

FOREWORD:

SPECIAL ISSUE ON PUBLIC LAW IN THE STATES

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This year, states have stepped into the spotlight. The Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*¹ has focused attention on the state role in defining individual rights, while democracy cases like *Moore v. Harper*² have underscored the important state role in elections.³ In addition, many high-profile issues are being brought directly to voters through state ballot measures.⁴ As state institutions take center stage, state-focused scholarship has never been more timely or important.

Attention to states was warranted even before the Supreme Court's recent decisions. States have long been doing the heavy lifting in the U.S. legal system. Most Americans are much more likely to come into contact with state laws and courts than the federal legal system.⁵ Outside of the courtroom, it is often subnational institutions that most shape people's day to day lives.

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1. 142 S. Ct. 2228 (2022).

2. 143 S. Ct. 2065 (2023).

3. See, e.g., *Dobbs*, 142 S. Ct. at 2279; *Moore*, 143 S. Ct. at 2087; Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. (forthcoming Nov. 2023); Alicia Bannon, *The Supreme Court Is Retrenching. States Don't Have To.*, POLITICO (June 29, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928> [<https://perma.cc/7DKH-Q69V>].

4. See generally Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. (forthcoming 2023).

5. See, e.g., NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS // 2022 POLL 11 (2022), https://www.ncsc.org/_data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf [<https://perma.cc/794L-5H6E>] (finding that more than ninety-five percent of all cases in the United States are filed in state courts).

<https://doi.org/10.59015/wlr/RALR6984>

The Essays in this Special Issue were presented at, or grew out of, the third annual Public Law in the States Conference hosted by the State Democracy Research Initiative at the University of Wisconsin Law School in June 2023.⁶ This conference brings together scholars and state jurists to explore questions pertaining to state public law and state courts, with an eye toward distinctive state features as well as the relationship between state and federal public law. In addition to a judicial panel, this year's conference featured four academic panels on state courts, state constitutions, state institutions, and state-level democracy.

A. JUDICIAL INSIGHTS

The conference's keynote judicial panel featured Justice Jennifer Brunner (Ohio Supreme Court), Justice Leondra Kruger (California Supreme Court), Justice Anne McKeig (Minnesota Supreme Court), and Vice Chief Justice Ann Timmer (Arizona Supreme Court). Each first reflected on their state's high court and its notable features.⁷ In a moderated discussion, the justices also offered insights on their states' judicial selection methods as well as the need to invest more resources into state courts to meet their increasingly demanding dockets.⁸

In *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, Justice Jennifer Brunner asks whether state-level fights surrounding reproductive rights “are like a Trojan horse for raiding the principles of democratic self-governance in favor of a government of the few.”⁹ Justice Brunner considers Ohio's experience as a case study, paying special attention to actions of the Ohio General Assembly and Secretary of State. Specifically, she examines how the state legislature tried to make it more difficult for Ohioans to pass citizen-initiated constitutional amendments by calling an August special election just months before a proposed

6. *State Democracy Research Initiative Hosts 3rd Annual Public Law in the States Conference*, UNIV. OF WIS. L. SCH. (June 22, 2023), <https://statedemocracy.law.wisc.edu/featured/2023/state-democracy-research-initiative-hosts-3rd-annual-public-law-in-the-states-conference/> [https://perma.cc/N849-GP4G] [hereinafter *Public Law in the States Conference*]. See also Allie Boldt, Miriam Seifter & Robert Yablon, Foreword, *Special Issue on Public Law in the States*, 2021 WIS. L. REV., no. 5, at i (special issue); Allie Boldt, Miriam Seifter & Robert Yablon, Foreword, *Special Issue on Interpretation in the States*, 2022 WIS. L. REV., no. 5, at i (special issue).

7. *Public Law in the States Conference*, *supra* note 6.

8. *Id.*

9. Jennifer Brunner, *Is Limiting Abortion a Pretext for Oligarchy? Abortion and the Quest to Limit Citizen-Initiated Ballot Rights in Ohio*, 2023 WIS. L. REV. 1493, 1499.

amendment to enshrine abortion rights was slated to appear on the ballot. She also describes how the secretary of state “campaign[ed] extensively” in favor of this change and expressed opposition to the underlying abortion proposal, despite being responsible for administering the relevant state elections.¹⁰ Justice Brunner contextualizes these actions by considering Ohio’s legal landscape, including its constitutional commitment to self-governance, its provision for legislative “facilitation” of initiatives, and the prevalence of gerrymandering.¹¹

B. STATE COURTS

Three pieces in this Special Issue were presented at a panel entitled “State Courts.” In *Public Law Litigation and Electoral Time*,¹² Zachary D. Clopton and Katherine Shaw explore how election-related timing—like the end of a politician’s or judge’s fixed term—can create opportunities for strategic behavior in public law litigation, on the part of both litigants and adjudicators. Professors Clopton and Shaw coin several phrases to help describe this phenomenon. For instance, government litigants bring *midnight litigation* to entrench a policy position in the face of a looming or possible personnel change, and litigants engage in *temporal forum shopping* by comparing a court as constituted before and after a judicial election.¹³ The Essay pays special attention to how electoral time can create opportunities for anti-democratic entrenchment, particularly in the context of a lame duck period between an election and transfer of power. The authors conclude that “public law litigation is often politics by other means” and argue that courts should be clear-eyed about this reality.¹⁴

In *Family Court as Problem Solving?*,¹⁵ Tonya L. Brito and Daanika Gordon present findings of fieldwork research and an ethnographic study about child support enforcement proceedings in family court. Specifically, Professors Brito and Gordon examine whether legal actors in child support enforcement cases against poor fathers perceive these cases to be adversarial versus problem-solving in nature. They conclude that lawyers recognize *both* adversarial and non-adversarial features in these cases, and that a lawyer’s unique orientation may create

10. *Id.* at 1497–98.

11. *Id.* at 1503.

12. Zach Clopton & Katherine Shaw, *Public Law Litigation and Electoral Time*, 2023 WIS. L. REV. 1513.

13. *Id.* at 1514.

14. *Id.* at 1534.

15. Tonya L. Brito & Daanika Gordon, *Family Court as Problem Solving?*, 2023 WIS. L. REV. 1537.

consequences for their clients.¹⁶ For example, a problem-solving orientation may undermine zealous advocacy for a client's position, whereas an adversarial perspective may detract from providing the client with services such as professional development or transportation assistance.

In *Dobbs, Democracy, and Dysfunction*,¹⁷ Rosalind Dixon and David Landau critique a central claim made by the U.S. Supreme Court in the *Dobbs* majority opinion: that it was returning questions of abortion access to state-level actors and thus, to democracy.¹⁸ They argue the Court failed to grapple with two major sources of democratic dysfunction, rendering its celebration of democracy hollow. First, systemic distortions in state legislatures, including but not limited to partisan gerrymandering, can undermine responsiveness to the popular will, including in the abortion context.¹⁹ Second, many state abortion laws either predate *Roe*²⁰ or were originally passed as symbolic "messaging" bills in the *Roe/Casey*²¹ era and are thus problematic measures of current public opinion.²² Professors Dixon and Landau then consider how *Dobbs* might be revisited to reckon with these dysfunctions: including through the use of delayed declarations and/or other creative remedies.

C. STATE CONSTITUTIONS

Another piece in this Special Issue was presented at a panel entitled "State Constitutions." In *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*,²³ Robert F. Williams argues that to defend against anti-democratic state action, the next generation of state constitutionalists should develop arguments pertaining to the *structure* of state constitutions in addition to more familiar arguments regarding particular state *rights*. Professor Williams catalogs some of these less visible structural arguments, including with respect to procedural requirements for enacting constitutional amendments and legislation, separation of powers, and stare decisis. Professor Williams

16. *Id.* at 1567–68.

17. David Landau & Rosalind Dixon, *Dobbs, Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569.

18. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

19. Landau & Dixon, *supra* note 17, at 1584–89.

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

22. Landau & Dixon, *supra* note 17, at 1597–603.

23. Robert F. Williams, *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*, 2023 WIS. L. REV. 1615.

concludes by reflecting that, as state constitutions can be a source of affirmative, more expansive rights, so too can they be invoked to defend against state abuses of power. The State Constitutions panel also featured remarks by Professor Wilfred Codrington III on the ways that U.S. states may shape the federal constitutional amendment process.²⁴

D. STATE INSTITUTIONS

Other Essays in this Special Issue address legal questions in the context of specific state institutions. In *States of Emergency: COVID-19 and Separation of Powers in the States*,²⁵ Richard Briffault explores states' responses to the pandemic through a separation of powers perspective, describing gubernatorial actions and state court decisions as well as legislative responses that followed. He concludes that with some exceptions, state courts generally sided in favor of gubernatorial authority, relying on both state-specific analysis as well as federal analogies.²⁶ Professor Briffault also discusses how partisanship—and “separation of parties” in particular—played a central role in these kinds of inter-institutional conflicts.²⁷

In *The (Local) Prosecutor*,²⁸ Carissa Byrne Hessick and Rick Su provide a new lens through which to consider debates about reform prosecutors and the backlash they receive. They explain that the prosecutor role cleaves along three legal axes: a horizontal separation of powers between branches of government; a vertical divide between state and local governments; and finally, a constitutional distinction between constitutional and statutory offices. States' differences regarding these classifications, Professors Hessick and Su argue, prevent a shared understanding about the prosecutor's role in state government.²⁹ They conclude that in the face of this interstate variety, as well as conceptual uncertainty about the prosecutor's role, “we are unlikely to arrive at a national resolution about the proper role of the local prosecutor, and . . . any resolutions in particular states may not prove durable.”³⁰

24. *Public Law in the States Conference*, *supra* note 6.

25. Richard Briffault, *States of Emergency: COVID-19 and Separation of Powers in the States*, 2023 WIS. L. REV. 1633.

26. *Id.* at 1640–58, 1663–68.

27. *Id.* at 1667 (quoting Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006)).

28. Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669.

29. *Id.* at 1671.

30. *Id.* at 1673.

In *Constitutional Accountability through State Tort Law*,³¹ Nancy Leong recognizes the challenges plaintiffs face in enforcing constitutional rights against local governments under 42 U.S.C. § 1983, and explores an alternative mechanism: state tort law. Focusing on municipal liability for negligent hiring, training, and supervision, Professor Leong games out how litigation might proceed under state tort law, assessing whether and how state torts can provide a remedy against municipalities for plaintiffs who would otherwise be unsuccessful under Section 1983. She concludes that in at least some states, state torts can provide plaintiffs a path to vindicate civil rights.³²

In *Home Rulings*,³³ Nestor M. Davidson asserts that home rule jurisprudence in the states has tended to resemble constitutional common law, with insufficient attention devoted to the text of the applicable provisions and the underlying history of popular reform to empower local governments. Professor Davidson uses the state of New York as a case study in “judicial resistance” to a home rule amendment and argues for more textual and contextual grounding of the case law.³⁴ He further contends that such an approach is justified by popular sovereignty values, as well as the experimentalist benefit of preserving institutional flexibility in state constitutional structures.

E. STATE PUBLIC LAW AND DEMOCRACY

Two pieces in this volume were presented on a panel entitled, “State Public Law and Democracy,” which also featured Nicholas Stephanopoulos.³⁵ In *Election Administration as a Licensed Profession*,³⁶ Ganesh Sitaraman and Kevin Stack make the case for establishing a professional licensing system for election administrators to address problems in U.S. election administration, including lack of uniformity and professionalism. Under their proposal, working as an election administrator would require taking courses and passing an exam.³⁷ Professors Sitaraman and Stack argue that recent criticisms of licensing regimes are inapplicable to election administrators and that their proposal

31. Nancy Leong, *Constitutional Accountability Through State Tort Law*, 2023 WIS. L. REV. 1707.

32. *Id.* at 1734.

33. Nestor M. Davidson, *Home Rulings*, 2023 WIS. L. REV. 1735.

34. *Id.* at 1743.

35. *Public Law in the States Conference*, *supra* note 6.

36. Ganesh Sitaraman & Kevin Stack, *Election Administration as a Licensed Profession*, 2023 WIS. L. REV. 1757.

37. *Id.* at 1759.

is more feasible than other election administration reform solutions.³⁸ They examine Michigan as a case study to consider how their system might be applied on the ground.

Finally, in *Our Federalism and Our National Democracy: Complements or Foes?*,³⁹ Aziz Z. Huq challenges the traditional view that the U.S. system of federalism is good for our national democracy by cataloging a multiplicity of ways in which state institutions can be vehicles for democratic backsliding at the national level. For instance, Professor Huq argues that states can play a “miner’s canary” role by revealing whether previously untested anti-democratic measures can achieve political acceptance.⁴⁰ State actors can also dilute the competitiveness of national elections through their power to prescribe the time, place, and manner of federal elections, or contribute to the gaming of election results due to their significant role in election administration. After discussing these and other vectors through which anti-democratic dynamics can traverse from the state to the national level, Huq recommends caution about the relationship between federalism and national democracy.⁴¹

Collectively, the Essays in this Special Issue remind us that scholars have much to gain by looking beyond federal law and federal courts. Our hope is that these pieces, and the conference organized around them, will help spur additional thinking around the role of states, including with respect to both advancing and defending democracy.

38. *Id.* at 1760.

39. Aziz Z. Huq, *Our Federalism and Our National Democracy: Complements or Foes?*, 2023 WIS. L. REV. 1791.

40. *Id.* at 1799 (quoting LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002)).

41. *Id.* at 1817.

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