

FROM RIGHTS ARGUMENTS TO STRUCTURE ARGUMENTS: THE NEXT STAGE OF THE NEW JUDICIAL FEDERALISM

ROBERT F. WILLIAMS*

State constitutions espouse a democracy principle that commits states to political equality, popular sovereignty, and majority rule. This Essay explains 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.

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.

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INTRODUCTION

As Jessica Bulman-Pozen and Miriam Seifter have contended, the new anti-democratic wave in our country, including the variety of election subversion statutes they describe, has highlighted the necessity for structural arguments against those and other illiberal measures, including the statutory and constitutional imposition of minority religious opinions about abortion.¹ In this brief Essay, I want to applaud and

* Distinguished Professor of Law Emeritus, Rutgers University School of Law; Director, Center for State Constitutional Studies. This Essay expands upon a presentation at the State Democracy Research Initiative's 2023 Public Law in the States Conference. Many thanks for all the constructive comments of the participants.

1. Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1339, 1365. For a fuller exposition of the state constitutional *democracy principle*, see Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021).

expand on their efforts, describing a number of tactics that can be used against both statutory and state constitutional measures that can be viewed as anti-democratic or as rights-restricting. We need to resist these new “Laboratories of Autocracy”² or “Laboratories Against Democracy.”³

Much of the last several generations’ “New Judicial Federalism” relied on state constitutional *rights* arguments.⁴ State constitutional provisions, some of which were unfamiliar to those steeped in federal constitutional law, were deployed to seek rights above the federal minimum standards of rights.⁵ We are at a point where the importance of state constitutions is moving beyond rights to structural arguments that must be recognized by emerging new generations of state constitutionalists.⁶

State constitutions contain a number of structural provisions and limitations that may be deployed to resist a variety of state constitutional and statutory changes. These provisions, such as procedural requirements for adopting state constitutional amendments, requirements for enacting

2. See DAVID PEPPER, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES (2021). See also Miriam Seifter, *Countermajoritarian Legislators*, 121 COLUM. L. REV. 1733 (2021) (explaining how the state legislature is typically a state’s least majoritarian branch); Miriam Seifter, *Saving Democracy, State by State?*, 110 CALIF. L. REV. 2069 (2022) (suggesting state-level reforms to strengthen democracy); David Landau & Rosalind Dixon, Dobbs, *Democracy, and Dysfunction*, 2023 WIS. L. REV. 1569 (discussing how returning the abortion question to the states is undemocratic due to the non-majoritarian make-up of many state legislatures).

3. JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022). See also Aziz Z. Huq, *Our Federalism and Our National Democracy: Complements or Foes?*, 2023 WIS. L. REV. 1791 (identifying mechanisms by which states can serve as vectors of anti-democratic forces).

4. See Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 951 (2020).

5. See *id.*

6. We are embarking on a new post-*Rucho* and post-*Dobbs* chapter of the New Judicial Federalism, after the earlier post-Burger Court recognition of state constitutions as sources of more protective rights than the federal minimum standards. See *id.*; Scott L. Kafker, *State Constitutional Law Declares Its Independence: Double Protecting Rights During a Time of Federal Constitutional Upheaval*, 49 HASTINGS CONST. L.Q. 115 (2022) (arguing that the state court reaction to the current Supreme Court will be reminiscent of the first surge in state constitutional interpretation brought on by the Burger Court).

For post-*Dobbs* abortion cases in the states, compare *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023) (no abortion rights), with *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770 (S.C. 2023) (recognizing abortion rights). See generally John Dinan, *The Constitutional Politics of Abortion Policy After Dobbs: State Courts, Constitutions, and Lawmaking*, 84 MONT. L. REV. 27 (2023) (discussing state supreme court decisions invalidating restrictive abortion policies).

statutory law, separation of powers, and stare decisis, as well as political defenses, should be recognized in addition to rights arguments.

I. RESTRICTIONS ON STATE CONSTITUTIONAL AMENDMENTS

A final distinctive feature of state constitutional practice regarding constitutional change is the involvement of state courts in overseeing the process of change. The reliance on formal constitutional change in the states has prompted opponents of proposed changes to challenge their legality in the courts. Whereas the United States Supreme Court has dismissed procedural challenges to the federal amendment process as “political questions,” state courts have proved quite willing to address a wide range of issues associated with state constitutional change.

—G. Alan Tarr⁷

When the regressive, multipurpose tax-limitation proposal known as Proposition 13 was proposed as an amendment to the California Constitution, opponents challenged it on state constitutional procedural grounds. They relied on the California Constitution’s provision banning initiative measures “embracing more than one subject.”⁸ They further alleged that the title and summary of the proposed constitutional amendment were misleading to the voters.⁹ These arguments failed in the California Supreme Court.¹⁰ Despite this loss, however, it was a very credible challenge. It was based on a *quantitative* argument: there were too many different provisions submitted for a single vote by the electors.¹¹ The Florida Supreme Court, by contrast, struck down a tax and revenue limitation amendment on single-subject grounds.¹²

A generation later in California, however, when a proposed state constitutional initiative sought to “lockstep” virtually all of the state

7. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 26 (1998). *See also* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 442–50 (2d ed. 2023) (discussing how state courts have enforced procedural limitations on the amendment process).

8. CAL. CONST. art. II, § 8(d). *See also Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978).

9. *Amador Valley*, 583 P.2d at 1298.

10. *Id.* at 1283. *See also* George Lefcoe & Barney Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case*, 53 S. CAL. L. REV. 173 (1979).

11. *Amador Valley*, 583 P.2d at 1289–91.

12. *Fine v. Firestone*, 448 So. 2d 984, 986 (Fla. 1984). *See also Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (striking down an amendment about damages in civil actions for violating the single-subject rule).

constitution's criminal procedure guarantees to the United States Supreme Court's interpretation of the analogous federal guarantees,¹³ a different sort of procedural challenge was brought. There, the California Supreme Court struck down the proposal not because it had too many subjects, but rather because it constituted a "revision" of the constitution when initiatives were only permitted to "amend" the constitution.¹⁴ The court rejected a quantitative single-subject challenge but enforced the qualitative amendment/revision limitation.¹⁵ In 2009, a similar amendment/revision challenge was leveled, this time on *qualitative* grounds, against Proposition 8: a short, proposed initiative to overturn the California Supreme Court's decision recognizing marriage equality.¹⁶ The argument that this amendment constituted a "revision" of the constitution because of its wide-ranging effect failed.¹⁷

In Florida, the amendment/revision limitation on initiated constitutional amendments was also enforced through a qualitative analysis, striking down an attempt to amend the state constitution to create a one-house legislature.¹⁸ The short amendment would have caused changes to a wide variety of provisions in the state constitution.¹⁹

In Pennsylvania, after a 2019 voter-approved "Victim's Rights Amendment" appeared to have been added to the state constitution, it was challenged on procedural grounds.²⁰ The single amendment, proposed by the legislature, would have added several constitutional rights for victims of crime, some of which appeared to conflict with constitutional rights of persons accused of crimes.²¹ Article XI, Section 1 of the Pennsylvania Constitution requires that "[w]hen two or more

13. David Aram Kaiser & David A. Carrillo, *California Constitutional Law: Reanimating Criminal Procedural Rights After The "Other" Proposition 8*, 56 SANTA CLARA L. REV. 33, 46 (2016).

14. *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990). It has been argued that most of Proposition 115's invalidated changes have been added to the California Constitution one by one over the years since *Raven*. See Kaiser & Carillo, *supra* note 13, at 40.

15. *Raven*, 801 P.2d at 1086–87.

16. See *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008).

17. *Strauss v. Horton*, 207 P.3d 48, 110 (Cal. 2009). For an explanation of the qualitative revision argument, see David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 REV. L. & SOC. JUST. 45, 75–76 (2010).

18. See *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970).

19. *Id.* at 826. For a discussion of an additional argument that could have been made in *Gunter* to invalidate the unicameral legislature amendment, see *infra* note 37 and accompanying text.

20. *League of Women Voters of Pa. v. Degraffenreid*, 265 A.3d 207, 210 (Pa. 2021).

21. See *id.* at 210–11.

amendments shall be submitted they shall be voted upon separately.”²² The Pennsylvania Supreme Court invalidated the amendment on that ground.²³

In Montana, after the new 1972 Constitution appeared to be adopted by a very close vote, it was challenged as not “approved by a majority of the electors voting” at the election.²⁴ The Montana Supreme Court, noting that the proposed new constitution was recommended by a constitutional convention, concluded that a 3,000-vote margin in favor of the constitution itself resulted in approval of the new constitution.²⁵ A number of proposed state constitutional amendments have been challenged on state constitutional, or even statutory, disclosure requirements for informing voters of the nature of the changes.²⁶ The temptation to misrepresent the effect of a proposed amendment is strong.

A few state constitutions, such as Illinois’s, impose substantive limitations on the use of the initiative to amend the constitution.²⁷ The Illinois Supreme Court enforces these limitations strictly.²⁸ Justice Schaefer, dissenting in an earlier case, explained the reasons for the narrow authorization for initiatives:

What the constitutional convention feared was that the initiative procedure which it was authorizing might be misused to accomplish “substantive changes.” For example, amendments reading: “The General Assembly shall never pass a law abolishing the death penalty” or “The General Assembly shall enact legislation which will prohibit abortions” could arguably be regarded as amendments to the legislative article since they bear directly upon the power of the legislature. It was to avoid that kind of amendment that the convention

22. PA. CONST. art. XI, § 1.

23. *DeGraffenreid*, 265 A.3d at 227–42. *Contra Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 990 N.W.2d 122, 125 (Wis. 2023) (upholding the same victim’s rights amendment against a similar challenge).

24. MONT. CONST. art. XIV, § 8.

25. *State ex rel. Cashmore v. Anderson*, 500 P.2d 921, 929 (Mont. 1972). *See also Gatewood v. Matthews*, 403 S.W.2d 716, 721–22 (Ky. 1966) (holding that the state constitution’s provisions for change are not exclusive).

26. *See, e.g., Grose v. Firestone*, 422 So. 2d 303 (Fla. 1982); Thomas C. Marks, *The Case of the Bogus Ballot Summary: Grose v. Firestone*, 5 ST. THOMAS L. REV. 147 (1992). *Cf. Patrick O. Gudridge, Florida Constitutional Theory (for Clifford Alloway)*, 48 U. MIA. L. REV. 809 (1994) (discussing the single-subject rule in Florida, which aims to simplify proposed amendments to improve voter understanding).

27. *See ILL. CONST. art. XIV, § 3.*

28. *See, e.g., Chi. Bar Ass’n v. State Bd. of Elections*, 561 N.E.2d 50, 53–54 (Ill. 1990).

decided to limit the subject matter of amendments proposed by popular initiative.²⁹

The Hawai'i legislature proposed two alternative amendments to be voted on in a primary election, with the one receiving the most votes to be submitted in the general election.³⁰ When challenged, the Hawai'i Supreme Court disapproved this procedure as not authorized in the state constitution.³¹ Most state courts hold that amendment procedures must be followed strictly.

Florida's constitution creates a unique, appointed Taxation and Budget Reform Commission with authority to put proposed constitutional changes on "taxation or the state budgetary process" directly on the ballot, bypassing the legislature.³² In 2008, that commission proposed amendments repealing the state "Blaine Amendment," which prohibited the use of public funds for religious purposes and authorizing school vouchers.³³ These were challenged as being beyond the commission's mandate.³⁴ The Florida Supreme Court agreed and struck them from the ballot.³⁵

One of the most interesting, albeit untried in modern times, state constitutional defenses is Professor Jonathan Marshfield's contention that certain significant, "foundational" state constitutional changes may only be submitted to the voters by a state constitutional convention, and not by initiative or legislatively proposed amendment.³⁶ While he states that his theory needs further development, he posits some examples of

29. *Coal. for Pol. Honesty v. State Bd. of Elections*, 359 N.E.2d 138, 148 (Ill. 1976) (Schaefer, J., dissenting).

30. *See* Act 294, 1992 Haw. Sess. Laws 754–57, *invalidated by Blair v. Cayetano*, 836 P.2d 1066 (Haw. 1992).

31. *Blair*, 836 P.2d 1066.

32. FLA. CONST. art. XI, § 6.

33. *See* FLA. TAX'N & BUDGET REFORM COMM'N, CP0020, RESOLUTION PROPOSING AN AMENDMENT TO THE STATE CONSTITUTION CONCERNING RELIGIOUS FREEDOM (2008), <http://library.law.fsu.edu/Digital-Collections/FTBRC/pdf/CP20E1Final2.pdf> [https://perma.cc/DR4Y-8Y9W]; FLA. TAX'N & BUDGET REFORM COMM'N, CP0026 & CP0040, RESOLUTION PROPOSING AMENDMENTS TO THE STATE CONSTITUTION CONCERNING PUBLIC EDUCATION (2008), http://library.law.fsu.edu/Digital-Collections/FTBRC/pdf/Combined26_40FINAL.pdf [https://perma.cc/4484-MPC4].

34. *See Ford v. Browning*, 992 So. 2d 132, 135 (Fla. 2008).

35. *Id.* at 141. For a discussion of the role of the Florida Taxation and Budget Reform Commission in reforming the state's tax structure, see Donna Blanton, *The Taxation and Budget Reform Commission: Florida's Best Hope for the Future*, 18 FLA. ST. U. L. REV. 437 (1991).

36. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 71–72 (2019).

proposed state constitutional changes that should not be permitted by amendment but only by proposal from a constitutional convention.³⁷

Marshfield applies the doctrine “to two hypothetical amendments: (1) an amendment eliminating direct democracy from the Oklahoma Constitution; and (2) an amendment eradicating New Hampshire’s public education provision.”³⁸ Given the fact that state constitutional amendments are a regular part of state governance, these defensive measures are likely to become more important.³⁹

II. STATE CONSTITUTIONAL REQUIREMENTS AND LIMITS ON STATUTORY ENACTMENT

State legislatures, unlike Congress, are subject to a number of state constitutional procedural limitations and requirements as they enact legislation. Many of these provisions were inserted in state constitutions in the mid-nineteenth century in reaction to anti-democratic state legislative abuses.⁴⁰ They have survived many constitutional revisions.⁴¹

Often, the more controversial the legislative proposal is, the greater the temptation to bypass these limitations and requirements. For example, the Pennsylvania Legislature legalized casino gambling in a 144-page “amendment” attached at the last minute to a one-page bill.⁴² There were no committee references or hearings, yet the Pennsylvania Supreme Court upheld the process.⁴³ The state constitution, among other things, required committee reference for bills, banned laws that contained more than “one *subject*,” and provided “no bill shall be so altered or amended, on its passage through either House, as to change its original *purpose*.”⁴⁴

On the other hand, that court struck down a bill that affected almost half of the state’s social services budget and eliminated the General

37. *Id.* at 138. This might have been an argument against the proposed Florida unicameral legislature amendment in *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970). See *supra* notes 18–19 and accompanying text.

38. *Marshfield*, *supra* note 36, at 138.

39. See generally JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018) (discussing the implications of state constitutions being more easily and frequently amended than the federal constitution).

40. WILLIAMS & FRIEDMAN, *supra* note 7, at 290.

41. *Id.* at 289–309.

42. *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 392 (Pa. 2005).

43. *Id.* at 410, 419.

44. PA. CONST. art. III, §§ 1–3 (emphasis added). These provisions also seek to protect the gubernatorial veto power from “veto-proof” bills. WILLIAMS & FRIEDMAN, *supra* note 7, at 293–94. Advocacy for gubernatorial veto is a form of political defense.

Assistance (GA) public assistance program.⁴⁵ The Pennsylvania Legislature, however, responded by eliminating GA again in an act that drew a similar challenge.⁴⁶ This time the law was upheld against a strong dissent.⁴⁷

One wonders: how many of the recent anti-democratic voter-suppressive, anti-LGBTQIA+, book-banning, and anti-abortion laws might have been vulnerable to constitutional challenges based on state requirements of committee reference, disclosure of content of bills in their titles, limits such as to single subjects, and bans on significant alteration of bills during their consideration?

Another little-known state constitutional limit on legislation is the ban on special laws.⁴⁸ These limitations were inserted into state constitutions in the mid-nineteenth century in response to state legislatures' favoritism and outright corrupt statutes classifying persons and entities.⁴⁹ They prohibit legislative classifications that are not rational and are often confused by lawyers and judges with equality guarantees.⁵⁰ They are not, however, rights guarantees but rather are limitations on the legislative branch.⁵¹

Often these kinds of procedural challenges—by contrast to substantive challenges on familiar grounds like free speech, due process and equal protection, and unreasonable search and seizure—are seen as a sort of desperate, last-gasp tactic. These legislative procedure limits and requirements, however, are central to how we govern ourselves in the states. These required procedural requirements are democracy enhancing and provide transparency and access to the public and to advocates. As we saw in several of my examples, some challenges were rejected. Further, some of these violations can be and are cured by resort to proper procedures. Still there is often little to lose in invoking legitimate procedural challenges.

Fortunately, the United States Supreme Court rejected the extreme version of the Independent State Legislature Theory (ISLT) in *Moore v.*

45. *Washington v. Dep't of Pub. Welfare*, 188 A.3d 1135, 1139 (Pa. 2018).

46. *Weeks v. Dep't of Hum. Servs.*, 222 A.3d 722 (Pa. 2019).

47. *Weeks v. Dep't of Hum. Servs.*, No. 22 EAP 2021, 2023 WL 6300797 (Pa. Sept. 28, 2023). *See id.* at *28 (Wecht, J., dissenting).

48. Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 416, 421 (2019); Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 420 (2012).

49. WILLIAMS & FRIEDMAN, *supra* note 7, at 310–12.

50. *Id.* The Virginia Supreme Court explained the distinction in *Benderson Dev. Co. v. Sciortino*, 372 S.E.2d 751, 756 (Va. 1988).

51. WILLIAMS & FRIEDMAN, *supra* note 7, at 310.

Harper.⁵² This would have eliminated any state court judicial review of state election laws, applied to federal elections, under state constitutions based on the United States Constitution's Elections Clause language delegating to state "Legislature[s]" the power to regulate federal elections.⁵³ This topic had been hotly debated in academic circles.⁵⁴ So, for now, state courts may subject election laws applying to federal elections to ordinary judicial review under their state constitutions. In the words of Neal Katyal in his oral argument in *Moore*, the "blast radius" of a decision adopting the extreme version of ISLT would have been incalculable.⁵⁵

However, the Court did not reject the argument entirely. While it rejected the claim that there could be no state judicial review in federal election cases, it viewed the Elections Clause as creating a possible federal question within its jurisdiction to decide if state courts "transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections."⁵⁶ Therefore, state court decisions interpreting state constitutions in federal election cases will no longer constitute "adequate and independent state grounds" insulating them from SCOTUS review.⁵⁷ This is a potential huge avenue for the Court to enter election controversies in the 2024 federal elections and beyond. It is even possible the Court will do so using its "shadow docket," without full briefing or oral argument.⁵⁸

III. STATE CONSTITUTIONAL SEPARATION OF POWERS ARGUMENTS

Separation of powers doctrines are not designed to protect government officials but rather to protect people from governmental tyranny.⁵⁹ Therefore, separation of powers arguments can be deployed to

52. 143 S. Ct. 2065 (2023).

53. *Id.* at 2074; U.S. CONST. art. I, § 4, cl. 1.

54. See, e.g., Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571; Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235.

55. Transcript of Oral Argument at 71:22–25, 84:20–85:6, 101:5–13, *Moore*, 143 S. Ct. 2065.

56. *Moore*, 143 S. Ct. at 2089.

57. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

58. See generally STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023) (discussing the consequences of the current Court's use of shadow rulings).

59. See Williams, *supra* note 4, at 976.

protect rights as well as defend against abuse of government power.⁶⁰ State constitutional separation of powers issues can be treated quite differently from the federal doctrines. First, federal doctrines have never been applied to the states (“incorporated”), so there is no “floor” below which states may not go when interpreting their state constitutions.⁶¹ This does not mean, however, that federal constitutional separation of powers does not, as a practical matter, exert some gravitational force.⁶²

By contrast to the federal Constitution, about forty state constitutions contain *textual* statements on separation of powers.⁶³ State courts sometimes rely on these clauses,⁶⁴ and sometimes they do not.⁶⁵ There is a wide variety of governmental arrangements in the states, such as elected judiciaries, plural executives, and constitutional agencies.⁶⁶ Consequently, a nonfederal, state-specific doctrine of separation of powers needs to be considered.⁶⁷ For example, California has relied on the “strong legislature” model⁶⁸ whereas the New Jersey Supreme Court has relied on the “strong governor” model.⁶⁹ Issues like legislative delegations⁷⁰ and legislative appointments to executive agencies⁷¹ are good examples of state-specific interpretation. All of these state separation of powers approaches, like state constitutional rights claims, must proceed only on a state-by-state basis and lack the promise of national solutions. In some states, anti-democratic “power plays” where outgoing governors sign laws passed by their party’s majority legislature

60. *Id.* See also Justin R. Long, *State Court Protection of Individual Constitutional Rights: State Constitutional Structures Affect Access to Civil Justice*, 70 RUTGERS U. L. REV. 937, 953–57 (2018) (discussing several cases where separation of powers cases protected the individual rights of tort plaintiffs).

61. Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 94 (1998).

62. James A. Gardner, *The Positivist Revolution that Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 109–10 (1998).

63. WILLIAMS & FRIEDMAN, *supra* note 7, at 269. See also Johnathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4369636 (discussing the importance of textual statements on separation of powers in state constitutions).

64. See, e.g., *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924–25 (Fla. 1978). See also Marshfield, *supra* note 63 (manuscript at 22–23).

65. See, e.g., *Brown v. Heymann*, 297 A.2d 572, 576–77 (N.J. 1972).

66. WILLIAMS & FRIEDMAN, *supra* note 7, at 340–41.

67. *Id.* at 270–71.

68. See, e.g., *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 113 P.3d 1062, 1078 (Cal. 2005). See generally Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079 (2004).

69. See, e.g., *Commc'ns Workers of Am. v. Florio*, 617 A.2d 223, 230 (N.J. 1992).

70. See WILLIAMS & FRIEDMAN, *supra* note 7, at 276.

71. See *id.* at 274–76.

that diminish the powers of the incoming governor of the other party, have recently been utilized.⁷² In some of these instances, separation of powers defenses have proved to be an effective response.⁷³

A recent case in Montana illustrates the fact that the details of state constitutional separation of powers can vary significantly among states. In *Board of Regents of Higher Education v. State*,⁷⁴ the Montana Supreme Court held that the constitutionally established Board of Regents had final authority, rather than the legislature, over whether firearms could be possessed on state university campuses.⁷⁵

Importantly, in this current context, Professor Jonathan Marshfield has proposed an alternative understanding of state constitutional separation of powers:

As described above, the federal approach separates power to reinforce representative government, entrench constitutional norms, and mitigate majority faction. To do this, it relies on Madison's belief that officials will compete between branches of government, which will then hold government in check from within.

State constitutions capture an alternative logic for the separation of powers. State constitutions have a long history of viewing government officials as a dangerous elite that will eventually coalesce in a common interest against the people. The best antidote to this is to enhance popular oversight of government. The separation of powers is an important tool in this regard because by dividing (and sub-dividing) government into specific departments with detailed constitutional mandates, the public is better equipped to monitor and direct government. In the state tradition, a foundational reason for separating government power is to enhance popular accountability.⁷⁶

Marshfield continued:

However, state constitutions, tend to be oriented around a different concern. State constitutionalism seems obsessed with

72. Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1219 (2019).

73. See WILLIAMS & FRIEDMAN, *supra* note 7, at 277, 343–44.

74. 512 P.3d 748 (Mont. 2022).

75. *Id.* at 755–56. A recent Ohio power play sought to remove many of the important powers of the elected state board of education. A state trial court struck down the legislation as violating the single-subject rule. See *Collins v. DeWine*, No. 23CV-6611 (Ohio Ct. C.P. Franklin Cnty. Sept. 21, 2023).

76. Marshfield, *supra* note 63 (manuscript at 29).

the fear that government will be captured, not by a self-serving democratic majority, but by an elite minority. The dominant concern in state constitutional theory is that government officials will use their political power to pursue their own interests at the expense of the public and in derogation of popular preferences. Thus, state constitutional design tends to be oriented around a different problem than Madisonian constitutional theory (or at least a different prioritization of risk). State constitutions are structured principally to empower democratic majorities and regulate government officials. Madisonian constitutional theory, on the other hand, looks to use government officials and institutions to enforce constraints on democratic majorities.⁷⁷

These interpretations, documented through the evolution of state constitutions' distribution of powers, are directly relevant to the anti-democratic, illiberal, sometimes "power grabbing" legal policies we are observing and appear to fit into the fears of state government abuses that Marshfield describes: "ambitious government officials were likely to collude across government institutions and offices. Political power was a gravitational force that overtook all other distinctions in law and society."⁷⁸ Today's "minority faction[s]" are exactly what state constitutionalists feared would overtake popular sovereignty.⁷⁹ A focus, therefore, as pointed out by Jessica Bulman-Posen and Miriam Seifter, on popular sovereignty is the antidote.⁸⁰

Marshfield proposes, with illustrative examples, that courts apply an "accountability doctrine," requiring close attention to state constitutional text.⁸¹ Where text does not solve the question, "a critical consideration should be whether the proposed power would obfuscate the public's ability to track accountability for decisions."⁸²

State constitutions, in addition to containing a wide range of rights guarantees and provisions distributing and limiting governmental power, also contain many "policy" provisions. This has been an increasing feature of state constitutions since the first provisions were adopted. These will have no analog in the federal constitution. On average nationally, up to forty percent of state constitutional provisions deal with

77. *Id.* (manuscript at 37) (footnotes omitted).

78. *Id.* (manuscript at 39).

79. *Id.*

80. Bulman-Posen & Seifter, *supra* note 1, at 1340. Marshfield's theory could be important in challenging power plays. *See supra* notes 72–73 and accompanying text.

81. Marshfield, *supra* note 63 (manuscript at 60–63).

82. *Id.* (manuscript at 61–62).

policy matters, most of which could be dealt with by ordinary legislation.⁸³ These entrenched matters such as regulation of elections and environmental quality, among other matters. For example, provisions dealing with workers' compensation can be seen as creating positive rights.⁸⁴

Finally, state constitutions are simply more "democratic" than the federal Constitution.⁸⁵ Governors are elected statewide, with no Electoral College to declare the candidate who lost the popular vote to be the winner.⁸⁶ State constitutional amendments are voted on statewide, and state senates are subject to the federal one person, one vote requirement.⁸⁷ Most elected state supreme court justices run statewide, without gerrymandering.⁸⁸

As encouraging as the state constitutional democratic opportunities are, we cannot forget that they were pointed out partially as *defenses* against election subversion. Jim Gardner has provided a thorough analysis of the already-existing anti-democratic policies that have been flooding at least some of the states.⁸⁹ He concludes that "[i]n the preceding review of authoritarian-style actions . . . certain states show up far more frequently than others."⁹⁰ Further:

Based on this analysis, it seems plausible to conclude that North Carolina and Wisconsin have advanced the farthest down the road to subnational authoritarianism, with Florida, Texas, Kansas, Arizona, and Alabama not far behind. Disturbing initial signs of democratic backsliding may be seen as well in Georgia, Iowa, Michigan, Ohio, Pennsylvania, and Tennessee. Meanwhile, New York and California, whose governors openly, repeatedly, and sometimes loudly opposed Mr. Trump, may have deepened their states' commitment to liberal

83. WILLIAMS & FRIEDMAN, *supra* note 7, at 40.

84. See Robert F. Williams, *Can State Constitutions Block the Workers' Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1095–98 (2017). Michigan recently added the fundamental right to vote as well as voter-protection provisions to its constitution. MICH. CONST. art. II, § 4.

85. See Bulman-Pozen & Seifter, *supra* note 1, at 1340.

86. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 295 (2022).

87. See *id.* at 298.

88. *Id.* at 296.

89. See James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021). See also Seifter, *supra* note 86, at 304–27 (describing recent attacks on state majoritarian institutions).

90. Gardner, *supra* note 89, at 908.

democracy, though how well those polities actually implement that commitment is an entirely different question.⁹¹

Political alignments in the states can change very quickly, as we have seen. Those who oppose anti-democratic proposals cropping up in states around the country will need to be nimble in moving between offensive strategies for democratic proposals and defensive strategies for anti-democratic proposals.

IV. STATE CONSTITUTIONAL STARE DECISIS

The need to focus on the doctrine of precedent has arisen as state courts, with newly elected Republican majorities, have overturned even very recent precedents. The Iowa Supreme Court overturned a recent abortion rights decision;⁹² the North Carolina Supreme Court did the same with respect to gerrymandering and voter ID;⁹³ and other attempts to overturn abortion rights decisions are pending in Florida⁹⁴ and North

91. *Id.* at 909 (footnote omitted). Professor Gardner has attributed some of the democratic backsliding to the United States Supreme Court, at least in election law. *See* James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 *FORDHAM L. REV.* 423, 425–26 (2021) (“[I]t is now clear that the Supreme Court has functioned, in its management of the constitutional jurisprudence of democracy, as a vector of infection, a kind of super-spreader of the conditions in which populist authoritarianism may take root and thrive.”).

92. *See Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022).

93. *See Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023); *Holmes v. Moore*, 886 S.E.2d 120 (N.C. 2023).

94. *State v. Planned Parenthood of Sw. & Cent. Fla.*, 342 So. 3d 863 (Fla. Dist. Ct. App. 2022). *See also* Regan McCarthy, *Voters Could Decide the Future of Abortion Access in Florida*, NPR (Aug. 4, 2023, 5:30 AM), <https://www.npr.org/2023/08/04/1191746133/abortion-access-florida-voters-constitutional-amendment-ballot-initiative> [<https://perma.cc/EY8P-G5U4>] (“[T]his fall a Florida Supreme Court decision is expected to trigger a six-week ban passed by the Republican-led legislature earlier this year.”). Florida’s Constitution is among the easiest state constitutions to amend in the country. *See* TALBOT D’ALEMBERTE, *THE FLORIDA STATE CONSTITUTION* 315 (G. Alan Tarr ed., 2d ed. 2011). Further, Florida’s voters have already rejected a proposed amendment to overturn the abortion rights decision. McCarthy, *supra* (“In 2012, voters defeated a proposed amendment that would have specified Florida’s constitution could not be interpreted to provide greater abortion protection than the U.S. Constitution.”).

Dakota.⁹⁵ The South Carolina Supreme Court overturned its recent affirmation of abortion rights.⁹⁶

Stare decisis is viewed differently in common law, statutory interpretation, and constitutional law.⁹⁷ But, of course, there are two kinds of American constitutional law. In federal constitutional law the well-known weaker version of stare decisis is based on Justice Brandeis's dissent in *Burnet v. Coronado Oil & Gas Co.*⁹⁸ He reasoned that because federal amendment was so difficult, the Court had to have the power to correct its own errors.⁹⁹ What many people fail to notice is that Justice Brandeis continued, making a point about state constitutions:

The policy of *stare decisis* may be more appropriately applied to constitutional questions arising under the fundamental laws of those States whose constitutions may be easily amended. The action following the decision in *Ives v. South Buffalo Ry. Co.* shows how promptly a state constitution may be amended to correct an important decision deemed wrong.¹⁰⁰

This fundamental point—that state constitutions are much more easily amended—can support an argument for a stricter doctrine of precedent in the states.¹⁰¹ As we see more rights-protective state court decisions being challenged these and other arguments supporting stare decisis will need to be further developed.

V. STATE CONSTITUTIONAL POLITICAL STRATEGIES

There are many political approaches to defending against proposed state constitutional amendments, and, of course, many more political defenses to the enactment of statutes. Most of these are beyond the scope of this Essay, but it is worth mentioning a few.

Immediately after the Supreme Court's *Dobbs v. Jackson Women's Health Organization*¹⁰² decision, we saw very effective political defenses

95. Trisha Ahmed & Geoff Mulvihill, *North Dakota's Latest Try at Abortion Ban Could Face Lawsuit*, HUFFPOST (Apr. 26, 2023, 5:03 PM), https://www.huffpost.com/entry/abortion-north-dakota-lawsuit_n_64498c70e4b03c1b88cb0120 [<https://perma.cc/K8KP-4ZWM>].

96. *Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121 (S.C. 2023).

97. WILLIAMS & FRIEDMAN, *supra* note 7, at 389–91.

98. 285 U.S. 393 (1932).

99. *See id.* at 406–07 (Brandeis, J., dissenting).

100. *Id.* at 409 n.5 (citation omitted).

101. *See* WILLIAMS & FRIEDMAN, *supra* note 7, at 389–91.

102. 142 S. Ct. 2228 (2022).

to anti-abortion amendments in Kansas,¹⁰³ Kentucky,¹⁰⁴ California,¹⁰⁵ and Michigan.¹⁰⁶ In Kansas, the anti-abortion amendment was submitted at a low-turnout summer election but was soundly defeated.¹⁰⁷ Some states, such as New Jersey, require constitutional amendments to be submitted at general elections.¹⁰⁸ The Kansas defeat was a major national surprise, and has affected both the national conversation about reproductive rights as well as the state-specific political discourse.¹⁰⁹

An interesting political defense against a proposed state constitutional amendment in Ohio deserves mention. As told by Dean Steven Steinglass:

On November 3, 2015, Ohio voters approved an amendment proposed by the General Assembly to make more difficult the use of the initiative to create monopolies, to specify or determine tax rates, or to confer special benefits on favored groups. This proposal was widely seen as a ploy to undercut a proposed initiated amendment to permit the growth, cultivation, manufacture, distribution, and sale of marijuana products for both recreational and medical uses.¹¹⁰

It turned out that the marijuana amendment was “overwhelmingly rejected” by the electorate, but the anti-monopoly amendment was adopted.¹¹¹ Steinglass went on to explain that the marijuana amendment created a monopoly, that the nature of the successful anti-monopoly

103. David Welch, *Abortion Rights Backed by Voters in Michigan, Kentucky, Vermont*, BLOOMBERG L. (Nov. 9, 2022, 7:46 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-rights-backed-by-voters-in-michigan-kentucky-vermont> [https://perma.cc/HB4W-WULG].

104. *Id.*

105. Sydney Johnson, *Abortion Rights Win in California as Well as Red States*, S.F. EXAM’R, https://www.sfexaminer.com/news/abortion-rights-win-in-california-election-and-red-states/article_f6fd19b4-6089-11ed-bd8d-57665979d90c.html [https://perma.cc/39PA-F54P] (Feb. 2, 2023).

106. Gabriella Borter, *Abortion Rights Wins in Michigan, Kentucky Give Fuel for Future Ballot Measures*, REUTERS (Nov. 9, 2022, 3:59 PM), <https://www.reuters.com/world/us/michigan-headlines-night-state-abortion-rights-victories-2022-11-09/>.

107. *See* Welch, *supra* note 103.

108. N.J. CONST. art. II, § 2.

109. *See* Sherman Smith & Lily O’Shea Becker, *Kansas Voters Defeat Abortion Amendment in Unexpected Landslide*, KAN. REFLECTOR (Aug. 2, 2022, 9:38 PM), <https://kansasreflector.com/2022/08/02/kansas-voters-defeat-abortion-amendment-in-unexpected-landslide-1/> [https://perma.cc/4YUX-BN8Q].

110. Steven H. Steinglass, *Constitutional Revision: Ohio Style*, 77 OHIO ST. L.J. 281, 326 (2016).

111. *Id.* at 327.

amendment was rather complicated, and that it might have taken precedence had the monopoly amendment also been approved based on the “last-antecedent” rule.¹¹² The larger lesson from this sophisticated use of the “ploy” of an amendment that conflicted substantively with another one is an interesting political strategy.

The recent Wisconsin Supreme Court election reminds us how important these former low visibility races are.¹¹³ Further, states like Ohio unsuccessfully moved to propose, through amendment, a higher threshold for popular adoption of state constitutional amendments.¹¹⁴ The Ohio Supreme Court approved a low-turnout, Kansas-style August referendum to raise the threshold to thwart a reproductive rights amendment on the November election ballot,¹¹⁵ but the proposal failed overwhelmingly at the polls, with a Kansas-style turnout.¹¹⁶ The reproductive rights amendment itself survived a separate-vote challenge¹¹⁷ and then survived an inadequate voter information challenge.¹¹⁸

112. *Id.* at 326–29 (quoting *Wohl v. Swinney*, 888 N.E.2d 1062, 1065 (2008)).

113. See generally Jane S. Schacter, *Polarization, Nationalization, and the Constitutional Politics of Recent State Supreme Court Elections*, 2022 WIS. L. REV. 1311.

114. Marty Schladen, *Poll: Majority of GOP Lawmakers Want to Cut Voter Access to Ohio Constitution*, OHIO CAP. J. (Apr. 17, 2023, 5:00 AM), <https://ohiocapitaljournal.com/2023/04/17/poll-vast-majority-of-gop-lawmakers-want-to-cut-voter-access-to-ohio-constitution/> [https://perma.cc/4NLS-SEL3].

115. See *State ex rel. One Pers. One Vote v. LaRose*, No. 2023-Ohio-1992 (Ohio June 16, 2023) (per curiam). See also Annie Gowen, *Ohio's GOP Supermajority Tests Limits of Democracy Before Abortion Vote*, WASH. POST (Oct. 6, 2023, 6:00 AM), <https://www.washingtonpost.com/nation/2023/10/06/ohio-abortion-gerrymandering-republicans-supermajority/>.

116. Adam Edelman, *In a Win for Abortion-Rights Supporters, Ohio Voters Reject Issue 1*, NBC NEWS, <https://www.nbcnews.com/politics/elections/ohio-issue-one-reject-loss-abortion-rights-ballot-measure-rcna98842> [https://perma.cc/L73X-KPC4] (Aug. 8, 2023, 10:29 PM).

117. See *State ex rel. DeBlase v. Ohio Ballot Bd.*, No. 2023-Ohio-1823 (Ohio June 1, 2023) (per curiam); Jessie Balmert, *Ohio Supreme Court Rejects Legal Challenge, Clears Path for November Abortion Rights Vote*, CIN. ENQUIRER, <https://www.dispatch.com/story/news/politics/2023/08/11/ohio-supreme-court-rejects-legal-challenge-to-abortion-rights-issue/70567955007/> [https://perma.cc/2DLC-33F8] (Aug. 11, 2023, 8:40 PM).

118. See *State ex rel. Ohioans United for Reprod. Rts. v. Ohio Ballot Bd.*, No. 2023-Ohio-3325 (Ohio Sept. 19, 2023) (per curiam). The reproductive rights amendment was ratified overwhelmingly on November 7, 2023. Kate Zernike, *Ohio Vote Continues a Winning Streak for Abortion Rights*, N.Y. TIMES, <https://www.nytimes.com/2023/11/07/us/politics/ohio-abortion-amendment.html> (Nov. 8, 2023, 11:05 AM).

CONCLUSION

State constitutions, including their procedural limits and requirements for amendments and revisions, and the enactment of statutes, remain relatively low visibility. My objective in this Essay is simply to introduce these provisions as possible defenses to the rising tide of anti-democratic and rights-restricting state statutes and constitutional amendments. As the authoritarian *national* politics of the Republican Party continue to permeate *state* politics, we cannot expect any diminution in the volume of illiberal proposals in states where it is in control.¹¹⁹

It is important for us to recognize the possible affirmative benefits available under state constitutions, while at the same time understand how these same constitutions can be invoked in defense against measures of which we disapprove.

119. See James A. Gardner, *The Myth of State Autonomy: Federalism, Political Parties, and the National Colonization of State Politics*, 29 J.L. & POL. 1, 48 (2013); GRUMBACH, *supra* note 3, at 4; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080 (2014) (“Democratic and Republican, not state and national, are today’s political identities. But the state and federal governments are important sites of partisan affiliation.”).