

FOREWORD

SPECIAL ISSUE ON PUBLIC LAW IN THE STATES

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Although states sit at the heart of the American democratic system, academic and popular discourse often overlook state-level public law. The lion's share of attention, instead, goes to the federal government.¹ In this Special Issue, the states take center stage. The essays in this collection explore issues relating to subnational democracy, government, and institutions. These essays were first presented at a conference entitled "Public Law in the States," which took place in June 2021.² The conference was the inaugural academic convening of the new State Democracy Research Initiative at the University of Wisconsin Law School. Like this Special Issue, the Initiative aims to contribute to the vitality of democracy at the state level through research and learning focused on the states.

Each day of the conference began with a keynote address. California Supreme Court Justice Goodwin Liu gave the first lecture. Justice Liu highlighted the value of state constitutionalism as a way for our pluralistic democracy to channel interpretative disagreements.³ He explained that the very structure of our system of federalism demands that state courts interpret their constitutions independently, rather than reflexively embracing federal court interpretations of analogous federal constitutional provisions. State courts can and do disagree with the U.S. Supreme Court's

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1. See Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 388–91; Miriam Seifter, *Bringing the States into the Spotlight*, STATE & LOC. GOV'T L. BLOG (Sept. 1, 2021), <https://www.sloglaw.org/post/bringing-the-states-into-the-spotlight> [https://perma.cc/6XAL-HQFS].

2. *Public Law in the States Conference*, UNIV. OF WIS. L. SCH. (Aug. 12, 2021), <https://statedemocracy.law.wisc.edu/featured/2021/public-law-in-the-states-conference/> [https://perma.cc/W96Q-ZDXG].

3. Justice Liu has developed these themes in prior published work. See Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304 (2019) (book review); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307 (2017).

conclusions, and such disagreements need not reflect a state's distinctive constitutional language or history. The interpretative pluralism facilitated by our system of federalism not only allows states to protect basic liberties beyond a federal floor but also serves to foster ongoing discourse on contested legal issues. Sometimes, an influx of state supreme court decisions can even induce a second look by the U.S. Supreme Court.

Chief Judge Jeffrey Sutton of the U.S. Court of Appeals for the Sixth Circuit delivered the second keynote. He made an argument in favor of state courts as “laboratories of democracy,” drawing on the metaphor originally applied by Justice Brandeis to state legislatures.⁴ Judge Sutton lamented that when interpreting individual rights, state courts tend to start with a presumption that what the U.S. Supreme Court has said about the federal guarantee should also apply to the state guarantee—sometimes in the face of unique state constitutional history or provisions.⁵ Judge Sutton suggested that state courts should fulfill their laboratory function by determining for themselves the appropriate scope of state constitutional protections—whether broader or narrower than their federal counterparts.

In addition to the keynotes, the conference featured four moderated panels, which addressed state institutions, state constitutions, states and democracy, and intrastate affairs.

A. State Institutions

The institutions of state government vary widely, yet common themes emerged in the panel discussion, including questions regarding transparency and institutional design. In *State-Local Litigation Conflicts*,⁶ Margaret Lemos illustrates the important role that state statutory law can play in structuring state and local institutions. Professor Lemos examines disputes between attorneys general (AGs) and local government attorneys in opioid litigation and elsewhere in an effort to better understand the relationship between state and local litigation. After assessing arguments made by state AGs in opposition to locally controlled litigation, Professor Lemos suggests that conflicts between AGs and local attorneys turn not on characteristics intrinsic to state or local government but on advantages and disadvantages that flow from—and could be changed by—state law.

Professor Lemos's piece was part of a panel centered on state institutions moderated by David Pozen of Columbia Law School. This panel included presentations of several papers not included within this

4. *E.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

5. *See generally* JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2021); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

6. Margaret H. Lemos, *State-Local Litigation Conflicts*, 2021 WIS. L. REV. 971.

volume. Justin Weinstein-Tull (Sandra Day O'Connor College of Law at Arizona State University)⁷ presented *Suspect Institutions*, exploring the ways that federalism theory and doctrine fail to account for civil rights violations within state and local institutions. Michael Pollack (Cardozo School of Law) presented on *Courts Beyond Judging*,⁸ which assesses the many functions beyond traditional judging assigned to state courts. Bridget Fahey (University of Chicago Law School) presented on *Federalism Big Data*, which explores a different sort of overlooked state function: data-sharing across jurisdictional boundaries that creates “unorthodox” “cross-governmental bureaucracies,” which often lack clear lines of authority and are occluded from public scrutiny.⁹

B. State Constitutions

As with state institutions, states have unique constitutions, reflecting histories and processes distinct from that of the U.S. Constitution. As they can generally be amended more easily, state constitutions serve as particularly useful measurements of the will of the people over the course of history and, as Judge Sutton noted, have contributed to a ratcheting up of more democracy in each era. Through their text, history, and structure, state constitutions embrace what Miriam Seifter and Jessica Bulman-Pozen have termed the “democracy principle,” encompassing the pillars of popular sovereignty, majority rule, and political equality.¹⁰ State constitutions are critical resources for constraining antidemocratic behavior¹¹ and are the focus of several pieces in this collection.

In *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*,¹² Robert Williams explores how two or more state constitutional provisions can be interpreted as strengthening or “enhancing” one another. Professor Williams draws on concrete examples in which provisions have been interpreted “in tandem” with one another or as “stacking” and building onto one another “according to their chronological evolution.”¹³

7. Institutional affiliations are provided here for participants who have not authored pieces in this Special Issue.

8. Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719 (2021).

9. Bridget Fahey, *Federalism Big Data*, 135 HARV. L. REV. (forthcoming 2022).

10. Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 864 (2021).

11. *See id.* at 907–09.

12. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001.

13. *Id.* at 1007.

In *Federalism and Federal Rights Minimalism: Overlooked Effects on State Court Education Litigation in Wisconsin*,¹⁴ Helen Hershkoff and Nathan Yaffe explore how the lack of a federal constitutional right to education may have undermined education movements in the states rather than supercharging them, despite explicit state constitutional protections. The piece examines Wisconsin education decisions as a case study and finds that U.S. Supreme Court jurisprudence contributed to a narrowing of democratic options in Wisconsin for equalizing and improving public schools.

In *Zombie State Constitutional Provisions*,¹⁵ Maureen E. Brady canvasses a different phenomenon relating to state constitutions: that of clauses and amendments that are clearly or arguably unenforceable yet remain on the books. Professor Brady explores “what makes these [constitutional] provisions problematic and some of the nuanced and difficult questions involved in any decision to neutralize them.”¹⁶

These essays were initially presented in a panel on state constitutions moderated by Emily Zackin of Johns Hopkins University. The authors were also joined by Robert Yablon (University of Wisconsin Law School), who presented preliminary findings of an expansive, empirical research project on the work of state supreme courts.¹⁷ This research suggests that state supreme courts decide relatively few state constitutional claims, particularly in civil cases—a finding that is somewhat in tension with theories that state constitutions serve as “a font of individual liberties.”¹⁸

C. States and Democracy

States have an integral role to play in advancing and protecting American democracy, including through their state constitutions and other legal landscapes, yet they also face limitations. In *Federalism and the Limits of Subnational Political Heterogeneity*,¹⁹ James Gardner considers whether and how subnational governments in a federation can preserve liberal democracy in the face of autocracy at the national level. The article

14. Helen Hershkoff & Nathan D. Yaffe, *Federalism and Federal Rights Minimalism: Overlooked Effects on State Court Education Litigation in Wisconsin*, 2021 WIS. L. REV. 1011.

15. Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 WIS. L. REV. 1063.

16. *Id.* at 1066–67.

17. *Research: State Supreme Court Research Project*, UNIV. OF WIS. LAW SCHOOL, <https://statedemocracy.law.wisc.edu/research/> [https://perma.cc/5HUT-2FQP] (last visited Sept. 16, 2021).

18. Hershkoff & Yaffe, *supra* note 14, at 1013 (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977)).

19. James A. Gardner, *Federalism and the Limits of Subnational Political Heterogeneity*, 2021 WIS. L. REV. 1097.

disputes the contention that federalism and subnational democratic institutions are likely to help stave off an authoritarian central government. Instead, the article suggests that, in the United States, a more likely outcome would be “an eventual strangling of subnational liberal democracy.”²⁰

In *Measuring State Capture*,²¹ Abby Wood, Pamela McCann, and Douglas Spencer use state-level data on campaign finance, lobbying, industry dominance, and transparency laws to measure the degree to which each state’s executive, legislative, and judicial branches are at risk of capture by powerful groups. The authors also explore the implications of their empirical findings and discuss judicial review of agency action when there is a risk of capture.

In *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*,²² Edward Foley explores a different aspect of states and democracy, proposing a new voting system that draws from the concept of a “round-robin” tournament in sports. Professor Foley proposes using a round-robin style primary election to identify the top two candidates to compete head-to-head as finalists in the general election. This, he argues, is the electoral system best able to implement the democratic ideal of majority rule, offering advantages over instant-runoff voting.

These pieces were presented in a panel on states and democracy moderated by Professor G. Alan Tarr of Rutgers University. The authors were joined by Michael Kang (Northwestern Pritzker School of Law) and Joanna Shepherd (Emory University School of Law), who presented an excerpt of *Free to Judge: The Influence of Money in State Courts*, a book project detailing why campaign money affects judicial decisions and what can be done about it. Their essay on this topic is forthcoming in the next issue of the *Wisconsin Law Review*.²³

D. Intrastate Affairs

This Special Issue also includes four pieces exploring interactions between state and local governments, which were initially presented in a panel moderated by Jessica Bulman-Pozen of Columbia Law School.

20. *Id.* at 1139.

21. Pamela J. Clouser McCann, Douglas M. Spencer & Abby K. Wood, *Measuring State Capture*, 2021 WIS. L. REV. 1141.

22. Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*, 2021 WIS. L. REV. 1187.

23. Michael S. Kang & Joanna Shepherd, *Judicial Campaign Finance and Election Timing*, 2021 WIS. L. REV. (forthcoming Dec. 2021).

In *Legislative Administration*,²⁴ Maria Ponomarenko focuses on how local legislative bodies perform administrative functions that blur the boundaries of familiar administrative law categories and the doctrines built upon them. The piece also reflects “on how courts and legislatures might go about reconciling the practical realities of legislative administration with the demands of modern administrative law.”²⁵

In *Federalism in the States: What States Can Teach About Commandeering*,²⁶ Fred Smith considers how the federal and state governments have diverged with respect to “anti-commandeering” doctrine and the regulation of local autonomy. Professor Smith describes the commandeering-like activities at the state level and explores what this phenomenon can demonstrate about the relationship between commandeering, democratic accountability, and collective action problems. He also considers how the experience of the states might inform the future path of the anti-commandeering doctrine at the federal level.

The final pieces present two different visions of local government. In *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*,²⁷ Richard Schragger considers the increasing conflicts between states and their cities, which often reflect urban-rural polarization. Professor Schragger explains why, in his view, state-based federalism doctrines fail to provide sufficient space for metropolitan governance and points to state constitutional reform as a place to start.

In *Exclusionary Zoning’s Confused Defenders*,²⁸ David Schleicher provides a more skeptical account of local government decision-making, at least in the context of zoning, and critiques arguments against land-use interventions by state or federal governments. The article also assesses how a post-pandemic expansion of remote work might affect land use, including by making zoning reform even more pressing.

Collectively, the essays in this volume underscore both the richness of state public law as a field of study and the centrality of state-level institutions to our lived experience with American democracy. As the keynote speeches highlighted, we can add real value in our system of federalism by thoughtfully developing, interpreting, and applying state law. It is the hope of the State Democracy Research Initiative that this Special Issue will be our first of numerous collections focusing on government and public law in the states.

24. Maria Ponomarenko, *Legislative Administration*, 2021 WIS. L. REV. 1231.

25. *Id.* at 1233.

26. Fred O. Smith, Jr., *Federalism in the States: What States Can Teach About Commandeering*, 2021 WIS. L. REV. 1257.

27. Richard C. Schragger, *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 WIS. L. REV. 1283.

28. David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315.