhancing reforms. His list includes: religious liberty protections, equal protection (especially as it relates to gender equality and disability protections), privacy (in the context of criminal searches, informational privacy, and personal autonomy), gun rights, property rights, the rights of crime victims, the right to public information and records, and hunting and fishing rights.[36]

Dinan acknowledges that the forces driving these amendments are complex, but he also observes that in many instances reformers acted from the belief that courts and legislators were unlikely or unwilling to recognize or expand the disputed right.[37] Reformers often select formal amendment, Dinan observes, because it allows them to bypass existing courts or legislators and bind future officials.[38] Viewed through this lens, it is noteworthy that Dinan's list of rights-enhancing amendments could be characterized as a list of mostly majoritarian protections.[39] Few of the rights he identifies operate to provide rigorous minority protections. Instead, their general function seems to be the protection of the majority from government regulation.

31. *See* DINAN, *supra* note 5, at 58–59 (describing legislative-veto amendments and processes in various states).

32. *Id.* Dinan also notes that voters in many states rejected legislative-veto amendments. *Id.* at 58.

33. *See id.* at 73–108.

34. *Id.* at 73–74.

35. *Id.* at 74.

36. *Id.* at 75–108.

37. *Id.* at 74–75.

38. *Id.* at 75.

39. By this I mean that the amendments are rights associated with the political preferences of the majority and not explicitly designed or intended to protect the rights of vulnerable political minorities.

This is, of course, a vast generalization, but take gun rights as an example. Dinan notes that since 1960, state constitutions have been frequently revised to include language that enhances gun right protections.[40] Various states, for example, supplement language in their constitutions providing for a "well regulated militia" with more explicit language guaranteeing individuals the right "to keep and bear arms."[41] Other states adopted language to clarify that the right to bear arms is an individual rather than a collective right.[42] Finally, some states adopted language to clarify that their state constitutions included not only the right to "bear" arms, but also the right to "keep" arms.[43] Dinan notes that these changes in gun rights were due in part to widely unpopular proposals by state legislatures to adopt gun-control regulations.[44] In other words, one perspective on these provisions is that they represent efforts by political majorities to use state bills of rights to prevent majorities from unwanted government regulation. Dinan himself does not make this claim, but it illustrates the great richness of his empirical research and the many inquiries and ideas that spring from his work.[45]

Finally, Dinan's chapters on policy-based amendments are an important read for anyone seeking to understand contemporary state constitutionalism.[46] Dinan notes that at the federal level, unpopular congressional policies are rarely (if ever) addressed through constitutional amendment.[47] Instead, groups focus on "unseating wayward Congress members or pressuring them to change their behavior."[48] The states, on the other hand, have a long history of using constitutional amendments to set policy directly or influence policy choices by public officials.[49] Dinan surveys a dizzying array of policy amendments dating back to at least the early nineteenth century, and he observes that the states have been relatively sophisticated in how they tackle policy issues.[50] Some amendments strip state legislatures of

40. *Id.* at 91–94.
41. *Id.* at 91–92.
42. *Id.* at 92.
43. *Id.*
44. *Id.* at 91.
45. The distinction between rights that protect majorities from corrupt, abusive, or unresponsive government officials and rights that protect vulnerable political minorities from a majority is perhaps an underexplored distinction in state constitutional law and theory. It is a distinction that I intend to explore in future work.
46. *See id.* at 153–264.
47. *Id.* at 153.
48. *Id.*
49. *Id.*
50. *Id.* at 153–55.

authority to permit certain activities (such as lottery bans) or place significant limitations on the legislature's policy choices (such as debt limits).[51] Other amendments affirmatively empowered legislatures to regulate in specific areas where there were concerns about the legislature's constitutional authority to do so (such as the regulation of the hours, wages, and conditions for workers).[52] Finally, Dinan notes that many policy amendments effectively bypass the legislature and set detailed substantive policy directly (such as recent marijuana and stem-cell amendments).[53]

Dinan's account of these policy amendments is important. State constitutions are often dismissed as dysfunctional precisely because they contain statute-like policies and details, which degrade the constitution and blur the distinction between statutes and the constitution as *higher law*.[54] Dinan explains that, in reality, these policy amendments often reflect a clear and sophisticated understanding of the distinction between constitutional law, statutes, and legislative behavior.[55] He notes that policy amendments are often a reaction to perceived democratic failures in the law-making process; either because of undue influence by special interests,[56] self-interest by legislators,[57] or temporal shortsightedness by legislatures.[58] He notes that reformers often select formal amendment as a pathway for policy change precisely because constitutionalizing reform helps address those democratic deficiencies.[59] In this way, reformers take advantage of the state constitution as higher law to reign in wayward legislatures and close the gap between popular policy preferences and actual government outputs. On this view, states constitutions are functioning consistently with a bedrock aspiration for written constitutions: they help ensure that government remains faithful to "the people."

51. *Id.* at 155–59, 168–71.
52. *Id.* at 189–90.
53. *Id.* at 235–36, 242–48.
54. *See* Jeffery S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 KAN. L. REV. 687, 689–90 (2011).
55. *See* DINAN, *supra* note 5, at 266 ("The determination to proceed through amendment rather than through legislation or litigation is often the product of significant deliberation.").
56. *Id.* at 154.
57. *Id.* at 236.
58. *Id.* at 154.
59. *Id.* at 266–73.

II. ASSESSING STATE AMENDMENT PRACTICE AND POLITICS

Dinan concludes his book with a chapter assessing the consequences of frequent formal amendment in the states.[60] He makes the important observation that the states provide a valuable lens through which to assess more general theories of constitutional performance because they are so frequently amended relative to the United States Constitution and other constitutions around the world.[61] Dinan acknowledges that frequent amendment comes with risks and may be inferior to other pathways of change in certain circumstances.[62] His claim, however, is that existing theories and perspectives overlook the possibility that in some circumstances, accessible and frequent amendment may be preferable to other pathways of change. To this end, Dinan draws a few important distinctions.

First, he notes that formal amendments may be preferable because they can sometimes secure different outcomes than other pathways for change.[63] Dinan notes that courts and legislatures can operate as barriers to reform and that amendment processes can provide a means to overcome those barriers.[64] He is quick to note, of course, that bypassing those obstacles can sometimes lead to problems.[65] Dinan's contribution, however, is to emphasize that the state constitutional tradition is replete with instances where there are genuine failures in existing institutions and formal amendment provided a useful device for correcting those errors.[66]

This logic is most obvious as it relates to democratic defects in the legislature. Dinan points to redistricting as an example of how amendments may facilitate good governance.[67] He notes that state legislators have struggled to draw legislative lines "without regard to incumbency and partisanship" but various states have used amendment processes to correct for this defect.[68] He also points to state debt limitations following the financial crisis of 1837 as evidence of how amendment processes can correct defects in legislative decision-making.[69]

60. *Id.* at 265–80.
61. *Id.* at 265–66.
62. *Id.* at 271–73.
63. *Id.* at 266.
64. *Id.* at 266–67.
65. *Id.* at 266–67, 280.
66. *Id.* at 266–67.
67. *Id.* at 269.
68. *Id.* at 269–70.
69. *Id.*

Dinan also confronts the question of whether amendments that target constitutional rulings by courts can facilitate good governance.[70] His analysis of this issue is insightful and fresh. He notes at the outset that it is unhelpful to frame this question as about greater or lesser protection of individual rights because the states have a long history of using amendments to expand rights without prompting from courts.[71] This is a point that is often missed in academic and theoretical critiques of state constitutional flexibility, and Dinan's book highlights in great detail the historical evidence supporting this point.[72] Dinan also notes that "reasonable persons can disagree" about whether courts should be privileged in defining the substance of rights.[73] He notes that accessible amendment procedures allow democratic institutions to respond to court rulings in ways that may be preferable to judicial elections or recall procedures, or, as at the federal level, pent-up and brooding political frustration.[74] There are surely risks in a system where constitutional adjudication of rights is subject to reversal by popular amendments, but Dinan is compelling in drawing attention to an alternative and under-explored perspective on this phenomenon.

But Dinan also notes a second important distinction helpful in assessing the impact of frequent amendment. He explains that even when legislatures or courts are able and willing to provide outcomes similar to those available through amendment, amendment can offer other unique benefits that attract reformers.[75] Dinan notes two benefits that reformers often cite for selecting amendment as a preferred pathway for change: stability and legitimacy.[76] Regarding stability, Dinan notes that amendments are often adopted in order to ensure that particular policies are achieved and uncertainty related to the legislature is resolved.[77] Amendments can also enhance stability by

70. *Id.* at 270–73.

71. *Id.* at 272.

72. *Id.* Here, I would again note my observation that there may be two general categories of rights at play that meaningfully affect the political and constitutional dynamics. One relates to rights with broad majoritarian support that are constitutionalized in an effort to protect the majority from regulation by government officials. The other relates to rights designed to project vulnerable political minorities from abuse by politically powerful majorities. One reading of Dinan's examples is that the states have used amendment practices primarily to expand protection for majority-orientated rights, but they have been less willing to use amendments to expand protections for vulnerable political minorities.

73. *Id.* at 272–73.

74. *Id.* at 273.

75. *Id.* at 273–80.

76. *Id.* at 273–77.

77. *Id.* at 274.

entrenching a policy over time and from powerful interest groups.[78] Regarding legitimacy, Dinan notes that in both state and federal jurisprudence, there is a norm suggesting that constitutional change is most legitimate when achieved through explicit changes to constitutional text.[79] This is especially true because state amendment processes almost universally require that the people be consulted directly through a referendum (in all states except Delaware).[80] From this view, amendments come with the highest democratic imprimatur.

III. INFORMAL CONSTITUTIONAL GOVERNANCE AND FORMAL AMENDMENT

Dinan's book draws attention to a question of constitutional theory and design that is largely absent from discussion about the Federal Constitution. Specifically, it highlights the many factors that influence the pathways that constitutional changes take. Dinan notes that unlike the Federal Constitution, where formal amendment is essentially impossible, state constitutions present various viable pathways for constitutional reform including formal amendment.[81] He emphasizes transformative legislation, constitutional litigation, and formal amendment.[82] Dinan also observes that formal amendment is a frequent pathway for change in the states and that state reformers often select it because of its benefits over alternatives.[83]

Hiding in Dinan's findings are several important and related questions that may shed new light on how we understand constitutional change. For present purposes, I focus on the presumed interaction between formal and informal pathways of constitutional change. Prevailing theories (which are derived mostly from federal constitutional experience) suggest that formal and informal change are inversely related. That is, when formal constitutional change is frequent and accessible, informal processes of change are likely diminished in significance and frequency because pressures for constitutional change are addressed through formal amendment.

Dinan's findings challenge this notion because they suggest that constitutional change is a highly contextual phenomenon. Much of Dinan's book is dedicated to showing that state reformers are often

78. *Id.* at 275–76.
79. *Id.* at 278–79.
80. *Id.* at 279; *see* John Dinan, *State Constitutional Developments in 2016*, *in* BOOK OF THE STATES 3, 12–13 tbls.1.2 & 1.3 (2017) (showing that all states except Delaware require a referendum to ratify amendments).
81. *Id.* at 11–12.
82. *Id.* at 273–74.
83. *Id.* at 273–80.

conscientious in analyzing the best pathway for reform and deliberate in their selections based on particular objectives, resources, and institutional constraints (among other factors).

State constitutions present a useful sample for studying these dynamics precisely because reformers have several viable pathways, including formal amendment. I recently published original data analyzing the relationship between the frequency of formal amendment under state constitutions and the frequency with which state high courts announce changes in state constitutional rules.[84] I found that contrary to prevailing theories, there does not seem to be a simple inverse relationship between judicial involvement in constitutional change and amendment frequency.[85] Although that correlation holds true for some states, the aggregate trend is in the opposite direction: as amendment frequency increases, judicial involvement in constitutional change increases as well.[86] Indeed, states with some of the highest formal amendment rates (Alabama, California, Oklahoma, and Texas) also have some of the highest rates of judicial activism.[87] My data also reveal a further complexity in that not all subjects follow the same trends.[88] On individual rights issues, for example, courts were systematically more involved in constitutional change than formal amendment, but on tax policy issues, courts were mostly disengaged.[89]

Commenting on these data, James Gardner has observed that state constitutionalism is characterized by state judges taking an active role in governance.[90] Whereas federal judges sometimes hold themselves out as passive participants in governance, Gardner sees my data as confirming that state courts remain active and engaged in constitutional governance even when other actors are also active through formal amendment processes.[91] He notes that "[s]tate courts . . . share with the other branches of state government, actively and without apology, a conception of their role as requiring them to do their best to produce the best possible results for their bosses, the people of the states."[92]

All of this suggests, at least to me, that we still have much to learn from state constitutionalism. To the extent that constitutionalism is

84. *See* Marshfield, *supra* note 22.
85. *Id.* at 106–08.
86. *Id.* at 108 fig.3.
87. *Id.* at 107.
88. *See* Marshfield, *supra* note 2, at 491.
89. *Id.*
90. *See* Gardner, *supra* note 23, at 548.
91. *Id.* at 556.
92. *Id.*

built on the notion that a codified higher law can facilitate good governance, state constitutionalism offers new insight into how constitutions actually operate. John Dinan's book draws our immediate attention to how formal amendment might contribute to good governance, but his work also brings to the fore new questions about how other institutions and actors are influenced by frequent amendment. We still know very little about those interactions, but Dinan's book brings us closer to answers and the next generation of important questions.

CONCLUSION

State constitutions are an important but overlooked source of insight regarding constitutionalism. John Dinan's new book provides invaluable data, context, and analysis regarding how state constitutions actually function. At the bottom, he presents compelling evidence challenging the dominant perspective that state constitutions are dysfunctional because of their relative flexibility and frequent amendment. In a measured and nuanced way, Dinan shows that state constitutionalism presents a coherent and rational alternative approach to good governance; an approach grounded in the use of frequent formal amendment to constrain and correct government officials and institutions. His book will surely have a lasting impact on state constitutionalism, American politics, and constitutional governance generally.