COUNTERING THE NEW ELECTION SUBVERSION: THE DEMOCRACY PRINCIPLE AND THE ROLE OF STATE COURTS

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Among the threats to American democracy, the most serious may also be the most banal: future elections will be compromised by quiet changes to the law. State legislators across the country have introduced bills that give them power to reject the will of voters. They have established sham audits and investigations. And they have created new criminal offenses that undermine professional election administration. While power-shifting legislation, audits, and criminal penalties advertise their fealty to law, they threaten the franchise and electoral integrity, as well as nonpartisan, expert election administration. Because of its ostensibly legal, even legalistic, character, however, the new election subversion complicates ordinary judicial countermand. Federal courts, in particular, have foreclosed many of their own means of responding to such measures.

This essay, written for the University of Wisconsin Law School Symposium on Interpretation in the States, describes why state courts are well situated to counter the new election subversion. Building on our prior work exploring the democracy principle in state constitutions, we explain how the text, structure, and history of states' founding documents privilege popular sovereignty, majority rule, and political equality. After canvassing emerging threats to elections across the country, we explain how state courts might apply the democracy principle to address the new election subversion.

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INTRODUCTION

Among the threats to American democracy, the most serious may also be the most banal: future elections will be compromised not by violence but by state officials quietly changing the law.[1] In statehouses across the country, legislators have proposed, and in some cases, passed bills that give them power to suppress or reject the will of the people.[2] They have assigned themselves roles previously granted to election administrators. They have established sham audits and investigations. And they have introduced new criminal offenses that undermine professional election administration.

For many watching these subnational developments, they augur a frightening *fait accompli*. Legal challenges following the 2020 election were clownish efforts.[3] But those challenges provided a roadmap for the state-level legal changes we see now.[4] In future elections, election subversion may be—at least superficially—lawful. It may come from new state laws rather than challenges to them, and from enforcement of legal provisions rather than objections to them.

In one account of how this ends, courts will have nothing to do but bless these antidemocratic acts. Precisely because of its ostensibly legal, even legalistic, character, the new election subversion complicates

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1. *See, e.g.*, Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843/ [https://perma.cc/M6PC-6ECC] (Dec. 9, 2021, 3:21 PM); *see also* Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 284 (2022) ("By far the most likely way in which election subversion would infect United States elections in the near term is through a respectable bloodless coup dependent upon technical legal arguments overcoming valid election results.").

2. *See, e.g.*, STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & L. FORWARD, A DEMOCRACY CRISIS IN THE MAKING: HOW STATE LEGISLATURES ARE POLITICIZING, CRIMINALIZING, AND INTERFERING WITH ELECTION ADMINISTRATION (2022), https://statesuniteddemocracy.org/wp-content/uploads/2022/05/DCITM_2022.pdf [https://perma.cc/JWZ2-W4UC]; *Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022 [https://perma.cc/RW5U-NXZC].

3. *E.g.*, Hasen, *supra* note 1, at 268–73.

4. *See* Julie Novkov, *Donald Trump, Constitutional Failure, and the Guardrails of Democracy*, 81 MD. L. REV. 276, 289 (2021) ("The failure of the lawsuits, rather than undermining the narrative, fueled a wave of Republican-initiated state legislative proposals to limit or claw back broader ballot access initiatives undertaken during the 2020 election.").

ordinary judicial countermand. As scholars have noted in related contexts, power-grabs and sabotage that operate through the law present special challenges for courts.[5] And the problem is acute when it comes to state manipulation of federal elections. Federal courts have foreclosed many of their own means of halting democratic decline, and the Supreme Court seems to be seriously entertaining outlandish theories that would insulate state legislatures' manipulations from challenge.[6]

Although commentators are right to worry, discussions of judicial review too often overlook the distinctive role of state courts. Well before the moment of election tabulations, state courts have the authority—and duty—to preserve democracy's basic functioning. As we have described in prior work, state constitutions espouse a *democracy principle* that commits states to political equality, popular sovereignty, and majority rule.[7] And as we explain in this Essay, state court application of the democracy principle can mitigate several impending threats to elections, including direct attempts to overturn election results, as well as efforts to degrade the integrity of elections through bogus audits and harassment of election personnel. State courts alone cannot save American democracy, but they can extinguish smaller fires and diminish the risk of a massive conflagration in 2024. While diverse efforts at reform remain critical at federal, state, and local levels alike, we neglect the role of state courts at our peril.[8]

Part I of the Essay offers a primer on the democracy principle, including new case law that underscores the principle's import and relevance. Part II explores the principle's application to a variety of election-related threats. We conclude with cautious optimism about the state judicial role in times of democratic vulnerability.

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5. Perhaps the closest cousin to the electoral subversion we explore here is "autocratic legalism" as diagnosed by Kim Lane Scheppele: officials with antidemocratic designs "creat[e] new law as a way of consolidating political power." Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 & n.7 (2018); *cf.* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 816–24 (2015) (analyzing subversive law-following as a strategy of resistance).

6. *See, e.g.*, *Moore v. Harper*, 142 S. Ct. 2901 (2022) (granting certiorari); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J.); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 732–33 (2021) (Thomas, J., dissenting from denial of certiorari); *Moore v. Circosta*, 141 S. Ct. 46, 46–47 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28–29 (2020) (Gorsuch, J., concurring in denial of vacatur of stay).

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

8. *See* Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. (forthcoming 2022) (manuscript at 4–9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042959.

2. THE DEMOCRACY PRINCIPLE IN STATE CONSTITUTIONS: A PRIMER

State constitutions are powerfully committed to democracy. As we have explained at length in prior writing, the text, structure, and history of these foundational documents privilege popular sovereignty, majority rule, and political equality.[9] In this shared commitment to what we term the *democracy principle*, state constitutions depart from their federal counterpart. While the federal constitution contains no channels for direct self-rule, state constitutions embrace active popular sovereignty.[10] While the federal constitution thwarts majoritarian governance and empowers political minorities, state constitutions insist on rule by popular majorities.[11] And while the federal constitution undermines political equality because of the very system of federalism, state constitutions powerfully endorse equal access to political institutions by members of the political community as well as equal treatment of these individuals by political institutions.[12] These differences render democracy central to the project of state constitutional interpretation—and they make state constitutions a critical resource in protecting and advancing American democracy.

A. Pillars and Origins

The democracy principle is an animating feature of all fifty state constitutions.[13] These constitutions embrace popular sovereignty, majority rule, and political equality in their ample text as well as their structure and historical development. Indeed, the common practice of amending has instantiated popular majority rule at the same time as it has further inscribed democratic commitments into state constitutions.

First, popular sovereignty is the cornerstone of state constitutions. From the start, these constitutions proclaimed that all government power comes from the people, and they have regularly expanded channels for unmediated expressions of the popular will. Forty-nine state constitutions include an express commitment to popular sovereignty in operative

9. This Part draws on our longer article, *The Democracy Principle in State Constitutions*. Bulman-Pozen & Seifter, *supra* note 7.

10. *Id.* at 879–82.

11. *Id.* at 887–89.

12. *See id.* at 890–94.

13. We recognize that the fifty state constitutions are different—adopted and amended by different political communities at different moments—but nonetheless believe both that the democracy principle is a shared constitutional commitment and that there is value in understanding it as a trans-state principle without denying the need for state-specific context and nuance. For more on our interpretive approach and the question of many states, see *id.* at 865–69.

provisions, rather than merely aspirational preambles, most commonly stating that "all political power is inherent in the people."[14] These constitutions also guarantee the people's right to alter or abolish the constitutions they have created and insist that government exists to serve the people.[15] Consistent with such textual commitments, the people have repeatedly and significantly amended state constitutions. Most states have held multiple constitutional conventions, and state constitutions have collectively been amended more than 7,500 times.[16]

Further embodying a commitment to popular sovereignty, every state constitution confers the right to vote,[17] and a majority declare that elections shall be "free," "free and equal," or "free and open."[18] These constitutions also provide for the people to fill most government offices—including governor and numerous other executive offices as well as judges—through popular statewide vote.[19] Over time, state constitutional amendments have particularly reflected a concern about the inadequacy of legislative representation. Although the first state constitutions treated the legislature as the closest approximation of the people, numerous nineteenth- and twentieth-century amendments have been "primarily concerned with preventing faithless legislators from frustrating the popular will."[20] From term limits to detailed procedural requirements, state constitutions constrain legislative power to ensure greater popular accountability.[21] They also seek to enhance connections between the people and other government actors, including governors and judges, as a check on the legislature.[22]

To elevate the people above their legislative representatives, state constitutions have likewise been amended to provide opportunities for direct popular lawmaking. In the early twentieth century, approximately half of the states adopted the initiative or referendum.[23] Today, direct

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14. *Id.* at 869–70 & nn.48–51 (collecting constitutional provisions).

15. *Id.* at 870 & nn.52–54 (collecting constitutional provisions).

16. JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 19–21, 23 (2018).

17. Bulman-Pozen & Seifter, *supra* note 7, at 870–71 & nn.55–58 (collecting constitutional provisions).

18. *Id.* at 871 & n.59 (collecting constitutional provisions).

19. *Id.* at 872–73 & nn.62–66 (collecting constitutional provisions).

20. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT?: VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87, 94 (Elliott Abrams ed., 2002).

21. *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 258 (2009); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 33 (2013); Bulman-Pozen & Seifter, *supra* note 7, at 874–75 & nn.74–79 (collecting constitutional provisions); Tarr, *supra* note 20, at 94.

22. Bulman-Pozen & Seifter, *supra* note 7, at 885–86.

23. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 94 (2006).

democracy permeates state constitutions in the form of provisions for constitutional or statutory initiative, legislative or popular referendum, recall, and constitutional convention.[24] Such clauses generally indicate that they withhold power from state legislatures and retain it for the people.[25] In provisions for direct democracy and accountable representative democracy alike, then, state constitutions insist that the people remain sovereign and the government must be accountable to them.

Second, and closely related to the commitment to popular sovereignty, state constitutions understand the people as a body that governs through majority rule. From their earliest incarnations, some state constitutions have expressly recognized "a majority of the community" as the source of government power.[26] And through amendments over time—including an early slew of entirely new constitutions adopted through majoritarian proceedings outside of constitutionally specified processes[27]—state constitutions have increasingly provided for popular majorities to ratify popular amendments, adopt initiatives and referenda, and choose representatives.[28]

Today, the many state executive officials who are elected—from governors and lieutenant governors to attorneys general, secretaries of state, treasurers, and more—are chosen by statewide majorities; state constitutions include nothing akin to the federal Electoral College to constrain popular majorities.[29] So too, states with initiatives and referenda generally provide that approval is to be by majority vote.[30] Constitutional amendment and recall provisions likewise contemplate action by popular statewide majorities.[31] And within the government bodies they establish, state constitutions provide for majority voting rules

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24. Bulman-Pozen & Seifter, *supra* note 7, at 876–79 & nn.85–106 (collecting constitutional provisions).

25. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . . ."); Bulman-Pozen & Seifter, *supra* note 7, at 877 & n.91 (collecting constitutional provisions). These provisions also deny gubernatorial power to veto initiative measures approved by the people. *See* Bulman-Pozen & Seifter, *supra* note 7, at 877 n.92 (collecting constitutional provisions).

26. *E.g.*, VA. CONST. of 1776, declaration of rts., art. 3. When the connection was not explicit, it "went without saying in a variety of declarations precisely because it was so obvious." Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 482 (1994).

27. *See, e.g.*, CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS 30–31 (2008).

28. *See* Bulman-Pozen & Seifter, *supra* note 7, at 888–89.

29. *See id.* at 872 & nn.62–64 (collecting constitutional provisions).

30. *See id.* at 876–77 & nn.90 & 96 (collecting constitutional provisions).

31. *See id.* at 878–79 & nn.102 & 105 (collecting constitutional provisions).

and impose limits on minoritarian power.[32] With respect to constitutional adoption and amendment, as well as both direct democracy and elections for representatives, state constitutions treat the majority as the best approximation of the people and indicate that the preference of the majority is to prevail in the face of political disagreement.

Third, state constitutions embrace a distinctive vision of political equality that informs democratic commitments to popular sovereignty and majority rule. These constitutions propose that all members of the political community share in the power to influence government, and, in turn, they seek to foreclose forms of special treatment by government.

One of the principal fears that has animated state constitutional provisions over time is "minority faction, not majority faction"—a concern that the privileged few might capture government at the expense of the many.[33] From the start, numerous state constitutions accordingly insisted on equality among the limited group of people understood to constitute the political community.[34] Those limits were severe, and later periods of retrenchment have sharply underscored the ways in which an abstract commitment to political equality has not effectively guaranteed equality to people of color, women, and others. Yet the articulation of political equality as an ideal has underwritten more inclusive understandings. Today, the state constitutional commitment to political equality appears most clearly in the provisions, contained in some form in every state constitution, that broadly guarantee the right to vote and to participate in free and fair elections.[35]

The state constitutional commitment to political equality is also pronounced in provisions requiring the government to work for the good of the whole and not for particular segments of the population. Some early constitutions expressly included common-good guarantees and prohibitions on special treatment,[36] and these commitments grew more common across the nineteenth century as state constitutional conventions adopted limitations on legislative favoritism, as well as equality guarantees and public purpose requirements.[37] Today, most state constitutions limit special legislation and seek to foreclose other forms of favoritism by the government.[38]

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32. *Id.* at 875.

33. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 78 (1998).

34. *See* Bulman-Pozen & Seifter, *supra* note 7, at 890 & nn.178–80 (collecting examples from early declarations of rights).

35. *See supra* notes 17–19 and accompanying text.

36. Bulman-Pozen & Seifter, *supra* note 7, at 892.

37. *Id.* at 892–94.

38. *See id.* at 875 & n.80 (collecting constitutional provisions).

B. Recent Developments

Although the democracy principle is a longstanding commitment of state constitutions, it has been urgently invoked in recent years as challenges to partisan gerrymandering and other electoral mischief have been pushed out of federal I to state courts.[39] The attendant litigation looks different in each state and, as is appropriate for a shorthand formulation, does not rely on the "democracy principle" as such but rather on state-specific constitutional text, history, and doctrine. But while such diversity is both salutary and inevitable, considering together the cases that treat democracy as a state-level constitutional concept illuminates more than it obscures. State courts are correct to consider a shared state commitment to democracy as they interpret and implement their particular constitutions.[40]

As litigation challenging partisan gerrymanders unfolds across the country,[41] for instance, judicial opinions and briefs have been further elaborating the democracy principle. In North Carolina, the state supreme court recently invalidated a partisan gerrymander by the state legislature.[42] Describing the "fundamental right to vote" in terms that reflect the democracy principle's commitment to popular sovereignty, majority rule, and political equality, the court stated: "The fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.' The right to equal power encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views."[43]

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39. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that partisan gerrymandering is not justiciable under the federal Constitution).

40. *See, e.g.*, *N.C. State Conf. of the NAACP v. Moore*, 876 S.E.2d 513, 528 & n.5 (N.C. 2022) (recognizing that principles of popular sovereignty and democratic self-rule "are not unique to North Carolina's Constitution") (citing Bulman-Pozen & Seifter, *supra* note 7); *see also, e.g.*, *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009) (looking to interpretations of election protections in "[o]ther states with similar constitutional provisions"); Bulman-Pozen & Seifter, *supra* note 7, at 910–16 (discussing partisan gerrymandering litigation).

41. *See generally Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 [https://perma.cc/9GNA-RL2S] (Sept. 14, 2022) (compiling cases challenging racially discriminatory and partisan gerrymanders).

42. *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022).

43. *Id.* at 546 (citation omitted); *see also id.* at 546–47 ("When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.").

The supreme courts of Ohio and New York have also recently invalidated partisan gerrymanders. In both states, after the 2010 cycle of redistricting, voters adopted constitutional amendments seeking to stem partisan manipulation. Ohioans prohibited their state legislature from adopting a plan that "unduly favors or disfavors a political party or its incumbents" or that "unduly split[s] governmental units."[44] New Yorkers provided for an independent redistricting commission to draw maps and prohibited the formation of districts to "discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties."[45] In both states, these processes of constitutional amendment themselves reflected the democracy principle: popular majorities altered state constitutions in a manner that underscored the people's authority and sought to limit unrepresentative, self-interested legislative activity. And state courts relied on these amendments, with a nod to the underlying democratic principles, to invalidate state legislative maps.[46]

The democracy principle has also informed other important litigation. In a recent decision concerning the aftermath of a racial gerrymander, for example, the North Carolina Supreme Court limited the power of an unconstitutionally gerrymandered legislature to initiate amendments to the state constitution.[47] Recognizing "popular sovereignty and democratic self-rule" as "the beating heart of North Carolina's system of government," the court held that an unconstitutionally composed legislature should not be able to entrench its power, insulate itself from political accountability, or discriminate against those groups that had been shut out of the representative process.[48] If such legislators had unreviewable authority to initiate constitutional amendments, the

44. OHIO CONST. art. XIX, § 1(C)(3).

45. N.Y. CONST. art. III, § 4(c).

46. *See, e.g.*, *Adams v. DeWine*, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *1 (Ohio Jan. 14, 2022) (invalidating Ohio's gerrymander by stating, "[i]n our representative democracy, the power rests at all times with the people. Their power is never more profound than when it is expressed through their vote at the ballot box"); *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *10 (N.Y. Apr. 27, 2022) (invoking "the most fundamental of all democratic principles—that the 'voters should choose their representatives, not the other way around'") (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1940 (2018)). We recognize, but do not explore here, the more complicated normative picture the New York ruling raises given the national prevalence of Republican gerrymanders. *See* Aaron Goldzimer & Nicholas Stephanopoulos, *The Novel Strategy Blue States Can Use to Solve Partisan Gerrymandering by 2024*, SLATE (May 6, 2022, 2:41 PM), https://slate.com/news-and-politics/2022/05/new-york-democrats-partisan-gerrymandering-2024.html [https://perma.cc/KUB7-L2LH] (observing that "[a] fairer New York map will result in greater *un*fairness at the national level" and recommending "[b]lue state redistricting based on national partisan fairness").

47. *N.C. State Conf. of the NAACP v. Moore*, 876 S.E.2d 513 (N.C. 2022).

48. *Id.* at 527.

court reasoned, "the fundamental principle that all political power resides with and flows from the people of North Carolina would be threatened."[49]

Another notable contribution to the democracy principle's articulation comes from an Idaho case concerning initiative and referendum rights. In 1912, Idahoans adopted a constitutional amendment in which the "people reserve[d] to themselves" the powers to approve or reject legislation as well as to propose and enact laws directly, but the state legislature has repeatedly attempted to make these initiative and referendum processes more onerous.[50] After a successful Medicaid Expansion ballot initiative in 2018, the legislature dramatically increased the geographic distribution requirement for signatures required to qualify an initiative or referendum for the ballot and delayed the effective date of passed initiatives so that the legislature would have time to repeal or amend them before they ever took effect.[51] The Idaho Supreme Court invalidated these provisions as unjustified encroachments on the fundamental rights of initiative and referendum.[52]

Much of the opinion engages in a close textual reading of the state constitution's initiative and referenda provisions, but the court also offered a robust response to several antidemocratic arguments advanced by the state legislature. After beginning its analysis with reminders that under the Idaho Constitution "[*a*]*ll* political power is inherent in the people"[53] and that the government was instituted to do the people's will, the court placed the legislation in its "historical context[,] . . . which shows an unmistakable pattern by the legislature of constricting the people's initiative and referendum powers after they successfully use [them]."[54]

The court readily saw through the legislature's faux solicitude for minority interests and majority support. First, the legislature argued that its requirements were "necessary to prevent the minority from being 'trammeled by the majority,'" but the court noted both that the legislature had identified no threat to minority interests and that, in fact, the state's most recent referenda and initiatives were better understood as "examples of the majority of Idaho voters acting in a democratic fashion to *protect* minority interests (educators and the poor) when the Idaho Legislature would not."[55] Second, rejecting the legislature's argument that its requirements would ensure sufficient statewide support, the court

49. *Id.* at 519.

50. *Reclaim Idaho v. Denney*, 497 P.3d 160, 167–69 (Idaho 2021) (describing legislature's failure to pass enabling legislation, decisions to increase signature requirements, and the like over the course of a century).

51. *Id.* at 169.

52. *Id.* at 180–81.

53. *Id.* at 180 (quoting IDAHO CONST. art I, § 2).

54. *Id.* at 186.

55. *Id.* at 186–87.

responded that protection against provincialism was provided by the requirement that any qualifying initiatives or referenda be adopted by a subsequent majority vote.[56] Vindicating the constitutional right of the people of Idaho to engage in popular self-governance, the court was neither fooled nor long detained by the legislature's inversions of democratic principles. Its clear-eyed, careful opinion offers guidance for reviewing the electoral threats to which we now turn.

II. STATE COURTS AND THREATS TO AMERICAN ELECTIONS

Today, state legislatures across the country are proposing new laws that would undermine free and fair elections. Outside of the legislative process, officials and others pursuing antidemocratic theories have told bold lies, initiated sham investigations, and harassed election officials. These measures are of a piece with Samuel Issacharoff's observation that the "gravest threat to our democracy" lies in movement towards "[w]eaponizing the electoral system," including by "solidify[ing] party control of election mechanisms" and "turning the ordinary task of tabulating election results into an opportunity for partisan mischief."[57]

Some of the new election subversion is brazen in its lawlessness. For instance, although the Ohio Supreme Court invalidated its partisan gerrymander in January,[58] the Ohio Redistricting Commission repeatedly defied court orders concerning the content of districting plans and the process of adopting them.[59] In Arizona, the infamous "Cyber Ninjas" audit pursued baseless ideas (like searching ballots for bamboo fibers based on a conspiracy theory that the ballots were smuggled from Asia)[60] by flouting standard audit protocols involving security and chain of custody. The company's violations of state public records laws, and then of court orders, led to a contempt order fine of $50,000 per day.[61]

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56. *Id.* at 190.

57. Samuel Issacharoff, *Weaponizing the Electoral System*, 74 STAN. L. REV. ONLINE 28, 28 (2022).

58. *See supra* note 46 and accompanying text.

59. *See, e.g.*, *Republican-Controlled Ohio Redistricting Commission Refuses Supreme Court Order to Draft Constitutional Maps a Sixth Time*, OHIO HOUSE OF REPS. (June 3, 2022), https://www.ohiohouse.gov/news/democrat/republican-controlled-ohio-redistricting-commission-refuses-supreme-court-order-to-draft-constitutional-maps-a-sixth-time-110329 [https://perma.cc/CS3U-CW2G].

60. *See* Michael Waldman, *Hold Cyber Ninjas Accountable*, BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/analysis-opinion/hold-cyber-ninjas-accountable [https://perma.cc/7QCL-SCLV].

61. Jonathan J. Cooper, *Cyber Ninjas Faces Fine over Arizona Election Review Records*, AP NEWS (Jan. 6, 2022), https://apnews.com/article/elections-lawsuits-arizona-phoenix-8417d871de10db020ee11e26ab28d03b [https://perma.cc/A6XG-XFLJ]; *see also Cyber Ninjas, Inc. v. Kemp*, No. CV-22-0055-SA (Ariz. Mar. 10, 2022) (order denying special petition for interlocutory review of the contempt ruling); Mary Jo

Although there remain obstacles to halting even such clear-cut legal violations—witness the Ohio Supreme Court's inability to bring the Redistricting Commission into compliance[62]—these electoral machinations are straightforwardly challenged under existing statutes and doctrine.[63]

We focus here on more insidious efforts to undermine democracy that may pose challenges for traditional adjudication. Consider, for instance, a law that is facially neutral but deployed for antidemocratic ends: state legislation that shifts authority from local to state actors, or from one official to another, does not reveal itself as a partisan power-grab without attention to context.

Or consider the rash of audits, subpoenas, and threats of criminal enforcement that co-opt traditional tools of law enforcement for antidemocratic ends. These schemes can be difficult to challenge precisely because they rely on, even as they invert, usual legal approaches to election integrity and good government.

Although these and related attacks on democracy could readily escape judicial review, the democracy principle provides a framework through which courts should judge them. In Section A, we canvas several emerging threats to the integrity of elections. Then, in Section B, we explain how state courts might rely on the democracy principle to evaluate such threats.

Pitzl, *With Few Public Records Released, Arizona Supreme Court Keeps $50K in Daily Fines for Cyber Ninjas*, AZ CENTRAL (July 26, 2022, 6:33 PM), https://www.azcentral.com/story/news/politics/arizona/2022/07/26/arizona-supreme-court-keeps-50-k-daily-fines-place-cyber-ninjas/10159054002/.

62. The Ohio Supreme Court does not have authority to appoint a special master to draw maps or to do so on its own, so the commission and legislature flouted its orders and ran down the clock. *See, e.g.*, Susan Tebben, *Deadline for New Redistricting Plan Comes Without Action*, OHIO CAP. J. (June 3, 2022, 4:00 AM), https://ohiocapitaljournal.com/2022/06/03/deadline-for-new-redistricting-plan-comes-without-action/ [https://perma.cc/V3XT-YUMY].

63. In Wisconsin, for instance, a trial court judge held State Assembly Speaker Robin Vos in contempt of court for failing to comply with orders to disclose documents. *See Am. Oversight v. Vos*, No. 21-CV-2440, slip op. (Wis. Cir. Ct. Dane Cnty. Mar. 30, 2022) (order and decision supporting the court's contempt determination); *see also Am. Oversight v. Off. of Special Couns.*, No. 21-CV-3007 (Wis. Cir. Ct. Dane Cnty. June 15, 2022) (holding the Office of Special Counsel (OSC) in contempt of a prior order to search for and produce records and ordering the decision to be sent to the state Office of Lawyer Regulation); *see also Am. Oversight v. Off. of Special Couns.*, No. 21-CV-3007 (Wis. Cir. Ct. Dane Cnty. June 15, 2022) (order concluding that OSC had satisfied conditions for purging contempt and calculating sanctions owed during the contempt period). To the extent there may remain ambiguities in such cases, however, the democracy principle may help resolve them. *See, e.g.*, *infra* notes 147–62 and accompanying text.

A. Election Subversion

Since the 2020 presidential election, several troubling types of state legislation have emerged. First, a number of states have adopted or are considering power-shifting laws that would arrogate to the legislature or its partisan designees new responsibilities for running elections or even controlling their results.[64] Second, many states have pursued or proposed sham audits or investigations in order to destabilize and undermine faith in elections.[65] Third, numerous states have begun to criminalize aspects of election administration in ways that harass and intimidate officials or otherwise impede their ability to do their jobs.[66]

2. POWER-SHIFTING LEGISLATION

The first and most direct democratic threat comes from laws that would arrogate to state legislatures the power to run elections—or even the power to simply decide their results. At present, the most extreme of these measures remain pending, without immediate prospect of passing. In Arizona, H.B. 2476 would require the state's two at-large presidential electors to cast their votes for the candidate who received the highest number of votes from the *legislature*, rather than the state's popular vote.[67] Similarly, H.B. 2596 would add a new statutory provision providing that the legislature "shall" call itself into special session to review election results, shall accept or reject those results, and if it rejects them, "any qualified elector may file an action in the superior court to request that a new election be held."[68] Although these bills appear unlikely to pass,[69] they have already fueled proposals in other states.[70]

Moreover, less drastic versions of legislative arrogation have already been enacted in the form of laws that require legislative approval for various aspects of election administration. Montana and Kentucky

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64. *See infra* Part II.A.1.

65. *See infra* Part II.A.2.

66. *See infra* Part II.A.3.

67. H.B. 2476, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

68. H.B. 2596, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

69. *See, e.g.*, Howard Fischer, *Arizona's Top House Republican: 'I'm Not Going to Kick (Voters) in the Teeth*,*'* TUCSON.COM, https://tucson.com/news/local/govt-and-politics/arizonas-top-house-republican-im-not-going-to-kick-voters-in-the-teeth/article_043eb976-8475-11ec-819c-47a5a455510d.html [https://perma.cc/J48H-43LX] (Apr. 21, 2022) (describing how Arizona House Speaker Rusty Bowers "has taken the unprecedented step of assigning the proposal to each and every one of the 12 House committees, saying he knows full well there is no way it can secure approval of each").

70. *See, e.g.*, Reid J. Epstein, *Wisconsin Republicans Push to Take Over the State's Elections*, N.Y. TIMES (Nov. 19, 2021), https://www.nytimes.com/2021/11/19/us/politics/wisconsin-republicans-decertify-election.html.

now bar executive-branch officials from altering election procedures absent the legislature's approval.[71] North Carolina's S.B. 105 removes the discretion of the State Board of Elections to enter into a consent agreement with the courts regarding election matters.[72] In Kansas, one new law limits judicial and gubernatorial power to modify election administration or procedures and bars the secretary of state from doing so without approval from the state's legislative coordinator council.[73] Another Kansas law removes the secretary of state's discretion to extend the deadlyne for receipt of early ballots.[74] In other states, scores of related bills, assuming legislative power over longstanding election-administration functions, have been proposed and are pending.[75]

A new law in Georgia takes a somewhat different tack toward a similar end. It alters the structure of the State Elections Board in a way that enhances legislative control by assigning the legislature power to name the chair.[76] The law then gives the Board authority to take over election administration from local administrators.[77] This may sound innocuous (centralization of administration can, in some circumstances, yield coordinated good-government ends), but here the partisan opportunity for entrenchment is apparent. Indeed, "[t]he Board has already begun the process of taking over election administration in Fulton

71. H.B. 429, 67th Leg., Reg. Sess. (Mont. 2021); S.B. 1, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021); *see also After Veto Overrides, Beshear Sues Kentucky Republican Leaders to Maintain Emergency Powers*, WDRB.COM, https://www.wdrb.com/news/coronavirus/after-veto-overrides-beshear%e2%80%a6mergency-powers/article_5ceb542a-65af-11eb-ac89-5381cd7838ec.html.

72. S.B. 105, 2021 Gen. Assemb., Reg. Sess. sec. 18.7.(c) (N.C. 2021).

73. H.B. 2332, 2021–22 Leg., Reg. Sess. (Kan. 2021).

74. H.B. 2183, 2021–22 Leg., Reg. Sess. sec. 7.(b) (Kan. 2021). Iowa, in a similar vein, has removed the elections commissioner's discretion to mail absentee ballots to voters who did not request them, and vested that power with the legislature or legislative council (and only during a declared public health disaster). *See* S.B. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

75. *See* STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & L. FORWARD, *supra* note 2, at 17.

76. Specifically, the law switches the secretary of state to an ex officio role and replaces him with a chair chosen by the legislature. S.B. 202, 49th Leg., 156th Gen. Assemb., 1st Sess. (Ga. 2021) (enacted).

77. *Id.*

County,"[78] "the heavily Democratic population center of metro Atlanta that Republicans blame for their statewide losses."[79]

2. SHAM AUDITS

States have also been undermining elections by pursuing "sham audits,"[80] "bogus investigations,"[81] and other baseless challenges to election results. Open, rigorous audits can bolster public confidence and ensure sound results.[82] But in the wake of the 2020 election, we have instead seen pretextual investigations and pursuit of conspiracy theories. These audits invert the usual good-government ends of such practices: they shake confidence in elections, disrupt election administration, and intimidate election officials. They are causing professional, experienced election administrators to quit in droves[83] and to fear for their personal safety.[84] Insidiously, they do this under the banner of protecting the

78. *A Threat to Our Democracy: Election Subversion in the 2021 Legislative Session*, VOTING RTS. LAB (Sept. 29, 2021), https://votingrightslab.org/a-threat-to-our-democracy-election-subversion-in-the-2021-legislative-session/ [https://perma.cc/HTC6-86RE]; *see also, e.g.*, Mark Niesse, *Prospect of Georgia Election Takeover Fuels Concerns About Vote Integrity*, ATLANTA J.-CONST. (Dec. 23, 2021), https://www.ajc.com/politics/prospect-of-georgia-election-takeover-fuels-concerns-about-vote-integrity/CFMTLFW6TZFH7O4LLNDZ3BY4NE/ [https://perma.cc/ET6Z-BA9A].

79. Mark Niesse, *Georgia Bill Could Shift Power over Elections to GOP Appointees*, ATLANTA J.-CONST. (Mar. 24, 2021), https://www.ajc.com/politics/georgia-bill-would-shift-power-over-elections-to-gop-appointees/VPNVO2W4TBBTFKGA7Z2GZIEQEE/ [https://perma.cc/2BVM-NRXS].

80. Gowri Ramachandran, *A Year Later—Sham Election Reviews Continue to Undermine Democracy*, AM. CONST. SOC'Y: EXPERT F. (Jan. 5, 2022), https://www.acslaw.org/expertforum/a-year-later-sham-election-reviews-continue-to-undermine-democracy/ [https://perma.cc/Y4MR-RFYA].

81. Hasen, *supra* note 1, at 277.

82. *See, e.g.*, AD HOC COMM. FOR 2020 ELECTION FAIRNESS AND LEGITIMACY, FAIR ELECTIONS DURING A CRISIS: URGENT RECOMMENDATIONS IN LAW, MEDIA, POLITICS, AND TECH TO ADVANCE THE LEGITIMACY OF, AND THE PUBLIC'S CONFIDENCE IN, THE NOVEMBER 2020 U.S. ELECTIONS 17 (Apr. 2020), https://www.law.uci.edu/news/press-releases/2020/2020ElectionReport.pdf [https://perma.cc/4SL5-38Y2] (describing and recommending "risk-limiting audits" as the best post-election auditing method).

83. *See, e.g.*, Michael Wines, *After a Nightmare Year, Election Officials are Quitting*, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/us/politics/2020-election-voting-officials.html; Miles Parks, *1 in 5 Local Election Officials Say They're Likely To Quit Before 2024*, NPR (Mar. 10, 2022, 5:00 AM), https://www.npr.org/2022/03/10/1085425464/1-in-5-local-election-officials-say-theyre-likely-to-quit-before-2024 [https://perma.cc/WK6D-UXHD].

84. *See* Wines, *supra* note 83 ("[O]ne in three officials said they felt unsafe in the jobs."); Parks, *supra* note 83 (noting that nearly one-fifth of respondents had received threats and "more than half of them say they are worried about the safety of their colleagues in future elections").

democratic system, co-opting the language of "election integrity"[85] in the service of election subversion.[86]

The link between this wave of audits and antidemocratic designs is not subtle. The audits grew out of proposals by Trump loyalists seeking to undermine the outcome of the presidential election.[87] The now-infamous memo by John Eastman proposed, among other things, that state legislatures, "[t]aking the cue" from Vice President Mike Pence, would "order a comprehensive audit/investigation of the election returns in their states, and then determine whether the slate of electors initially certified is valid, or whether the alternative slate of electors should be certified by the legislature."[88] A group of U.S. senators likewise proposed a pause on certifying the election for an audit and reconsideration of state results.[89] These early calls placed pressure on Republican state officials to conduct baseless investigations.[90] Over some objections,[91] this pressure prevailed in Arizona, Texas, Pennsylvania, and Wisconsin and has gotten traction elsewhere,[92] even as officials

85. Courts have long recognized that, "[a] State indisputably has a compelling interest in preserving the integrity of its election process" and "in ensuring the order and fairness of elections." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231–32 (1989) (citing *Rosario v. Rockefeller*, 410 U.S. 752, 761 (1973)).

86. *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 92 (2018) ("One of the great ironies of how democracies die is that the very defense of democracy is often used as a pretext for its subversion.").

87. Ramachandran, *supra* note 80.

88. *READ: Trump Lawyer's Full Memo on Plan for Pence to Overturn the Election,* CNN (Sept. 21, 2021, 5:47 PM), https://www.cnn.com/2021/09/21/politics/read-eastman-full-memo-pence-overturn-election/index.html [https://perma.cc/A84L-MXJ7].

89. Joint Statement from Senators Cruz, Johnson, Lankford, Daines, Kennedy, Blackburn, Braun, Senators-Elect Lummis, Marshall, Hagerty, Tuberville (Jan. 2, 2022), https://www.cruz.senate.gov/newsroom/press-releases/joint-statement-from-senators-cruz-johnson-lankford-daines-kennedy-blackburn-braun-senators-elect-lummis-marshall-hagerty-tuberville ("Congress should immediately appoint an Electoral Commission, with full investigatory and fact-finding authority, to conduct an emergency 10-day audit of the election returns in the disputed states. Once completed, individual states would evaluate the Commission's findings and could convene a special legislative session to certify a change in their vote, if needed.").

90. *See, e.g.*, Hasen, *supra* note 1, at 277.

91. *See, e.g.*, Michael Wines, *Arizona Vote Review Is 'Political Theater' and 'Sham,' G.O.P. Leaders Say*, N.Y. TIMES, https://www.nytimes.com/2021/05/17/us/arizona-audit-trump.html (Sept. 24, 2021) ("The Republican leaders of Arizona's most populous county issued a blistering rebuke on Monday to a review of the November election that had been ordered by Republicans in the State Senate, calling it 'a grift disguised as an audit' that had spun out of the legislators' control.").

92. *See, e.g.*, STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & L. FORWARD, *supra* note 2, at 13–16.

recognized they had no legal pathway to decertify the election.[93] In Wisconsin, for instance, although a statutory audit and hand recount found no fraud in the 2020 election, former state supreme court justice Michael Gableman (a Trump supporter who has called the 2020 election stolen)[94] led an audit initially supported by the state Assembly Speaker that openly violated disclosure and subpoena rules.[95]

Gableman's audit and others have been widely identified as shams that lack the objectivity, transparency, and security of real audits.[96] Yet the damage even such circus-like affairs can do to public confidence is real. Although the majority of Americans continue to believe that elections are administered fairly,[97] surveys from the past year repeatedly show majorities within the Republican party who believe that ballots from deceased or ineligible voters decided the 2020 presidential election,[98] or who say they will not trust the 2024 election.[99] Indeed, the latter seems to be the point: sham audits are designed to sow doubt about election

93. *See* Alexander Shur, *Robin Vos Claims Widespread Fraud, but Can't Decertify, After Meeting with Election Skeptics*, MADISON.COM (Mar. 17, 2022), https://madison.com/news/local/govt-and-politics/robin-vos-claims-widespread-fraud-but-cant-decertify-after-meeting-with-election-skeptics/article_7a0cba85-9639-5f1b-81ff-a67071422b03.html [https://perma.cc/4QTA-BNBU].

94. Patrick Marley, *Michael Gableman Said Bureaucrats 'Stole Our Votes' Before He Was Put in Charge of Reviewing 2020 Election*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/politics/2021/08/09/michael-gableman-said-election-stolen-before-put-charge-wisconsin-review/5518815001/ [https://perma.cc/7TKQ-RY2G] (Jan. 6, 2022, 3:56 PM).

95. *See supra* note 63.

96. *See, e.g.*, Barry C. Burden & Trey Grayson, REPORT ON THE CYBER NINJAS REVIEW OF THE 2020 PRESIDENTIAL AND U.S. SENATORIAL ELECTIONS IN MARICOPA COUNTY, ARIZONA 1 (2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/06/6.22.21-SUDC-Report-re-Cyber-Ninjas-Review-FINAL.pdf [https://perma.cc/NPY9-86L8]; Gowri Ramachandran & Matthew Germer, *Bad-Faith Election Audits Are Sabotaging Democracy Across the Nation*, BRENNAN CTR. FOR JUST. (Aug. 4, 2021), https://www.brennancenter.org/our-work/analysis-opinion/bad-faith-election-audits-are-sabotaging-democracy-across-nation [https://perma.cc/2ZLZ-GWTW].

97. *See, e.g.*, Domenico Montanaro, *Most Americans Trust Elections Are Fair, but Sharp Divides Exist, a New Poll Finds*, NPR (Nov. 1, 2021, 5:01 AM), https://www.npr.org/2021/11/01/1050291610/most-americans-trust-elections-are-fair-but-sharp-divides-exist-a-new-poll-finds [https://perma.cc/VJP5-PRLB].

98. *See, e.g.*, Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests That They Do*, WASH. POST: MONKEY CAGE (Jan. 7, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump/ [https://perma.cc/39TL-3XSB] (reporting a finding from multiple polls that "only 21% of Republicans say Joe Biden's victory was legitimate").

99. *See, e.g.*, Montanaro, *supra* note 97 (reporting that only approximately one-third of Republicans surveyed stated that they would trust the 2024 election).

outcomes rather than to ensure integrity.[100] And now dozens of pending or enacted statutes would authorize new audit powers for future elections.[101]

3. CRIMINALIZING ELECTION ADMINISTRATION

States are also adopting new criminal standards, election police units, and other restrictions that serve to harass and chill election officials. Most concerning are laws and bills that threaten election administrators with criminal prosecution for efforts to facilitate voting or otherwise carry out discretionary aspects of their work.

For example, a 2021 Arizona law makes it a felony offense for a state or local election official to modify a filing date or other election-related deadline provided by statute unless ordered to by a court.[102] While, superficially, this legislation simply requires compliance by executive actors with state law, the threat of criminal prosecution is likely to stop good-faith voter-access measures, such as efforts to facilitate voting during the COVID-19 pandemic. A more recent Arizona law creates another felony offense: failure by a county recorder to investigate a voter-registration applicant's citizenship status if that applicant is later determined not to be a U.S. citizen.[103] These new state felony laws are likely not only to chill attempts by election officials to carry out discrete responsibilities but also to deter civil servants from serving in election administration positions.

Arizona is not alone in penalizing routine aspects of election administration. Texas has made it a crime for a public official to modify or suspend any election "standard, practice, or procedure mandated by law or rule."[104] That same law also makes it a crime for early voting clerks to facilitate mail voting by soliciting the submission of mail ballot applications or distributing a mail ballot application to someone who did not request one.[105] A new law in Iowa has created criminal offenses and enhanced penalties for election officials, including a felony for failing to perform official duties and an aggravated misdemeanor for failing to

100. A collaboration of several voting-rights organizations has created a sham audit-monitoring website born of the concern that the new wave of audits and audit-authorizing bills are "bad faith operations . . . aimed at undermining faith in our elections and stoking the same conspiracy theories that led to the January 6 insurrection." NOT AN AUDIT, http://notanaudit.com [https://perma.cc/JSE2-K5PF] (last visited Oct. 10, 2022).

101. STATES UNITED DEMOCRACY CTR., PROTECT DEMOCRACY & L. FORWARD, *supra* note 2, at 13–14, 16.

102. H.B. 2794, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (enacted).

103. H.B. 2492, 55th Leg., 2d Reg. Sess. (Ariz. 2022) (enacted).

104. S.B. 1, 87th Leg., 2d Special Sess. sec. 1.022 (Tex. 2021) (enacted).

105. *Id.* sec. 276.017.

perform required voter list maintenance.[106] And in Florida, a 2022 law creates a new "Office of Election Crimes and Security," as well as more funding for election-related investigations by the Florida Department of Law Enforcement.[107] Because the legislature and governor introduced no evidence of significant voting fraud that this criminal approach would deter, critics understand the measure as a way to impose "additional barriers to voting" that particularly "target[] communities of color."[108]

Beyond criminalizing electoral administration, other recent measures impose burdensome requirements on election administrators. Some states are considering bills that would, unworkably, prohibit the use of electronic tabulation and require ballots to be counted by hand,[109] or that would impose chain of custody requirements that sound in good governance but are "excessive, infeasible, and disruptive to the administration of elections."[110] Many others have adopted laws that prohibit local election officials from relying on private donations to conduct elections.[111] A number of these laws extend to voter education,

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106. S.B. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (enacted).

107. *See* S.B. 524, 2022 Reg. Sess. (Fla. 2022) (enacted).

108. Gary Fineout, *DeSantis Signs Bill Creating One of the Nation's Only Election Police Units*, POLITICO (Apr. 25, 2022, 5:22 PM), https://www.politico.com/news/2022/04/25/desantis-florida-election-police-units-00027577 [https://perma.cc/4AWB-9TG4] (highlighting a statement from Rep. Yvonne Hayes Hinson); *see also, e.g.*, S.B. 441, 156th Gen. Assemb., 2d Sess. (Ga. 2022) (enacted) (charging the Georgia Bureau of Investigations with identifying and investigating potential violations of election law).

109. *See, e.g.*, H.B. 2710, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.B. 2596, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.B. 2743 55th Leg., 2d Reg. Sess. (Ariz. 2022); S.B. 1338, 55th Leg., 2d Reg. Sess. (Ariz. 2022); S.B. 1348, 55th Leg., 2d Reg. Sess. (Ariz. 2022); H.B. 1204, 73d Gen. Assemb. 2d Reg. Sess. (Colo. 2022); H.B. 2633, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022); H.B. 1064, 2022 Sess. (N.H. 2022); H.B. 1778, 67th Leg., Reg. Sess. (Wash. 2022); H.B. 2115, 67th Leg., Reg. Sess. (Wash. 2022); H.B. 3233, Reg. Sess. (W.V. 2021); Holly Ramer & Christina A. Cassidy, *Some in GOP Want Ballots to be Counted by Hand, Not Machines*, L.A. TIMES (Mar. 12, 2022, 10:17 AM), https://www.latimes.com/world-nation/story/2022-03-12/gop-legislation-ballots-hand-count-machines [https://perma.cc/M9FU-7SRV]; *see also* Rosalind S. Helderman, Amy Gardner & Emma Brown, *How Trump Allies Are Pushing to Hand-Count Ballots Around the U.S.*, WASH. POST. (Apr. 4, 2022, 6:00 AM), https://www.washingtonpost.com/politics/2022/04/04/trump-hand-counted-ballots-dominion-machines/ [https://perma.cc/P6QX-M74F] ("Experts say hand-counting ballots is so impractical that, if adopted, election results would be thrown into unimaginable chaos, inviting mass human error and delaying results—and potentially giving bad actors more time to slow or even block certification.").

110. *Interference with Election Administration: Defining the Problem*, VOTING RTS. LAB, https://tracker.votingrightslab.org/election-interference-definitions [https://perma.cc/687V-TUTU] (last visited October 10, 2022).

111. *E.g.*, H.B. 194, 2022 Reg. Sess. (Ala. 2022); H.B. 2183, 2021 Reg. Sess. (Kan. 2021); H.B. 301, 2022 Reg. Sess. (Ky. 2022) (enacted); H.B. 1365, 2022 Reg. Sess. (Miss. 2022); H.B. 3046, 58th Leg., 2d Reg. Sess. (Okla. 2022); S.B. 122, 97th Leg., Reg. Sess. (S.D. 2022); S.B. 1534, 112th Leg., Reg. Sess. (Tenn. 2021).

outreach, and registration, and some make acceptance of such private funding to conduct elections a felony or misdemeanor.[112] Although this legislation may seem innocuous or beneficial—shouldn't elections be funded by the public fisc instead of private largesse?—by prohibiting use of such resources without guaranteeing adequate public funding for election administration, these laws impede election officials' ability to do their jobs.

B. The Democracy Principle at Work

What can be done about the sort of measures canvassed above? One salient characteristic of these measures is their veneer of legality. Not only are many adopted in the form of law—as normal legislation rather than rogue state action—but they also purport to require compliance with legal standards or to guarantee regularity and consistency in election administration. As power-shifting legislation, audits, and criminal measures advertise their fealty to law, however, they threaten the franchise and electoral integrity, as well as nonpartisan, expert election administration.

Although such measures may be difficult to challenge in federal court, state courts are well positioned to judge them, and the democracy principle provides a framework through which they might do so. After describing the distinctive role state courts play in American democracy, we begin to sketch how the democracy principle might bear on the new election subversion.

2. THE DISTINCTIVE ROLE OF STATE COURTS

Viewed through the lens of federal litigation, many of the threats described above may not seem amenable to judicial resolution. To begin, federal courts are institutionally constrained. The familiar "counter-majoritarian difficulty"[113] might compel federal courts to stay their hand in sensitive electoral disputes, especially those involving state laws given that states possess their own sovereignty.[114] Federal courts may also find themselves substantively constrained, short on federal constitutional resources to resolve such disputes. And federal courts are jurisdictionally constrained, bound by Article III and precedent to hear only certain types

112. *E.g.*, H.B. 301 (Ky. 2022); H.B. 194 (Ala. 2022).; H.B. 2183 (Kan. 2021); H.B. 3046 (Okla. 2022).

113. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed., Yale University Press 1986) (1962).

114. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1899–1901 (2001).

of cases and controversies and to forgo a more synoptic common-law role.[115]

Whatever the precise scope of these limits on federal courts, the state judicial role is markedly broader. State courts have long adjudicated cases that are politically fraught, that require distinguishing good from bad faith, and that call for a common-law eye for context and facts. Illustrative is state courts' approach to partisan gerrymandering after the Supreme Court's insistence in *Rucho v. Common Cause*[116] that federal courts had neither authority nor legal standards to direct them in adjudicating such claims.[117] Both recently and in the more distant past, state courts have recognized their role in fostering democracy. Their institutional, substantive, and jurisdictional differences from their federal counterparts place the new election subversion comfortably before them.

First, state courts are institutionally distinct from federal courts. The vast majority are elected.[118] While the systems of election vary across states, they share a commitment to keep judges connected to the people of the state. That is by design. Although there were many reasons, some ill-conceived, that reformers shifted to elective judiciaries,[119] one prominent justification was that elections would make judges more accountable to the people.[120] Available convention records underscore the link between judicial elections and the state constitutional principle of popular sovereignty. At the Wisconsin Convention, for example, proponents of judicial elections argued that appointed judges were too "dependen[t] upon the other two branches of government," whereas an elective judiciary would fulfill "an axiom of government in this country, that the people are the source of all political power, and to them should their officers and rules be responsible for the faithful discharge of their

115. *See, e.g.*, MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER (1991).

116. 139 S. Ct. 2484 (2019)

117. *See id.* at 2507; *Adams v. DeWine*, Nos. 2021-1428 & 2021-1449, 2022 WL 129092, at *7 (noting that the concerns the Supreme Court raised about federal courts adjudicating partisan gerrymandering claims do not apply to state courts).

118. *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/WMS7-YFJR] (Oct. 4, 2021).

119. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 717 (1995) ("*Marbury*, Jacksonianism, participation in politics by settlers of the western frontier, judicial rulings favorable to creditors, resistance to the English common law, and judicial corruption are all overlapping factors frequently mentioned by scholars (Jacksonianism most of all) as contributing to the adoption of elective judiciaries."); Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 190–93, 224 (1993).

120. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 272 (2012).

respective duties."[121] Even the minority of states that appoint judges retain a closer link to the people by using time-limited terms rather than life tenure.[122] Nor are state courts institutionally bound to defer to a subsidiary sovereign. Despite important appeals to the values of localism, there is no analogous intrastate judicial system that counsels state courts to stay their hands in favor of local adjudication.[123]

Second, state courts interpret constitutions in which democracy is a structural, orienting value. As described in Part I, the democracy principle distinguishes state constitutions from the federal Constitution. The arguments against constitutional "lockstepping," in which state courts reflexively follow federal decisions when interpreting their own state constitutions,[124] apply with special force in the context of democracy and elections. Historically and in recent years, state courts have indeed been attuned to their own distinctive constitutional provisions and traditions.[125]

Finally, state courts have different jurisdictional limits and a broader portfolio of work than the federal courts. Early state courts played an overt role in policymaking, with influential judges like James Kent viewing themselves "as a member of the policymaking branch of government, not just an interpreter of its work."[126] Even as the state judicial role has come to look more like the federal role, there remain important differences. Many state courts perform functions—ranging from attorney discipline and "problem-solving" in specialized criminal courts to the drawing of legislative districts—that blur lines between the branches.[127] Even in their judicial function, state courts lack Article III constraints, typically adopting only narrow and prudential jurisdictional

121. Croley, *supra* note 119, at 717 n.86 (quoting report of the Judiciary Committee of the Wisconsin Constitutional Convention).

122. *See* BRENNAN CTR. FOR JUST., *supra* note 118.

123. *See* Hershkoff, *supra* note 114, at 1901–03.

124. *See, e.g.*, JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174 (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

125. *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 7, at 910–12, 925–26; *supra* Section I.B.

126. Farah Peterson, *Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation*, 77 MD. L. REV. 712, 740 (2018).

127. Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 753 (2021).

limits.[128] Many issue advisory opinions.[129] And they decidedly remain common law courts. In that capacity, state courts not only "play an accepted policymaking role in a broad range of complex areas,"[130] but often bring common-law sensibilities and methodologies into their constitutional interpretation—taking close account of context and circumstances in their rulings.[131] They should do just that when confronted with the new election subversion.

2. SOME EXAMPLES

State courts are well positioned to review the sorts of power-shifting legislation, sham audits, and intimidation described above. Of course, any given case will turn on the specific facts and law involved; to the extent litigation proceeds under state constitutions, it will also necessarily demand attention to the particular text, history, and doctrinal understandings of the state constitution at issue. By invoking a trans-state democracy principle, we do not mean to undermine state-specific approaches or a focus on distinct facts and circumstances. We do, though, suggest that the democracy principle helps inform understandings of specific constitutional provisions and that state courts should attend to popular sovereignty, majority rule, and political equality as they encounter the new election subversion.

Begin with what should be a simple case under any instantiation of the democracy principle: a law, such as Arizona's proposed H.B. 2476, that would arrogate to a state legislature the people's power to decide elections.[132] Legislation that empowers the legislature to control election results is anathema to principles of popular sovereignty, majority rule, and political equality. It violates enforceable guarantees contained in forty-nine state constitutions that locate political power in the people themselves rather than in state government bodies.[133] For instance,

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128. *See, e.g.*, G. ALAN TARR & CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 42–45 (1993); *see also, e.g.*, *Village of Trempealeau v. Mikrut*, 681 N.W.2d 190, 192–93 (Wis. 2004) ("Circuit courts in Wisconsin are constitutional courts with general original subject matter jurisdiction over 'all matters civil and criminal.' Wis. Const. art. VII, § 8. Accordingly, a circuit court is never without subject matter jurisdiction.").

129. *See* TARR & PORTER, *supra* note 128, at 43–44.

130. Hershkoff, *supra* note 114, at 1837.

131. *See* Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1565 (2019) (discussing state courts' contextual, case-by-case approach in cases involving state agency independence); Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265, 306 (2007) (positing that state courts "treat constitutional law as a species of common law").

132. H.B. 2476, 55th Leg., 2d Reg. Sess. (Ariz. 2022).

133. *See, e.g.*, *League of Women Voters v. Commonwealth*, 178 A.3d 737, 803 (Pa. 2018); *supra* notes 14–15 and accompanying text.

Arizona's constitution states: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed."[134] Such legislation likewise undermines the right of suffrage guaranteed in each of the fifty states and the attendant guarantees of free elections.[135] Arizona's constitution, for example, provides: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[136] Elsewhere, the state constitution emphasizes the role of the people, through majority rule, to choose their government: "In all elections held by the people in this state, the person, or persons, receiving the highest number of legal votes shall be declared elected."[137] Taken together, these and related provisions demand popular majority rule by political equals—and belie the claim that anyone other than voters may decide elections.

The fact that the state legislature is seeking to arrogate this power to itself makes such proposals still more egregious. A line running through the development of state constitutions is the aim of "preventing faithless legislators from frustrating the popular will."[138] From term limits to detailed procedural requirements, state constitutions have been amended over time to ensure legislative accountability to the public and to limit the legislature's authority. In states including Arizona, the people have also retained a portion of the legislative power for themselves through the initiative and referendum.[139] The tradition of state constitutional amendment and interpretation exemplifies the broader constitutional resistance to treating the state legislature as the voice of the people, especially when the people may speak in less mediated forms. Given the myriad ways in which state constitutions seek to vindicate popular sovereignty against legislative aggrandizement, it is simply not plausible that the legislature could constitutionally wrest from the people their electoral power.[140]

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134. ARIZ. CONST. art. II, § 2.

135. *See supra* notes 18–19 and accompanying text. Arizona's suffrage provision has the most indirect framing, but it qualifies voters who meet eligibility requirements. ARIZ. CONST. art. VII, § 2.

136. ARIZ. CONST. art II, § 21.

137. *Id.* art. VII, § 7.

138. Tarr, *supra* note 20, at 94.

139. ARIZ. CONST. art. IV, § 1 ("[T]he people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.").

140. This state constitutional tradition also renders particularly problematic the independent state legislature claim some are advancing, *see supra* note 6, insofar as it would define state legislatures as bodies free from state constitutions rather than constituted by them. Since the late eighteenth century—and in the decades since as new states have joined the Union and state constitutions have been amended and replaced

State courts also have both tools and authority to address subtler and more indirect forms of legislative arrogation. Take the Georgia law that alters the State Elections Board's composition and authority.[141] The backdrop of its enactment was Georgia's dramatic role in the 2020 presidential election, in which Republican Secretary of State Brad Raffensperger refused to "find" enough votes to allow Trump to fraudulently claim victory.[142] The concentrated partisan control of the Board, and the potential deployment of the Board to displace entire slates of local election officials with new partisan "superintendents," should not be lost on a state court obligated to enforce the state constitution's commitment to democracy.

That the Georgia legislature has consolidated power in the State Elections Board by stripping power from the secretary of state deepens these concerns. One way state constitutions have indirectly constrained "faithless legislators" is by providing for popular election of executive actors who can accordingly "claim that they ha[ve] just as strong a connection to the people, the source of all political authority, as d[o] legislators."[143] In Georgia, the secretary of state is one of many executive officials elected statewide by popular majority vote, and he or she accordingly has the sort of democratic mandate and direct connection to voters constitutional reformers contemplated.[144] We do not suggest that election administration must always be the purview of separately elected officials.[145] But for the state legislature to not only remove the Secretary of State's authority, but also assign it to a chair chosen by the legislature itself flouts the constitution's approach to distributed power. In Georgia and other states that have recently altered the roles of election officials, state courts should take a hard look at changes to election administration, asking whether such changes have a legitimate basis other than partisan

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outright—state legislatures have been both empowered and constrained by state constitutions in the service of popular sovereignty. Nothing in the federal Constitution frees these legislatures from state constitutional bounds or empowers federal judges to override the will of the people of the state. *See generally* Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1; Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235; Carolyn Shapiro, *The Independent State Legislature Claim, Textualism, and State Law*, 90 U. CHI. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4047322; Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

141. *See supra* notes 76–79 and accompanying text.

142. Gellman, *supra* note 1.

143. Tarr, *supra* note 20, at 94.

144. *See* GA. CONST. art. V, § 3.

145. *See* Seifter, *supra* note 8 (manuscript at 35–37).

efforts to consolidate power and considering as evidence disruptions to distributed democratic power within the state.

The democracy principle also bears on the sham audits described above. Most narrowly, when challenges under specific statutory or constitutional provisions are raised—for instance, that the audit violates state contracting requirements or open-records rules—the democracy principle can play a supporting role, bolstering existing state-law principles and providing a canon of construction to guide close cases. The Arizona and Wisconsin audits described above are already the subject of legal challenges concerning state public records laws and misuse of subpoenas,[146] but litigation is ongoing, and far more is at stake than technical violations.

For instance, the Arizona Supreme Court recently decided that legislative privilege shielded many (but not all) legislative communications in connection with the "Cyber Ninjas" audit.[147] Although this ruling is contestable under state public records law itself—Arizona public records law presumptively favors disclosure, its doctrines cabin legislative privilege, and the court of appeals held the privilege inapplicable[148]—the democracy principle could have informed the court's analysis. The circumstances reveal that the audit was an attempt to subvert, not strengthen, the integrity of state election administration, so any close questions should be resolved in favor of public access and against legislative efforts to shield documents from the people.[149] So too, the democracy principle might have informed the Wisconsin attorney general's litigation about the Gableman audit's misuse of subpoenas. The problem is not just that the subpoenas lacked some of the formalities of authentic legal documents; it is that they were baseless and targeted to undermine election administration.[150]

Although the democracy principle has a role to play as a canon of construction in close cases governed by distinct state-law statutes or doctrines, the remedies imposed in such cases may be limited: a court might require disclosure or quash subpoenas, or it might invalidate impermissible contracts in ways that the legislature can simply cure.[151] In other cases, the democracy principle and the state constitutional provisions that undergird it may bear directly on the controversy and

146. *See supra* notes 61, 63 and accompanying text.

147. *See Fann v. Kemp*, 253 P.3d 1275, 1287 (Ariz. 2022).

148. *See, e.g.*, *Fann v. Kemp*, 505 P.3d 301, 307 (Ariz. Ct. App. 2022) ("A public official bears the burden of overcoming the presumption favoring disclosure.").

149. Instead, the court purported to stay its hand, stating that the electorate, not the courts, must "serve as the ultimate arbiters of the wisdom of any legislative action." *Fann*, 253 515 P.3d at 1287. While adopting the language of democracy, such statements undervalue the judicial role in enforcing the constitutional democracy principle.

150. *See supra* notes 94–99 and accompanying text.

151. *See supra* note 63.

furnish a stronger remedy that precludes the illegitimate activity. A court might conclude that the sort of sham audits we described above violate constitutional provisions guaranteeing popular sovereignty, political equality, and majority rule.[152]

For example, the Georgia Constitution states that "[a]ll government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them."[153] The state supreme court has already applied this clause to invalidate statutes that attempted to vest in private entities the appointment to public commissions, relying on the idea that "[f]undamental principles embodied in our constitution dictate that the people control their government."[154] Election audits by unaccountable figures do not comport with a requirement that the public retain some control of key government functions.

So too, such audits may violate state constitutional provisions concerning suffrage and elections that partially compose the democracy principle. For example, Arizona requires both that "[a]ll elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage,"[155] and that "[t]here shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise."[156] We should expect proponents of sham audits to defend them as securing "the purity of elections."[157] But state courts have already proven capable of distinguishing efforts to maintain integrity from efforts to erode it.[158] The Arizona Supreme Court recently rejected "election integrity" as a blanket justification for state preemption of local authority to set municipal

152. In some cases, this conclusion might follow from statutes requiring generous construction of provisions to favor voters. *See, e.g.*, Wis. Stat. § 5.01(1) (2019–20) ("Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.").

153. GA. CONST. art. I, § 2.

154. *Delay v. Sutton*, 818 S.E.2d 659, 661 (Ga. 2018) (rejecting law vesting appointment of DeKalb County Board of Ethics in private entities); *see also, e.g.*, *Rogers v. Med. Ass'n*, 259 S.E.2d 85, 87 (Ga. 1979) (noting that state "constitutional provisions mandate that public affairs shall be managed by public officials who are accountable to the people").

155. ARIZ. CONST. art. II., § 21.

156. *Id.* art. VII, § 12.

157. *Id.*

158. *See, e.g.*, *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1057 (Fla. 2010) (rejecting argument that new "politically charged counter-petition revocation campaigns" for ballot initiatives were necessary for ballot integrity).

election dates.[159] Citing a long line of cases, the court concluded that "election integrity generally refers to fair and honest election-related procedures, which are necessary to ensure voters' trust," and not simply any election-related measure that a state sees fit to assert.[160] The same could easily be said of an audit like the "Cyber Ninjas" one in Arizona.

These provisions and understandings likewise provide a basis for state courts to invalidate laws that threaten election officials with criminal prosecution for efforts to facilitate voting or otherwise carry out their duties. Such measures not only burden the right to vote and interfere with free and open elections but also pretextually invoke the coercive power of the state. Complementing the text and history we have described above, many state constitutions express particular concern with criminalizing participation in elections. More than half of the states—including most that have been adopting new felony and misdemeanor offenses around election administration—expressly protect voters from arrest during their attendance at or travel to or from an election. For example, Arizona's Constitution states: "Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at any election, and in going thereto and returning therefrom."[161] Although such provisions do not directly speak to criminalizing election administration, they do reflect a more pervasive concern with using the state's power of criminal enforcement to undermine free elections. In distinct clauses that protect free and equal or free and fair elections, for example, state constitutions also frequently prohibit the use of civil or military powers to interfere with the right of suffrage.[162] As the Arizona Court of Appeals noted in construing this provision consistently with other states' understandings, free and equal elections require that voters "not be prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will."[163] Intimidation and threats directed at election administrators, as well as at voters, can likewise undermine free and open elections.

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159. *State ex rel. Brnovich v. City of Tucson*, 484 P.3d 624, 631–32 (Ariz. 2021).

160. *See id.* at 631; *see also Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992) (rejecting argument that local public financing undermines election integrity).

161. ARIZ. CONST. art VII, § 4.

162. *E.g.*, *id.* art. II, § 21 ("All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

163. *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009) ("Other states with similar constitutional provisions have generally interpreted a 'free and equal' election as one in which the voter is not prevented from casting a ballot by intimidation or threat of violence, or any other influence that would deter the voter from exercising free will, and in which each vote is given the same weight as every other ballot.").

Especially considered together, as the democracy principle instructs, provisions guaranteeing popular sovereignty and the people's control over government, free and equal elections, and both general and specific forms of legislative accountability suggest a powerful state constitutional case against power-shifting legislation, sham audits, and pretextual criminalization—and one state courts are well equipped to evaluate in specific cases.

CONCLUSION

American democracy faces many threats. Some, like political violence that targets elections, directly attack the rule of law.[164] Yet one insidious possibility is that election subversion will come from within the legal system, not outside of it, and that it will co-opt the vocabulary and instruments of law, not reject them outright.[165] Already, state legislatures and officials are adopting power-shifting bills, audits, and criminal penalties for election administrators that present as lawful, even law-enhancing, measures. More such legislation can be expected.

Whatever the limits of federal courts when it comes to reviewing these measures, state courts have ample resources to engage with—and to counter—the new election subversion. The democracy principle in state constitutions commits states to popular sovereignty, majority rule, and political equality. The textual provisions, structural guarantees, and historical developments that inform the principle in each of the fifty states make state constitutional law a significant, if underappreciated, resource for combatting electoral threats. Indeed, the democracy principle underscores that state courts have not only the authority but also the duty to invalidate election-subverting measures and to serve as a bulwark for the basic functioning of American democracy.

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164. *See, e.g.*, NATHAN P. KALMOE & LILLIANA MASON, RADICAL AMERICAN PARTISANSHIP: MAPPING VIOLENT HOSTILITY, ITS CAUSES, AND THE CONSEQUENCES FOR DEMOCRACY 13, 36–37 (2022); Rachel Kleinfeld, *The Rise of Political Violence in the United States*, 32 J. OF DEMOCRACY 160, 163–64, 172 (2021).

165. *See, e.g.*, Hasen, *supra* note 1; Issacharoff, *supra* note 57, at 36–38; Scheppele, *supra* note 5.

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