FOREWORD

SPECIAL ISSUE ON PUBLIC LAW IN THE STATES

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National-level developments in law and government typically grab the biggest headlines and drive discourse in the legal academy. With a high-stakes presidential election, major U.S. Supreme Court rulings, and more, 2024 has been no exception. But many consequential legal developments have unfolded at the state level as well. A number of state courts, for example, have issued important rulings involving voting, direct democracy, and state governance. In explaining that the Montana Constitution protects voting rights more robustly than the Federal Constitution, the Montana Supreme Court rejected several new state voting restrictions.[1] In New York, the Court of Appeals (the state's highest court) concluded that the state constitution authorized a recent expansion of voting by mail.[2] In contrast, in Idaho and Kansas, state courts upheld restrictive voting laws.[3] Meanwhile, the Utah Supreme Court and the Michigan Supreme Court both rejected legislative efforts to meddle with direct democracy, concluding that they interfered with the people's fundamental rights to alter their government and initiate constitutional amendments.[4] And in a major state separation-of-powers ruling, the Wisconsin Supreme Court reined in the state's unusual system

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1. *Mont. Democratic Party v. Jacobsen*, 2024 MT 66, ¶¶ 4, 17, 545 P.3d 1074, 1082, 1085.

2. *Stefanik v. Hochul*, No. 86, 2024 WL 3868644, *10 (N.Y. Aug. 20, 2024).

3. *BABE VOTE v. McGrane*, 546 P.3d 694, 699 (Idaho 2024); *League of Women Voters of Kan. v. Schwab*, 549 P.3d 363, 369 (Kan. 2024).

4. *League of Women Voters of Utah v. Utah State Legislature*, 2024 UT 21, ¶ 8, 554 P.3d 872, 879; *Mothering Just. v. Att'y Gen.*, No. 165325, 2024 WL 3610042, at *1 (Mich. July 31, 2024), *opinion clarified*, 2024 WL 4231487 (Mich. Sept. 18, 2024) (mem.).

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of legislative committee vetoes.[5] This list could go on, and, of course, much more is happening in the states beyond the courtroom. When legal scholars cast their gaze to the states, they find no shortage of fascinating and salient topics to think and write about.

The Essays in this Special Issue were presented at, or grew out of, the Fourth Annual Public Law in the States Conference hosted by the State Democracy Research Initiative at the University of Wisconsin Law School in May 2024.[6] This annual conference brings together scholars and state jurists to explore questions pertaining to state public law, including examining distinctive features of state governance and the relationship between states and the federal government.[7] In addition to a keynote judicial panel, this year's conference featured four academic panels on state constitutions, state institutions, state courts, and state-level democracy.[8]

I. JUDICIAL INSIGHTS

The Conference's keynote judicial panel featured five current or retired state supreme court justices: Justice Joy Cunningham (Illinois), Justice Melissa Hart (Colorado), Justice Goodwin Liu (California), Chief Justice David Nahmias (ret.) (Georgia), and Justice Rachel Wainer Apter (New Jersey). In a discussion moderated by the State Democracy Research Initiative's Faculty Co-Director Rob Yablon, the justices discussed distinctive decision-making features of their respective state courts, including how opinions are assigned, when the court conferences, how conferences are managed, and when and how the justices vote on outcomes. The justices also discussed judicial selection methods and offered advice to aspiring jurists.

In addition to participating in the panel, Justice Melissa Hart and her former law clerk Jake Mazeitis contributed an Essay to this Special Issue, *The Role of State Justices in Advancing State Constitutional Law:*

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5. *Evers v. Marklein*, 2024 WI 31, ¶ 2, 8 N.W.3d 395, 399 (Wis. 2024).

6. *State Democracy Research Initiative Hosts 4th Annual Public Law in the State Conference*, UNIV. OF WIS. L. SCH. (Aug. 21, 2024) [hereinafter *Public Law in the States Conference*], https://statedemocracy.law.wisc.edu/events/2024/state-democracy-research-initiative-hosts-4th-annual-public-law-in-the-states-conference/ [https://perma.cc/V2F6-X9RN]; *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; Allie Boldt, Miriam Seifter & Robert Yablon, Foreword, *Special Issue on Interpretation in the States*, 2022 WIS. L. REV., no. 5, at i; Allie Boldt, Miriam Seifter & Robert Yablon, Foreword, *Special Issue on Public Law in the States*, 2023 WIS. L. REV. 1485.

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

8. *Id.*

Some Thoughts from Colorado.[9] In this piece, Justice Hart and Mazeitis discuss the apparent reluctance of Colorado litigants to raise novel state constitutional claims. They attribute this in part to "the habits and rules of the Colorado judicial system" and encourage state court justices to "move first" to signal willingness to consider state constitutional law.[10] The authors suggest jurists could do this by oral argument, public talks about state constitutional law, or publishing essays in appropriate forums, like this Special Issue.

II. STATE CONSTITUTIONS

Two pieces in this Special Issue were presented at a panel titled "State Constitutions." In *Constitutional and Administrative Innovation Through State Labor Law*, Kate Andrias explores the development of labor law at the state level.[11] Pointing to the failed efforts to reform labor law at the federal level, Andrias reviews efforts to strengthen labor rights at the state level through direct democracy and administration. Andrias's Essay highlights two key state developments—tripartite administrative boards and constitutional rights articulation—and considers whether these innovations could be useful beyond workers' rights. She concludes by stressing the importance of continued state innovation given recent federal setbacks for labor reform, including Supreme Court decisions undermining the administrative state and altering First Amendment doctrine in ways that hamper unions and labor organizing.[12]

In *Single-Subject Rules and the Nature of State Judicial Power*, Chad Oldfather explores the single-subject rules in many state constitutions, which "require legislation, ballot initiatives, and constitutional amendments to encompass only one subject."[13] While acknowledging the difficulty in applying single-subject rules, Oldfather reasons that in exercising such power and rejecting legislation based on the single-subject requirement, elected state courts can act as an "agent of majoritarianism" in "states with a divided political culture."[14] This panel also featured remarks by David Pozen on a recent essay, *The Common Law of Constitutional Conventions*, exploring the history of

9. Jake Mazeitis & Melissa Hart, *The Role of State Justices in Advancing State Constitutional Law: Some Thoughts from Colorado*, 2024 WIS. L. REV 1447.

10. *Id.* at 1450–52.

11. Kate Andrias, *Constitutional and Administrative Innovation Through State Labor Law*, 2024 WIS. L. REV. 1467.

12. *Id.* at 1511.

13. Chad M. Oldfather, *Single-Subject Rules and the Nature of State Judicial Power*, 2024 WIS. L. REV. 1513.

14. *Id.* at 1533.

state constitutional conventions as guidance for a possible federal convention. [15]

III. STATE INSTITUTIONS

The Conference's next panel discussed state institutions. In *Maximizing Disability: The Road to Extractive Federalism*, Karen Tani recounts the longstanding practice of "shift[ing] recipients of state-funded aid onto federally funded disability-based income support programs."[16] Based on her research, Tani explains that while the shift to federal disability funding could initially be seen as an attempt on the part of states to "better meet the needs of poor residents," recent examples demonstrate that states, often with the use of private consulting companies, are "us[ing] poor people as *conduits* for federal dollars," a pattern known as "extractive federalism."[17] Tani concludes by urging others to shine a light on examples of extractive federalism in other contexts. As part of this panel, Katherine Mims Crocker also presented an early-stage work exploring standing of municipalities, which will be part of our 2025 Special Issue.[18]

IV. STATE COURTS

Our panel "State Courts" featured three of the Essays in this Special Issue. In *Critical Family Regulation Scholarship*, Lisa Washington examines the family regulation system, including judges and caseworkers who intervene in families through separation and supervision.[19] Washington criticizes the system's tendency to compel marginalized families to engage in knowledge production that conforms to preconfigured, reductive scripts—scripts "that require parents to perform submission to and appreciation of state intervention" and embed "gendered and racialized narratives," while simultaneously discrediting the actual experiences of many marginalized families.[20] Washington explores how "critical family regulation scholarship" can better

15. *Public Law in the States Conference*, *supra* note 6; David Pozen, *The Common Law of Constitutional Conventions*, 112 CALIF. L. REV. (forthcoming 2024).

16. Karen M. Tani, *Maximizing Disability: The Road to Extractive Federalism*, 2024 WIS. L. REV. 1535, 1537.

17. *Id.* at 1538, 1540; *see also* Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 ARIZ. L. REV. 675 (2010).

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

19. S. Lisa Washington, *Critical Family Regulation Scholarship*, 2024 WIS. L. REV. 1559.

20. *Id.* at 1564–65.

understand and engage with marginalized families as "epistemic agents capable of producing and sharing knowledge."[21]

In an Essay entitled Chevron*'s 51 Imperfect Solutions*, Christopher Walker and Neena Menon explore the development of administrative law deference doctrines in state courts.[22] Descriptively, the authors present Menon's data on state courts' treatment of *Chevron* over time and analyze the "political dynamics of deference regimes in states."[23] Prescriptively, the authors conclude that structural distinctions between states and the federal government counsel against states moving in lockstep with federal *Chevron* reforms. Instead, they encourage states to innovate in this area.[24]

Finally, in *The State Statutes Project*, Diego Zambrano and Neel Guha discuss using "large language models (LLMs) to produce an annotated database of state statutes."[25] In describing possible annotations, the authors offer examples of "whether a clause creates a private right of action, whether it creates an immunity from lawsuits, [and] whether it is a criminal provision derived from a model code."[26] To illustrate, they offer a database of eighteen hundred distinct statutory clauses across the fifty states featuring "foreign relations ingredients," which they define as "any statutory text that implicates foreign countries, foreign individuals, foreign laws, or foreign courts."[27] The authors then analyze the results to describe the value of the database to further academic research, concluding with: "Our ultimate hope is that the database we build can support greater research into the states."[28]

V. STATE-LEVEL DEMOCRACY

The final Essay in this Special Issue was presented at a panel entitled "State-Level Democracy." In their Essay, Purcell *Principles for State Courts*, Robert Yablon and Derek Clinger explore whether and how state courts have used the "*Purcell* principle"[29]—a doctrine that discourages federal courts from "alter[ing] the election rules on the eve of an

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21. *Id.* at 105.

22. Christopher J. Walker & Neena Menon, Chevron*'s 51 Imperfect Solutions*, 2024 WIS. L. REV. 1586.

23. *Id.* at 1589.

24. *Id.* at 1609.

25. Neel Guha & Diego A. Zambrano, *The State Statutes Project*, 2024 WIS. L. REV.1615, 1617.

26. *Id.* at 1618.

27. *Id.*

28. *Id.* at 1635.

29. Robert Yablon & Derek Clinger, Purcell *Principles for State Courts*, 2024 WIS. L. REV. 1637.

election."[30] After surveying state court decisions citing *Purcell* and its U.S. Supreme Court progeny, the authors conclude that state courts "generally do not emulate" recent U.S. Supreme Court practice and instead "have taken a more nuanced and context-specific approach" to requests for pre-election relief.[31] The authors explain that state courts are right not to lockstep with the federal *Purcell* principle given state courts' distinctive institutional powers and duties. The authors also suggest several factors that state courts should consider when they are asked to intervene close to an election.[32] The panel also featured remarks by Joshua Sellers on the legal rights that permit political parties to disassociate from would-be candidates, and by Rebecca Green on distinctions between good faith and bad faith that might help courts ensure that elections in the United States are fair.[33]

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The Essays in this Special Issue highlight the central importance of state public law in both the legal academy and the public more generally. As legal scholars increasingly turn their attention to state constitutions, state courts, and state-level democracy, our hope is that these pieces will inform their work and kindle additional interest in these vital and still underexplored topics.

30. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

31. Yablon & Clinger, *supra* note 26, at 1640.

32. *Id.* at 1641.

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