STATE CONSTITUTIONAL RESPONSES TO *GIDEON V. WAINWRIGHT*

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INTRODUCTION

Gideon v. Wainwright was a watershed moment for American criminal procedure. Indeed, the U.S. Supreme Court has literally described it as one of the few "watershed" rules in the criminal procedure context that can be applied retroactively.[1] It is likely one of the most

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1. Beard v. Banks, 542 U.S. 406, 417 (2004) ("In providing guidance as to what might fall within this exception [*Teague*'s exception for 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding'], we have repeatedly referred to the rule of *Gideon v. Wainwright*, and only to this rule.") (citations omitted).

popular rules of American criminal procedure,[2] and likely one of the most well-known rules, too—perhaps because of the ubiquity of *Miranda* warnings[3] or because *Gideon's Trumpet* is commonly read or viewed in schools.[4]

Today, however, despite the impact of the Court's ruling in *Gideon*, its promise has not been fully realized. Though *Gideon* motivated states to create procedures for appointed counsel, public defender systems are cruelly overtaxed and underfunded[5] and contracted defender systems are wrought with conflicts of interest.[6] While the core of *Gideon* suggested a radical reimagining of the criminal legal system,[7] its promise has been stymied by subsequent Supreme Court decisions. Beyond that, its long-term viability as a matter of U.S. constitutional law could be in question.[8]

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2. *See* Yale Kamisar, *The Rise, Decline, and Fall(?) of* Miranda, 87 WASH. L. REV. 965, 1038–40 (2012).

3. *See* Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 155 (2013).

4. *See* M. Alex Johnson & Vidya Rao, *A 'Nobody's' Legacy: How a Semi-Literate Ex-Con Changed the Legal System*, NBC NEWS (Mar. 18, 2013, 5:40 AM), https://nbcnews.com/news/us-news/nobodys-legacy-how-semi-literate-ex-con-changed-legal-system-flna1c8914521 ("If you've heard of Clarence Earl Gideon at all, it's probably because of a movie you had to watch in school.").

5. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) ("By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."); *see also* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 138–48 (2020) (analyzing the systemic underfunding of public defenders).

6. *See* Maybell Romero, *Lowball Rural Defense*, 99 WASH. U.L. REV. 1081, 1114 (2021) (arguing that "[c]ompetitive bidding and encouraging defense counsel to undercut one another in an effort to secure contracts prevents the formation of practice norms" and "encourages underhandedness, dishonesty, and distrust between competing criminal defense counsel").

7. *Gideon*'s core requirement, while revolutionary, was a massive exception to a broader rejection of positive rights by the U.S. Supreme Court. *See* Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 886–87 (1989) ("With the significant exception of appointed counsel in criminal proceedings, virtually every attempt at generating a set of federal constitutional rights that would have compelled the expenditure of funds to meet the needs of the poor was rebuffed by the Supreme Court as inconsistent with democratic political theory and a conception of negative constitutional rights.").

8. *See* Garza v. Idaho, 586 U.S. 232, 260–61 (2019) (Thomas, J., dissenting) (arguing that "the Sixth Amendment appears to have been understood at the time of ratification as a rejection of the English common-law rule that prohibited counsel, not as a guarantee of government-funded counsel," and that *Gideon* and related cases did not "attempt[] to square the expansive rights they recognized with the original meaning" of the Sixth Amendment).

Part of the Court's claimed reluctance to expand the right to counsel too ambitiously is a concern about federalism. Twenty-one years before *Gideon*, in *Betts v. Brady*, the Court expressly rejected the requirement it would ultimately adopt in *Gideon*, noting that "the States should not be straight-jacketed in this respect, by a construction of the Fourteenth Amendment."[9] Yet while *Betts* was overturned, its concern about federalism endured. In *Argersinger v. Hamlin*, the Court declined to adopt a "prophylactic rule that would require the appointment of counsel to indigents in *all* criminal cases," observing that "the price of pursuing this easy course could be high indeed in terms of adverse impact on the administration of criminal justice systems of 50 States."[10] Likewise, in *Scott v. Illinois*, the Court observed that "the state and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind."[11]

Yet the flip side of this concern about federalism is that states can go further in recognizing a right to counsel if they choose to do so. And many have. Though *Gideon* undoubtedly *required* that states afford indigent criminal defendants appointed counsel, most states already imposed a similar requirement at that point—through judicial interpretations of their own constitutions, statutory requirements, or court rules promulgated by state supreme courts. And after *Gideon*, states were left in limbo about what the Sixth Amendment actually required. It took sixteen years for the U.S. Supreme Court to clarify when *Gideon* applied, which it did in *Scott v. Illinois*. There, it held that states were only obligated to provide counsel when defendants were *actually* imprisoned.[12]

During this same period of time, the inauguration of the Burger Court, and the retreat from the Warren Court's expansive criminal procedure rulings, inspired many advocates to turn to the states. New judicial federalists urged state supreme courts to interpret their state constitutions more broadly than the U.S. Constitution[13]—and while the project of new judicial federalism has been controversial, and its

9. Betts v. Brady, 316 U.S. 455, 471–72 (1942).

10. Argersinger v. Hamlin, 407 U.S. 25, 50–51 (1972) (emphasis added).

11. Scott v. Illinois, 440 U.S. 367, 372 (1979).

12. *See id.* at 373–74. In adopting the backward-looking "actual imprisonment" standard, the Court rejected a more protective standard that would have mandated counsel when a defendant was charged under a statute that *authorized* imprisonment. *See id.* In dissent, Justice Brennan argued that an "authorized imprisonment" standard would better "implement[] the principles of the Sixth Amendment identified in *Gideon*" and would be easier to administer. *Id.* at 382–84 (Brennan, J., dissenting).

13. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977).

effects debated,[14] it looks likely to continue producing state constitutional jurisprudence as federal courts become uneven venues for vindicating rights and liberties.[15]

This is true in the context of the right to counsel, too, though the effects of new judicial federalism have been far more muted. Some states have expanded the contexts in which the right to counsel applies—with respect to the stage in the criminal legal process,[16] the type of criminal sanction the defendant faces, or even the type of proceeding itself.[17] Several state courts have recognized a systematic failure of the state government to fund public defense and provide effective assistance of counsel, though the effects here are limited.[18] And a smaller number have recognized more expansive claims rooted in ineffective assistance of counsel.[19]

But few states have modified their constitutions to reflect their obligation under the Sixth and Fourteenth Amendments to provide indigent defendants with representation. During and following the criminal procedure revolution, a sizable number of states held constitutional conventions.[20] The high concentration of conventions during the 1960s and 1970s has many explanations, both societal and state-

14. *See, e.g.*, James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 772–73 (1992); G. Alan Tarr, *New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1117 (1997); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 299–300 (2007).

15. *See* Neal Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U.L. REV. 1129, 1165–74 (2019).

16. However, despite the significance of having counsel at bail hearings, *see* Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369, 373–74 (2020), state constitutions remain an underdeveloped source of a right to counsel in this context, *see* Douglas L. Colbert, *Thirty-Five Years After* Gideon*: The Illusory Right to Counsel at Bail Hearings*, 1998 U. ILL. L. REV. 1, 37–40 (1998) (noting the "paucity of right-to-counsel state court decisions").

17. *Infra* PART II.

18. *See generally* Lauren Sudeall, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) (surveying state supreme court decisions in Arizona, Louisiana, and Oklahoma); Brent R. Appel, *State and Federal Constitutional Right to Counsel in an Age of Case Specific and Systemic Inadequacies*, 93 UMKC L. REV. 523, 583–84 (2025).

19. Appel, *supra* note 18, at 581–82; *see generally* Quinn Yeargain & Miranda Thompson, A State Constitutional Right to Effective Assistance of Counsel (unpublished manuscript) (on file with author) (surveying state approaches to effective assistance of counsel and arguing for a more robust right).

20. *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 72–74 (1982); *see also* Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555, 2592–94 (2024) (noting the disuse of state constitutional conventions after this period).

specific, but the need to modernize state legislative apportionment schemes following the adoption of the one-person, one-vote standard was one of the main causes.[21] These conventions took place during an unprecedented time in federal-state relations—the Warren Court incorporated virtually every guarantee in the Bill of Rights to the states and added significant muscle to each protection, and the rise of new judicial federalism focused new attention on state bills of rights. But despite that context, the state constitutions that were proposed during this era contained shockingly few modifications to the rights afforded to criminal defendants and prisoners.[22]

In the decades immediately following *Gideon*, nearly thirty states either held constitutional conventions or submitted proposed constitutions to their electorates.[23] Beyond these proposed wholesale revisions of state constitutions or article-by-article changes, only a handful of discrete amendments were submitted to voters. Only a handful of these proposals suggested changes to the right to counsel or the state's obligation to provide counsel to indigent criminal defendants. Somewhat surprisingly, however, of the few states that *did* propose material changes in this space, the boldest changes were rejected by state electorates (though for reasons unrelated to these specific proposals).

In this article, I survey the responses of state constitutional drafters—conventions, commissions, legislatures, and voters themselves—to *Gideon* and its progeny and argue that the most recognizable "watershed" moment in constitutional criminal procedure produced extremely little formal change to state constitutions. Moreover, there was little pressure in any of these settings to amend what their state constitution said to account for the state's new obligations under *Gideon* and *Scott*. However, the originalist threat to the Warren Court's criminal procedure cases, including *Gideon*, demands that state constitutional development be taken seriously as a mitigation strategy. The Roberts Court's emphasis on history and tradition in interpreting the scope of rights under the U.S. Constitution poses a grave threat to the rights and liberties that defendants have in the current criminal legal system. And while *Gideon* has not featured prominently in originalist attacks on Warren Court jurisprudence, the risk of revanchism is too great to gamble on. Accordingly, I argue that the process of formal constitutional amendment is especially important today.

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21. Sturm, *supra* note 20, at 72–74.

22. Quinn Yeargain, *State Constitutional Changes in the Shadow of the Criminal Procedure Revolution*, 59 GA. L. REV. (forthcoming 2025).

23. Sturm, *supra* note 20, at 72–74.

I begin in Part I by discussing the developments in state constitutions from the 1960s to the 1980s. I outline the causes of the increase in constitutional conventions and discrete amendments and survey the major goals of both efforts. Drawing on both convention records and constitutional commission reports, I argue that modifications to criminal procedure, including the right to counsel, were not major catalysts or focuses.

Then, in Part II, I turn to the states in which proposals to revamp the right to counsel or the provision of counsel to indigent defendants were presented to voters. Based on a comprehensive survey of proposed constitutional revisions during this time, I identify three separate ways in which these changes were advanced: (1) textual modifications to the right to counsel; (2) an affirmative obligation that the state provide counsel to indigent criminal defendants; and (3) the creation of public defenders as constitutional officers. Finally, in Part III, I review the results of this state constitutional action *and* inaction. In the few states that saw modifications to their counsel provisions since *Gideon*, little differentiates them from the states that changed nothing. However, the people in those states may well be immunized against criminal procedure revanchism. Even if the gains made during the criminal procedure revolution are reversed, the incorporation of stronger rights to counsel into state constitutions, or a mandate that states provide counsel, could help *Gideon*'s promise endure in the states, as imperfect as it is.

I. STATE CONSTITUTIONAL REVISION DURING NEW JUDICIAL FEDERALISM

A. The Causes and Outcomes of Constitutional Changes

The two-decade period from the 1960s through the early 1980s saw a notable resurgence in the number of state constitutional conventions that were called. While the frequency of state constitutional conventions has decreased since its heyday in the mid-nineteenth century, and the uptick in the 1960s is small when measured against comparable periods in the previous century,[24] the resurgence is still notable.

There is no single explanation for the number of conventions held during this period, but the need to comply with the U.S. Supreme

24. *See* J. H. Snider, *Does the World Really Belong to the Living? The Decline of the Constitutional Convention in New York and Other US States, 1776–2015*, 6 AM. POL. THOUGHT 256, 260–61 (2017).

Court's one-person, one-vote rulings was a common explanation.[25] Another common factor was the perceived need to modernize state governments.[26] Many state constitutions were weighed down with overly specific provisions that frequently hemmed in state officials or that mandated the existence or election of archaic offices.[27] Removing these anchors was important in the abstract, but especially so in light of changing technologies, diversifying economies, and the need for adaptable regulation.[28]

The diverse factors that drove state constitutional conventions at least partially dictated the results. The necessity of compliance—sometimes reluctantly—with the one-person, one-vote requirement produced legislative branch and apportionment articles that mandated decennial redistricting and equipopulous districts. Likewise, sprawling executive branches were pruned back and power was concentrated in the governor.

However, constitutional reform extended beyond these core areas too. Much of this change was driven by reform efforts that were far less formal than a constitutional convention. Many states convened constitutional revision commissions to suggest possible changes, some of which were taken up by state legislatures. Outside of these official recommendations, legislatures took it upon themselves to propose revisions—and so did voters, at least in the states with initiative processes. Regardless of the source of inspiration, these changes served to professionalize state judiciaries, reform state taxation and budget rules, provide home rule for counties and municipalities, and expand state regulatory capacity.[29]

Amid this change, however, the effect on state bills of rights was quite limited. Core protections—in the contexts of criminal procedure and free expression—were largely unaltered, despite the massive jurisprudential changes at both the federal and state levels during this same period. To the extent that rights provisions were modified, the modifications usually revolved around the most salient rights issues.

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25. *See* G. Alan Tarr, *Explaining State Constitutional Change*, 60 WAYNE L. REV. 9, 28–29 (2014).

26. *See id.* at 23–28.

27. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–99 (2017); *see also* Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 U.C. DAVIS L. REV. 1347, 1381–82 (2023).

28. *Cf.* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 83 N.Y.U. L. REV. 107, 128–31 (2018) (noting the "drastic, but largely unheralded, growth in state-level administration" from the 1950s to the present).

29. *See* Sturm, *supra* note 20, at 89–95.

Equal protection clauses were modified to include specific references to protected groups; following the failure of the federal Equal Rights Amendment, state ERAs were added to guarantee equality to women; and more specific rights, like to privacy, education, or a clean and healthful environment, were added too.

And if rights were not a significant focus during this period of revision, then criminal procedure rights were even less of a focus. Several of the most controversial rulings of the Warren Court—namely, the incorporation of the exclusionary rule to the states in *Mapp v. Ohio* and the requirement of *Miranda* warnings—produced virtually no modifications to state constitutions at all.[30] The most significant changes to state constitutions that were kicked off during this time were the elimination or weakening of the right to bail,[31] the addition of victims' rights amendments,[32] and the nullification of criminal procedure rulings that went further than the U.S. Supreme Court's interpretation of analogous provisions.[33] Otherwise, constitutional revisions proposed during the 1960s through the 1980s produced only sparing change to criminal procedure rights.

B. Criminal Procedure Ignored

In reviewing the records of these conventions, as well as revision commissions, reformers during this period of time largely did not contemplate meaningful changes in this space.[34] Few commissions recommended change to criminal procedure protections in their state constitutions and few delegates submitted proposals to amend the existing provisions. Unsurprisingly, then, the majority of state constitutions that were proposed to voters—as either wholesale rewrites or article-

30. *See* Yeargain, *supra* note 22.

31. *See* Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 962–64 (2013).

32. *See* John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2132–33 (2013).

33. *See* John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1009–16 (2007).

34. In reviewing these records, I report my findings with caveats. As Molly Brady has persuasively demonstrated, state constitutional convention records—old and new alike—are flawed. They are "documented poorly," incompletely, or simply well after the fact, and subject to manipulation by editors and reporters. Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 WIS. L. REV. 1169, 1172–80 (2022). To that end, my use of these records is limited in the specific context of this article—and merely serves to illustrate the comparative silence of convention delegates on criminal procedure issues.

by-article revisions—did not meaningfully alter the constitutional protections afforded to defendants or prisoners.[35]

The same omission was true for the right to counsel. At most state constitutional conventions, if a proposal to modify the right was introduced, it did not get very far. Most constitutional commissions convened during this period similarly recommended no change to the right. And virtually no state legislature proposed a change, either, and in the states where voters have the right to initiate constitutional amendments of their own design, only one such amendment was introduced.

Two examples, from Illinois and Montana, helpfully illustrate this point. Both states adopted constitutions in the early 1970s—Illinois in 1970 and Montana in 1972—that are fairly progressive documents, especially with respect to rights and liberties.[36] Yet neither constitution included *any* change to their right to counsel,[37] and remarkably few changes to criminal procedure generally. Delegates to each convention proposed expansions of the right to counsel, but neither garnered much attention. Proposal No. 433 at the Illinois convention would have guaranteed the right to counsel to "any other proceeding wherein any person could be confined by virtue of state action for a period of six-months or more."[38] But the Committee on the Bill of Rights "liked the language and liked the protections as stated and felt they were wholly adequate," so it "vote[d] to retain the language."[39] A far bolder provision at Montana's convention would have provided an indigent person "the right to counsel in administrative or court proceedings in which the State, or any subdivision thereof, is an adverse party."[40] However, the proposal was not advanced, and the Bill of Rights Committee recommended the adoption of the existing language because it "felt it was an admirable statement of the fundamental

35. *See* Yeargain, *supra* note 22.

36. *See* Brett Legner, *Interpreting the Illinois Constitution: Understanding the Rights Afforded by a Modern Charter*, 48 LOY. U. CHI. L.J. 851, 855–58 (2017); *see also* Betsy Griffing, *The Rise and Fall of the New Judicial Federalism under the Montana Constitution*, 71 MONT. L. REV. 383, 385 (2010).

37. *Compare* ILL. CONST. of 1870, art. II, § 9, *with* ILL. CONST. art. I, § 8 (1970), *and* MONT. CONST. of 1889, art. III, § 16, *with* MONT. CONST. art. II, § 24 (1972).

38. ILL. CONST. CONVENTION, 3 RECORD OF PROCEEDINGS: VERBATIM TRANSCRIPTS: MAY 22, 1970 TO JULY 9, 1970, at 1373 (1972).

39. *Id.*

40. 1 MONTANA CONSTITUTIONAL CONVENTION PROCEEDINGS: 1971–1972, at 105 (1979).

procedural rights of the accused" and was not in receipt of any delegate proposals to alter the text.[41]

The Washington Constitutional Revision Commission of 1969 excluded any proposed change to the state constitution's bill of rights because "the present constitution's most serious deficiencies involve the structure and processes of government, rather than the rights of the people . . . ."[42] The Ohio Constitutional Revision Commission of 1976 reported that, with respect to the state constitution's analogous protections of "the Sixth Amendment rights," there were no "cases, statutes, or rules" that "go beyond present federal interpretations of the Sixth Amendment in any way that would call for constitutional amendment in Ohio."[43] Furthermore, it noted, "no person has appeared before the committee or the Commission recommending any change . . . ."[44]

There are many possible explanations for why these revision processes produced little discussion of individual rights. For one, many of these conventions were "limited" conventions—and thus were constrained to specific purposes.[45] The purposes varied, but many limited conventions were convened to alter the state's legislative apportionment process, to modify tax provisions, or, in Tennessee's case, because the process for legislative amendment of the constitution was too onerous.[46] Regardless of the specific tasks for these conventions, when so limited, they were barred from considering other modifications. In Texas, this was made quite clear. The Texas Constitutional Revision Commission convened in 1973 was expressly barred from considering any changes to the state's bill of rights; the amendment to the Texas Constitution authorizing the commission's proceedings "required that the Bill of Rights be retained in full."[47]

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41. 5 MONTANA CONSTITUTIONAL CONVENTION PROCEEDINGS: 1971–1972, at 1776 (1981).

42. WASH. CONST. REVISION COMM'N, FINAL REPORT TO GOVERNOR DANIEL J. EVANS 6 (1969), https://babel.hathitrust.org/cgi/pt?id=uc1.b4181717&seq=7. Of note, however, an interim report of the Commission concluded: "The Declaration of Rights as set forth in Article I of the state constitution should be rewritten to preserve basic rights," among other changes. WASH. CONST. REVISION COMM'N, REPORT TO GOVERNOR DANIEL J. EVANS 9 (1968), https://babel.hathitrust.org/cgi/pt?id=osu.32437121938985&seq=1.

43. OHIO CONST. REVISION COMM'N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION: PART 11: THE BILL OF RIGHTS 32 (1976).

44. *Id.*

45. *See* Marshfield, *supra* note 20, at 2575 n.135.

46. LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION 24–26 (2011).

47. TEX. CONST. REVISION COMM'N, A NEW CONSTITUTION FOR TEXAS: TEXT, EXPLANATION, COMMENTARY 63 (1973); H.J.R. 61, 62d Leg., Reg. Sess., 1971 Tex.

But what explains the omission of criminal procedure rights in general constitutional conventions, state legislative discussions, or voter-driven initiatives—especially during a period in which there were revisions of rights generally?[48] I argue elsewhere that the context in which the criminal procedure revolution took place—as opposed to the reapportionment revolution—helps explain this omission. While both revolutions affected significant changes to state governments, they had different externalities on state constitutions. In the one-person, one-vote context, extremely specific provisions in state constitutions—*e.g.*, apportioning one state senator per county—clearly ran afoul of the Court's holdings. But in the criminal procedure context, the rights protected by state constitutions are phrased more abstractly and are less likely to clash with the Court's interpretations of the U.S. Constitution's Bill of Rights. Accordingly, few changes, if any, were needed to comply with the Warren Court's rulings.

However, there are some ways in which the reapportionment and criminal procedure revolutions played out similarly. Both inspired significant resistance. The one-person, one-vote cases prompted some members of Congress to propose an (ultimately unsuccessful) amendment to the U.S. Constitution allowing the upper chambers of state legislatures to be apportioned on the basis of "population, geography, and political subdivisions."[49] Some states facially complied with the requirement to draw state legislative districts on the basis of population, but included in their constitutional amendments trigger provisions that allowed them to revert back to a county-based model of representation if the Court reversed itself.[50] And other states simply refused to modify their constitutional provisions at all, effectively

Laws 4141 (amending TEX. CONST. art. XVII, § 2(g)) ("The Bill of Rights of the present Texas Constitution shall be retained in full.").

48. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. 853, 867–70 (2022).

49. S.J. Res. 103, 89th Cong. (1966).

50. *See, e.g.*, MONT. CONST. of 1889, art. VI, § 2–3 (amended 1964) ("At such time as the constitution of the United States is amended or interpreted to permit apportionment of one house of a state legislative assembly on factors other than population, the senate of the legislative assembly shall be apportioned on the basis of one senator for each county."); TENN. CONST. art. II, § 4 ("Nothing in this Section nor in this Article II shall deny to the General Assembly the right at any time to apportion one House of the General Assembly using geography, political subdivisions, substantially equal population and other criteria as factors; provided such apportionment when effective shall comply with the Constitution of the United States as then amended or authoritatively interpreted. If the Constitution of the United States shall require that legislative apportionment not based entirely on population be approved by vote of the electorate, the General Assembly shall provide for such vote in the apportionment act.").

creating "zombie" reapportionment provisions that could very well be activated if the one-person, one-vote rule is weakened or abolished.[51]

A similar resistance played out to some of the more controversial aspects of the criminal procedure revolution, like the exclusionary rule and *Miranda* warnings. At the national level, the rulings in *Mapp v. Ohio* and *Miranda v. Arizona* prompted widespread opposition and fueled right-wing efforts to impeach Chief Justice Earl Warren.[52] Yet neither rule necessitated state constitutional change to be incorporated, so most constitutional revisions did not include any. And given that analogous requirements had previously been rejected by state supreme courts, by omitting any change, it seems possible, if not likely, that constitutional convention delegates and voters were keeping open the possibility that both rules would eventually be abolished (and they very well might be). Regardless of the explanation, however, only a discrete minority of proposed constitutional revisions presented to voters during this two-decade period included any change to the right to counsel—or a related change that would have implicated an indigent defendant's right to state-appointed counsel. I now turn to these changes.

II. UNPACKING THE PROPOSED CHANGES TO THE RIGHT TO COUNSEL

In the two decades after the U.S. Supreme Court's decision in *Gideon v. Wainwright*, fifteen states held twenty-one separate constitutional conventions.[53] In ten other states, the state legislatures proposed rewrites of their state constitutions.[54] And during this same period, thousands of discrete constitutional amendments were proposed either by state legislatures or the initiative process and presented to voters.[55] In total, only eleven states, on fifteen separate occasions,

51. *See* ALA. CONST. art. IX, §§ 198–200; *see also* Rice v. English, 835 So. 2d 157, 159 (Ala. 2002) ("Of course, pursuant to the Supremacy Clause . . . any provisions of § 200 that conflict with the Fourteenth Amendment . . . would not be enforceable.").

52. *See* MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953–1969, at 243 (2005).

53. Arkansas (1969–70, 1978–80), Connecticut (1965), Hawai'i (1968, 1978), Illinois (1969–70), Louisiana (1973–74), Maryland (1967–68), Montana (1971–72), New Hampshire (1964, 1974), New Jersey (1966), New Mexico (1969), New York (1967), Pennsylvania (1967–68), Rhode Island (1964–69, 1973), Tennessee (1965, 1971, 1977), and Texas (1974). *See* Sturm, *supra* note 20, at 82.

54. Florida (1968), Georgia (1976, 1983), Idaho (1970), Kentucky (1966), Minnesota (1974), North Carolina (1970), North Dakota (1972), Oregon (1970), South Dakota (1976), Virginia (1971). Sturm, *supra* note 20, at 75–76.

55. Marshfield, *supra* note 48, at 867–70.

presented to voters any change to the right to counsel or the provision of counsel to indigent defendants. Of these, ten were adopted and five were rejected.

These changes fell into three different categories, as shown in Table 1. Most of the proposed amendments made a textual change to the right to counsel itself. Not all of these changes were material, however; some just involved modifying or modernizing the verbiage. Some proposals added an affirmative duty of the state to provide counsel to indigent defendants, though far more of these were rejected than accepted. And four constitutionalized public defense, either by creating a public defender as a constitutional officer or by mandating the creation of a statewide public defender service. In this Part, I lay out and analyze each of these proposals, discussing each category of proposal in a separate section.

Table 1: Summary of Proposed Post-*Gideon* State Constitutional Changes to the Right to Counsel

State	Year	Source	Ratified?	Change to right?	Duty of state?	Public defender?
Arkansas	1970	Convention		X		
	1980	Convention		X	X	X
California	1972	Amendment	X	X		
	1974	Amendment	X	X		
	1990	Initiative	X	X		
Florida	1972	Amendment	X			X
Hawai‘i	1968	Convention	X		X	
	1978	Convention	X		X	
Louisiana	1974	Convention	X	X	X	X
New Hampshire	1966	Convention	X	X		
New York	1967	Convention		X		
North Carolina	1970	Convention	X			
Oregon	1970	Convention		X	X	
Pennsylvania	1968	Convention	X			X
South Dakota	1976	Convention		X	X	

A. Modifying the Right to Counsel

In Arkansas, California, Louisiana, New York, and Oregon, voters contemplated changes to how the right to counsel was phrased, what it meant, or the power of state courts to interpret that provision.

1. "Assistance of Counsel" and Self-Representation

First, in Arkansas (1970 and 1980) and California (1972), the proposals suggested providing the "accused" with "assistance of counsel for his defense."[56] The 1972 amendment to the California Constitution also guaranteed the right to "be personally present with counsel."[57] At the times that these proposals were submitted to voters, the Arkansas Constitution, as adopted in 1874, instead guaranteed the "accused" the "right to . . . be heard by himself and his counsel."[58] Similarly, the 1879 California Constitution provided the "party accused" with "the right . . . to appear and defend, in person and with counsel."[59]

This language protected different rights. The right to be "heard" or "defend" by counsel understandably confers a right to have counsel in the proceeding, which was expanded after *Gideon* and its progeny to infer a right of an indigent defendant to have appointed counsel. And the right to be "heard by," "appear," or "defend by" oneself has generally been understood by state supreme courts to confer a limited right to self-representation, which is also guaranteed by the Sixth Amendment.[60]

The proposals varied in the changes that they would have brought about. The "assistance of counsel for his defense" language likely reflected a purposeful effort to update the language to match the Sixth Amendment.[61] To that end, both of Arkansas's proposed modifications were described by the state constitutional conventions as having limited effects on the right itself.[62] However, both the 1970 and 1980

56. ARK. CONST. art. II, § 10 (proposed 1970); ARK. CONST. art. II, § 12 (proposed 1980); CAL. CONST. art. I, § 13 (amended 1972).

57. CAL. CONST. art. I, § 13 (amended 1972).

58. ARK. CONST. art. II, § 10.

59. CAL. CONST. art. I, § 13 (amended 1879).

60. Faretta v. California, 422 U.S. 806, 812, 831 (1975) ("The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation.").

61. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

62. SEVENTH ARK. CONST. CONVENTION, PROPOSED ARKANSAS CONSTITUTION OF 1970 WITH COMMENTS: A REPORT TO THE PEOPLE OF THE STATE OF ARKANSAS, at x (1970) (describing the change as a "[c]learer expression of protections of accused in areas of right to counsel and double jeopardy"); *id.* at 5 ("The first clause,

constitutional rewrites in Arkansas were ultimately rejected by voters, though for reasons entirely unrelated to the changes to the right to counsel.

Yet California's amendment brought about a more substantial change. The elimination of the defendant's right to "appear and defend[] in person" was intended to "[e]liminate . . . the provision giving a defendant in a criminal prosecution the right to defend himself in person."[63] A concomitant provision in the same amendment allowed the legislature to *require* defendants to have counsel in felony cases.[64] In an argument for the amendment printed in the state's voter guide, State Attorney General Evelle Younger and two state senators argued that self-representation in criminal convictions disadvantaged defendants, "work[ed] havoc on the judicial process" because of "a defendant's lack of familiarity with criminal law and courtroom procedure," which "substantially contribute[d] to the backlogs which plague our criminal courts, and add to the enormous cost of criminal trials."[65] After the amendment was ratified, statutory language ostensibly guaranteeing a right to self-representation remained, but the California Supreme Court concluded that this language guaranteed no such right.[66] In 1974, the California legislature proposed a broader rewrite of the state constitution's bill of rights, which consolidated the language, eliminated the legislature's power to compel defendants to accept counsel, and retained the same core protections.[67] The elimination of the mandate of counsel went unremarked in that year's voter pamphlet, and in any event, the requirement was struck down as unconstitutional

based on Amendment 6 to the United States Constitution, guarantees the right of an individual to be represented by an attorney when accused of a crime."); EIGHTH ARK. CONST. CONVENTION, PROPOSED ARKANSAS CONSTITUTION OF 1980 WITH COMMENTS: A REPORT TO THE PEOPLE 3 (1980) ("The first paragraph of this section is substantially the same as Article 2, Section 10, of the 1874 Constitution.") [hereinafter 1980 ARKANSAS CONSTITUTION REPORT].

63. GEORGE H. MURPHY, CAL. SEC'Y OF STATE LEG. COUNSEL, PROPOSED AMENDMENTS TO CONSTITUTION: PRIMARY ELECTION, TUESDAY, JUNE 7, 1972, at 7 (1972) [hereinafter 1972 CALIFORNIA VOTER GUIDE].

64. *See* CAL. CONST. art. I, § 13 (amended 1972).

65. 1972 CALIFORNIA VOTER GUIDE, *supra* note 63, at 8.

66. *See* People v. Sharp, 499 P.2d 489, 496, 499 (Cal. 1972). The context in which *Sharp* was decided is somewhat strange. The proceedings "were all had before the effective date of the [1972] constitutional amendment," yet the conclusion in *Sharp* was effectively mandated by the amendment. *Id.* at 499.

67. *See* CAL. CONST. art. I, § 15 (amended 1974).

under the Sixth Amendment by the U.S. Supreme Court the next year in *Faretta v. California*.[68]

2. Right to Counsel: Who, When, and Which Proceedings?

In Louisiana, New York, and Oregon, proposed constitutional amendments sought to clarify *when* a person is entitled to counsel. The U.S. Supreme Court has required that counsel not just be afforded to a criminal defendant at trial, but also during critical stages of the proceedings.[69] The 1974 Louisiana Constitution and the rejected 1967 New York Constitution sought to mirror this requirement—or perhaps expand it. The 1974 Louisiana Constitution provided that "every person is entitled to assistance of counsel of his choice" "[a]t each stage of the proceedings . . . ."[70] The 1967 proposed constitution in New York used similar language, which guaranteed "the assistance of counsel at every stage of the proceeding."[71] Though the New York provision was not adopted, and therefore never interpreted, the Louisiana provision has been held by the state supreme court to be "coextensive in scope, operation, and application" with the Sixth Amendment.[72]

Legislators in Oregon attempted to go even further with the constitution that they proposed in 1970. The Sixth Amendment right to counsel only applied in the criminal context, not the civil context. Accordingly, arguments that a person—a litigant or someone aggrieved by a government action—was entitled to counsel in a non-criminal proceeding was usually a matter of procedural due process, not the Sixth Amendment. However, the Oregon Legislature proposed a right to counsel that extended to both the criminal context and also "all

68. *See* Faretta v. California, 422 U.S. 806, 836 (1975) ("In forcing Faretta, under these circumstances, to accept against his will a state-appointed public defender, the California courts deprived him of his constitutional right to conduct his own defense.").

69. *See* United States v. Wade, 388 U.S. 218, 226 (1967) ("It is central to [the] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.").

70. LA. CONST. art. I, § 13 (1974).

71. N.Y. CONST. art. I, § 5(b) (proposed 1967).

72. State v. Carter, 664 So. 2d 367, 381–83 (La. 1995). However, the Louisiana Supreme Court did not discuss the potential difference between the *interpretation* of the Sixth Amendment by the U.S. Supreme Court to require counsel at *critical* stages of proceedings and the *text* of the Louisiana Constitution that guaranteed counsel at "*each* stage of the proceedings." *See* LA. CONST. art. I, § 13 (1974) (emphasis added).

official proceedings and dealings with public officers."[73] This was an expanded version of a similar provision that was supported by the Oregon Commission for Constitutional Revision in its 1962 proposed constitution. The Commission's version limited the civil right to proceedings "that may materially affect him,"[74] the meaning of which was not apparently clear.[75] However, when the changes were proposed to the voters in 1970, they were rejected—though primarily for unrelated reasons.

Finally, the Louisiana Constitution expressly guarantees a defendant the right to "counsel of his choice,"[76] verbiage that does not appear in other counsel guarantees. Under the U.S. Constitution, the Court has recognized an extremely weak right to choice of counsel, which is functionally limited to "the minority of people who can afford to hire private criminal defense counsel."[77] While the Louisiana Constitution might theoretically offer a more robust right to counsel of choice based on this text, it does not seem to have done so. Louisiana courts have repeatedly cited the Sixth Amendment and section 13 together without apparent differentiation.[78] And, like the U.S. Supreme Court, the Louisiana Supreme Court has held that "[a]n indigent defendant does not have the right to have a particular attorney appointed to represent him,"[79] even relying on a pre-1974 Constitution case for its interpretation of the provision adopted in the 1974 Constitution.[80]

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73. OR. CONST. art. I, § 9 (proposed 1970).

74. OR. COMM'N FOR CONST. REVISION, A NEW CONSTITUTION FOR OREGON: A REPORT TO THE GOVERNOR AND THE 52ND LEGISLATIVE ASSEMBLY 6–7 (1962) [hereinafter A NEW CONSTITUTION FOR OREGON].

75. *See* OR. STATE BAR, REPORT: OREGON STATE BAR, COMMITTEE ON CONSTITUTIONAL REVISION 3 (1963) [hereinafter OREGON STATE BAR REPORT] ("The Oregon State Bar has questioned the propriety of the limitation. The reason for its inclusion is not apparent, and there could be varying interpretations as to the meaning of that clause.").

76. LA. CONST. art. I, § 13 (1974).

77. Janet Moore, *Isonomy, Austerity, and the Right to Choose Counsel*, 51 IND. L. REV. 167, 170 (2018) (citation omitted); *see also* Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705, 1712–13 (2016); John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 2017 SUP. CT. REV. 117, 132–42 (2017).

78. *See, e.g.*, State v. Leggett, 363 So. 2d 434, 436 (La. 1978) ("Both the federal and state constitutions provide that the accused has the right to counsel of his own choosing to defend him on a criminal charge."); *see also* State v. Collins, 357 So. 3d 425, 428 (La. Ct. App. 2023) ("The Sixth Amendment of the United States Constitution and Article 1, section 13 of the Louisiana Constitution ensure similar rights to the assistance of counsel for criminal defendants.").

79. State v. Harper, 381 So.2d 468, 470 (La. 1980) (citing State v. Rideau, 278 So. 2d 100, 103 (La. 1973)).

80. *See id.*

B. The Duty of the State to Provide Counsel

Textual modifications to the right to counsel did not necessarily entrench or supplement the state's responsibility under *Gideon* and its progeny to provide counsel to indigent defendants. A few states—Hawai'i, Louisiana, New Hampshire, Oregon, and South Dakota—attempted to go further in safeguarding the state's duty in this respect. Each of these proposed modifications took place after *Gideon* was issued in 1963, but before the Court's decision in *Scott* in 1979, which firmly limited the Sixth Amendment to appointed counsel to situations where the defendant faced "actual imprisonment."[81]

As a result, though state constitutional drafters were not operating on a totally blank slate, because they operated with knowledge of *Gideon*'s floor, they did not know exactly how high the floor would end up. Amendments submitted to voters after 1972 were written with the knowledge that, under *Argersinger v. Hamlin*, "actual imprisonment" required an appointed counsel for indigent defendants, but left up in the air was whether even the potential of imprisonment, or other losses of liberty, was required. For the most part, this uncertainty did not meaningfully alter the scope of the protections that were proposed. The modifications proposed in New Hampshire (1966), Louisiana (1974), and South Dakota (1976) imposed a general duty on the state to provide counsel without specifying the circumstances that mandated counsel.[82]

However, at Hawai'i's 1968 constitutional convention, delegates underestimated what the Sixth Amendment required. A new sentence was added to the existing right to counsel that obligated the state to "provide counsel for an indigent defendant charged with an offense punishable by imprisonment *for more than sixty days*."[83] The Committee on Bill of Rights, Suffrage and Elections was clearly conscious

81. Scott v. Illinois, 440 U.S. 367, 373 (1979).

82. N.H. CONST. pt. 1, art. 15 (amended 1966) ("Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown[.]"); LA. CONST. art. I, § 13 (1974) ("At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents."); S.D. CONST. art. VI, § 9 (proposed 1976) ("In criminal prosecutions the accused shall have the right to defend in person and by counsel, and if the accused is indigent, to have counsel appointed[.]").

83. HAW. CONST. art. I, § 11 (amended 1968) (emphasis added).

of the meaning of the Sixth Amendment at that point in time,[84] yet simultaneously recognized that the sixty-day requirement was somewhat arbitrary.[85] Accordingly, after *Argersinger*, the delegates at the 1978 constitutional convention voted to strike out the sixty-day limitation. The Committee on Bill of Rights, Suffrage and Elections cited that the recodification of the Hawai‘i Penal Code included thirty-day offenses and that the general requirement would "be in keeping with the spirit of *Argersinger v. Hamlin* . . . ."[86]

Even setting aside the 1968 Hawai‘i Constitutional Convention's error, most of the language used by the proposed constitutions in these states was non-specific. The provisions did not seek to impose an affirmative obligation on the state to create any specific kind of public defender system, or even to create *public* defense attorneys at all. Instead, they simply mandated the appointment or provision of counsel for indigent defendants.

Constitutional reformers in Oregon—both the Commission for Constitution Revision convened in the early 1960s and the Legislature in 1970—sought to go further, however. The Commission's 1962 recommendation, which was adopted by the legislature in its proposed 1970 Constitution, was a constitutional requirement that an indigent litigant "have counsel appointed . . . in *any case* in which he may lose his liberty."[87]

Members of the commission concluded that "there is no ethical difference between being faced by a year's sentence in state prison and being faced with a year's sentence in city or county jail, or between

84. The Committee's report specifically cited *Gideon v. Wainwright*, *Miranda v. Arizona*, *United States v. Wade*, and *Mempa v. Rhay*. 1 HAW. CONST. CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968: JOURNAL AND DOCUMENTS 234 (1973). And as Delegate John W. Goemans observed, "[W]e're expanding the previous sentence beyond what the Supreme Court has so far ruled but perhaps we haven't gone as far as the Supreme Court will rule." 2 HAW. CONST. CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968: COMMITTEE OF THE WHOLE DEBATES 22 (1972).

85. Delegate Jack H. Mizuha observed, "On any kind of situation where you have a specific figure, a specific period of imprisonment, a specific salary, the question can be asked why. And it's almost impossible to answer but we feel, and I feel, that sixty days will be an adequate number of days in which we could base and impose upon the state to pay for counsel for indigent defendants." Separately, Delegate Mizuha said, "I don't know of any crime today in which a defendant may be charged with in this state where the maximum imprisonment is less than sixty days." 2 HAW. CONST. CONVENTION (1972), *supra* note 84, at 19, 21.

86. 1 HAW. CONST. CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978: JOURNAL AND DOCUMENTS 672 (1980).

87. OR. CONST. art. I, § 9 (proposed 1970) (emphasis added).

sentences in city or county jails."[88] The Oregon State Bar publicly opposed this addition, concluding that it "would apply to violation of city ordinances and could impose a financial burden on many municipalities. It would also apply to contempt of court and to civil arrest . . . ."[89] The commission rejected this argument, countering that "[t]o say that this will increase municipal costs is to argue that civil rights are fine if they don't cost anything."[90]

On the whole, these revisions had mixed results. Louisiana's 1974 Constitution was ratified by the electorate. The specific changes proposed by Hawai'i's 1968 and 1978 conventions and New Hampshire's 1966 convention, which were submitted as discrete amendments, were also ratified. However, voters in Oregon (1970) and South Dakota (1976) rejected the proposed constitutional rewrites.

C. Constitutionalizing Public Defense

A far less common approach was the creation of public defenders as constitutional offices. Only three proposed constitutional modifications sought to do so, and each articulated a vastly different model. Arkansas's 1980 Constitution proposed a mandate that the state legislature "establish a statewide system of public defense services in criminal cases for eligible persons," with eligibility specified by law.[91] In the public campaign to urge ratification of the amendment, Sherman Banks, the chairman of the rights committee at the convention, argued that it would enable attorneys to "have the time and money to devote to the case."[92] "Lawyers at the convention testified that they have gone to considerable expense to defend indigents—often thousands of dollars—and they have been forced to neglect their own businesses," he said.[93] While the details would be up to the legislature, a convention spokesman estimated that the system would cost $455,000[94]—or $1.6 million today.[95]

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88. A NEW CONSTITUTION FOR OREGON, *supra* note 74, at 46.

89. OREGON STATE BAR REPORT, *supra* note 75, at 3.

90. A NEW CONSTITUTION FOR OREGON, *supra* note 74, at 47.

91. 1980 ARKANSAS CONSTITUTION REPORT, *supra* note 62, at 3.

92. William Stuart, *Government 'Must Support' Rights*, PARAGOULD DAILY PRESS, Oct. 13, 1980, at 15c, https://www.newspapers.com/image/1104072915/.

93. *Id.*

94. *Constitution Gains More Backers*, PARAGOULD DAILY PRESS, Nov. 3, 1980, at 8, https://www.newspapers.com/image/1104025865/.

95. *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://data.bls.gov/cgi-bin/cpicalc.pl (enter "455,000" next to "$"; specify "November" and "1980" as the starting date).

The approach taken by Florida and Pennsylvania opted for a more explicitly local approach. Both states' revisions created public defenders at the local level, representing judicial circuits in Florida and counties in Pennsylvania. The approach taken by Pennsylvania was far more typical, with public defenders appointed by the county governing bodies themselves.[96] But Florida opted for a far more unusual approach—*elected* public defenders.[97]

In both states, the supporters of these revisions viewed them as essential for operationalizing the right to counsel.[98] Delegate David Barron, speaking to the Pennsylvania Constitution Convention in 1968, spoke emphatically of the role of the public defender in putting *Gideon*'s promise into practice:

> I submit to you that if we are to have the concept enshrined in our courts of Gideon v. Wainwright, the public is entitled to know that there is a man who is independent of the court, independent of the county solicitor, and one who is solely there for the purpose of representing those who do not have the money to be defended.[99]

Yet establishing a public defender as a constitutional office does not, by itself, bring *Gideon* to fruition. In Pennsylvania, there is neither a "statewide entity managing public defense services" nor a "statewide appropriation of funds," which leads to massive financial inequities between counties.[100] There is greater uniformity in Florida,[101]

96. PA. CONST. art. IX, § 4; 16 PA. STAT. AND CONS. STAT. ANN. § 9960.4 (West 1968) ("The public defender shall be appointed by the Board of County Commissioners.").

97. FLA. CONST. art. V, § 18 ("In each judicial circuit a public defender shall be elected for a term of four years, who shall perform duties prescribed by general law."); *see* Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. 803, 814 (2010).

98. *See* 2 DEBATES OF THE PENNSYLVANIA CONSTITUTION OF 1967–1968, at 772–73 (1969).

99. *Id.* at 772.

100. Joe, *supra* note 5, at 142. To that end, the ACLU of Pennsylvania recently filed a lawsuit arguing that the "delegat[ion of] nearly all funding and oversight responsibilities for indigent defense services to the counties" deprives defendants of effective assistance of counsel. Petition for Review in the Nature of an Action in Equity and for Declaratory Judgment at 6, Warren v. Commonwealth (Pa. Commw. Ct. June 3, 2024), https://www.aclupa.org/sites/default/files/field_documents/warren_v_commonwealth_petition_for_review_-_final.pdf. Of note, however, is the fact that of the provisions of the Pennsylvania Constitution that the litigants cited, the creation of public defenders was not one of them. *See id.* at 119.

101. ALAN CARLSON, KATE HARRISON & JOHN K. HUDZIK, ADEQUATE, STABLE, EQUITABLE, AND RESPONSIBLE TRIAL COURT FUNDING: REFRAMING THE

especially following a 1998 constitutional amendment that required greater state responsibility for funding public defenders and other offices.[102]

But the constitutional status and selection procedures for public defenders creates its own risks about the type of representation that is provided to defendants. For example, Matt Shirk, who was elected as the Fourth Judicial Circuit Public Defender in 2008, won the endorsement of the local police union after promising that no one in his office would accuse police officers of lying.[103] He "fir[ed] the office's most experienced trial attorneys," which produced "awful results for clients,"[104] sexually harassed the female attorneys working in his office, and deleted public records to conceal his misconduct.[105] However, because Shirk was a constitutional officer, he could only be removed from office by the Governor. In 2014, a grand jury investigating Shirk's activities did not indict him but instead recommended that he resign or that then-Governor Rick Scott remove him from office. Scott declined to do so, issuing a statement that said: "With no charges filed, it is for the voters of the 4th judicial circuit to decide who will service as public defender."[106] Shirk was ultimately defeated for re-election in 2016[107] and was finally disbarred in 2024.[108]

CONCLUSION: STATE CONSTITUTIONAL RIGHTS TO COUNSEL TODAY

Gideon v. Wainwright incorporated a straightforward rule to the states—that indigent criminal defendants are entitled to government-

STATE VS. LOCAL DEBATE 2–3 (2008) (noting that state-level funding generally led to greater uniformity, but not necessarily better outcomes).

102. FLA. CONST. art. V, § 14(a) (amended 1998) ("Funding for the state courts system, state attorneys' offices, public defenders' offices, and court-appointed counsel, except as otherwise provided in subsection (c) [which imposes a duty on counties to provide communications services and facilities for the offices], shall be provided from state revenues appropriated by general law."); *see also* Appel, *supra* note 18, at 590–91 (describing litigation in Florida).

103. *See* Alex Bunin, *Public Defender Independence*, 27 TEX. J. C.L. & C.R. 25, 61–62 (2021); *see also* Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 243 (2012).

104. Andrew Howard, *The Public's Defender: Analyzing the Impact of Electing Public Defenders*, 4 COLUM. HUMAN RTS. L. REV. ONLINE 173, 189–90 (2020).

105. *See* Bunin, *supra* note 103, at 62.

106. Jamie Smith, *Grand Jury Requests that Public Defender Matt Shirk Step Down*, ACTION NEWS JAX (Dec. 30, 2014, 7:38 PM), https://www.actionnewsjax.com/news/local/grand-jury-requests-public-defender-matt-shirk-ste/83780340/.

107. *See* Howard, *supra* note 104, at 190.

108. *See* Fla. Bar v. Shirk, No. SC2023-1440, 2024 Fla. LEXIS 401, at *1 (Fla. Mar. 13, 2024).

appointed counsel. Yet *Gideon*'s holding was not so straightforward, and in the half-century since it was handed down, that uncertainty has been laid bare. The federal and state judiciary, state legislators, and constitutional drafters have all worked through what the indigent person's right to counsel means and requires.

There is no singular right to counsel, however. Every state constitution but Virginia's has an affirmative right to counsel. And though some states lockstep with the U.S. Supreme Court's interpretation of what the right entails—from what constitutes a critical stage of proceedings through a post-conviction ineffective assistance of counsel claim—many others do not. Some have expanded beyond the limitations that the Court has placed on *Gideon*'s mandate and have recognized broader rights to counsel.

It is in this light that the state constitutional responses to *Gideon* are meaningful. These responses—whether in the form of reimagining the right to counsel, establishing an affirmative duty of the state to provide indigent defendants with counsel, or creating public defenders as constitutional offices—are not just historical trivia. Instead, they provide context for how we ought to understand the right to counsel in each specific jurisdiction.

First, the ratified revisions ground the understanding of the right to counsel in modern terms, not in the narrower meaning that the Founders may have intended. It is difficult to rebut the originalist response to *Gideon* and its progeny that the Sixth Amendment merely sought to grant what English law did not—that a defendant had a right to privately hired counsel. Though state-level jurisprudence evolved some on this point, most of the progress came from voluntary assumptions of a duty to provide indigent defendants with counsel. However, by ratifying a revised right to counsel in the 1960s or 1970s, after *Gideon* was decided and the midst of salient discussions about how far the right to counsel extended, we should understand voters as adopting a broader meaning.

Second, all of the proposed revisions, whether adopted or rejected, are visions of what the right to counsel could be. Many of these proposals go further than what the Sixth Amendment requires. These bolder guarantees of the right itself and stronger duties of the state suggest a criminal legal system with a more robustly established right to counsel and to public defense. Yet many of the rejected efforts have been unfairly lost to history.

Accordingly, in this article, I lay out the history of how these proposals were developed—not with the hope of merely providing historical commentary, but instead with the goal of inspiring further

innovation in this space. The U.S. Supreme Court's turn to originalism will expand the protections of the Bill of Rights in some areas and contract it in others. And though *Gideon* is a "watershed" moment in criminal procedure jurisprudence, it is certainly not safe. It is also incomplete. If states are divorced from the responsibility to provide indigent defendants with counsel, they may well need to chart their own courses in ensuring equity in the criminal legal system. The state constitutional responses to *Gideon* are a starting point.

APPENDIX

Table 2: Textual Changes of Post-*Gideon* Proposed State Constitutional Revisions				
State	**Year**	**Ratified?**	**Text?**	**Summary**
Arkansas	1970		In all criminal prosecutions, the accused shall <u>have</u> the right to <u>assistance of counsel for his defense</u> . . . and to be heard by himself and counsel.	Replacement of "enjoy" with "have"; addition of "assistance of counsel for his defense"
	1980		In all criminal prosecutions, the accused shall <u>have</u> the right to <u>assistance of counsel for his defense</u> . . . and to be heard by himself and <u>his</u> counsel. . . . <u>The General Assembly shall establish a statewide system of public defense services in criminal cares for eligible persons. Eligibility for services shall be as provided by law.</u>	Replacement of "enjoy" with "have"; addition of "assistance of counsel for his defense"; requirement of "statewide system of public defense"
California	1972	X	In criminal prosecutions, in any court whatever, the party accused shall have the right . . . <u>to have the assistance of counsel for his defense</u> . . . and to be personally present with counsel. . . . <u>The Legislature shall have power to require the defendant in a felony case to have the assistance of counsel.</u>	Addition of "assistance of counsel for his defense"; legislative power to "require" counsel in felony cases
	1974	X	[New text]: The defendant in a criminal cause has the right to . . . have the assistance of counsel for the defendant's defense, to be personally present with counsel . . .	Rephrased, but no material change

	1990	X	[New text]: In criminal cases the right of a defendant . . . to the assistance of counsel, to be personally present with counsel, . . . shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States . . .	Prohibition on construing right to counsel more broadly than the U.S. Supreme Court
Florida	1972	X	[New text]: In each judicial circuit a public defender shall be elected for a term of four years. He shall perform duties prescribed by general law. A public defender shall be an elector of the state and reside in the territorial jurisdiction of the circuit. He shall be and have been a member of the bar of Florida for the preceding five years. Public defenders may appoint such assistant public defenders as may be authorized by law.	Creation of public defenders as constitutional office
Hawai‘i	1968	X	[New text]: The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days.	Requirement of state to provide counsel for some offenses
	1978	X	The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment ~~for more than sixty days~~.	Elimination of 60-day requirement

Louisiana	1974	X	[New text]: When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.	Addition of *Miranda* warnings; addition of counsel at "each stage of the proceedings"; requirement of state to provide counsel
New Hampshire	1966	X	[New text]: Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.	Requirement of state to provide counsel; addition of power to waive counsel

New York	1967		[New text]: In all criminal prosecutions, the accused shall have the right . . . to have the assistance of counsel at every stage of the proceeding.	Addition of counsel "at every stage of the proceeding"
Oregon	1970		[New text]: Every person has the right to assistance of counsel in all official proceedings and dealings with public officers. If he cannot afford counsel, he has the right to have counsel appointed for him in any case in which he may lose his liberty.	Addition of counsel "in all official proceedings"; requirement of state to provide counsel
Pennsylvania	1968	X	[New text]: County officers shall consist of . . . public defenders. . . . County officers, except for public defenders who shall be appointed as shall be provided by law, shall be elected . . .	Creation of public defenders as constitutional office
South Dakota	1976		In criminal prosecutions the accused shall have the right to defend in person and by counsel, <u>and if the accused is indigent, to have counsel appointed</u> . . .	Requirement of state to provide counsel