

FOREWORD

SPECIAL ISSUE ON PUBLIC LAW IN THE STATES

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The deluge of high-profile, high-stakes controversies flowing from the federal government over the past year has made it easier than ever for legal scholars and the broader public to overlook events in their own backyard. But amid federal upheaval, myriad important legal and policy developments continue to unfold at the state level. State courts have continued to issue important opinions on topics ranging from voting and redistricting,¹ to education and guns,² and to state constitutional structure.³ State and local policymakers have continued to confront vexing societal challenges involving housing, education, public safety, the environment, and

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1. See, e.g., *Griffin v. N.C. State Bd. of Elections*, 387 N.C. 542, 542 (2025) (addressing a post-election challenge to a closely contested state supreme court race); *Genser v. Butler Cnty. Bd. of Elections*, 325 A.3d 458, 461 (Pa. 2024) (holding that state law allowed voters to cure deficient mail-in ballots by casting provisional ballots on election day); *League of Women Voters of S.C. v. Alexander*, 921 S.E.2d 660, 664 (S.C. 2025) (rejecting a state constitutional challenge to partisan gerrymandering).

2. See, e.g., *Contoocook Valley Sch. Dist. v. State*, No. 2024-0121, 2025 WL 1802543, at *1 (N.H. July 1, 2025) (holding that the state's existing education funding law violated the state constitution's commitment to provide an adequate education); *State v. Gator's Custom Guns, Inc.*, 568 P.3d 278, 281 (Wash. 2025) (rejecting right-to-bear-arms challenge to state law banning the manufacturing or sale of large-capacity magazines).

3. See, e.g., *Montenegro v. Fontes*, 576 P.3d 692, 695 (Ariz. 2025) (finding that plaintiffs, the Speaker of state's house of representatives and President of the state's Senate, were authorized to sue on behalf of the legislature and had standing to challenge the constitutionality of a citizen-initiated statute); *Evers v. Marklein*, 2024 WI 31, ¶2, 412 Wis.2d 525, 8 N.W.3d 395 (holding that statutes allowing legislative committees to suspend administrative rules violated the state constitution).

much more.⁴ And voters have continued to weigh whether to amend their state constitutions, including in ways that directly implicate the functioning of state democratic systems.⁵ These are all rich subjects for scholarly inquiry that too often go unstudied.

The Essays in this Special Issue were presented at, or grew out of, the fifth annual Public Law in the States Conference hosted by the State Democracy Research Initiative at the University of Wisconsin Law School in May 2025.⁶ 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. In addition to a keynote judicial panel, this year's conference featured four academic panels on state public law and democracy, state constitutions, state courts, and state institutions.

4. See, e.g., Robbie Sequeira, *'It Is a Crisis': Mayors Share How Grappling with Housing Has Shaped Their Jobs*, STATELINE (Oct. 27, 2025, at 5:00CT), <https://stateline.org/2025/10/27/it-is-a-crisis-mayors-share-how-grappling-with-housing-has-shaped-their-job/>; *Education Themes in 2025 State of The State Addresses*, NAT'L GOVERNORS ASSOC. (Apr. 2, 2025), <https://www.nga.org/news/commentary/education-themes-in-2025-state-of-the-state-addresses/>; Thea Sebastian & Hannah Love, *How States Can Lead on Community Safety: Five Recommendations for Preventing and Reducing Violence*, BROOKINGS INST. (May 20, 2025), <https://www.brookings.edu/articles/how-states-can-lead-on-community-safety-five-recommendations-for-preventing-and-reducing-violence/>; Lindsey Jean Schueman, *Beyond Washington: Nine Examples of Local Governments Taking Climate Action*, ONE EARTH (Oct. 10, 2025), <https://www.oneearth.org/nine-examples-of-local-governments-taking-climate-action/>.

5. See, e.g., Assemb. Const. Amend. No. 8, Res. Chapter 156, 2025–26 Reg. Sess. (Cal. 2025) (approved, redrawing California's congressional districts); Question 1: Citizen Initiative, Referendum Election, Nov. 4, 2025 (Me. 2025) (failed, requiring voters to present photo identification to vote and curtails access to absentee voting); S.J. Res. 2, 2025–26 Leg. (Wis. 2025) (approved, requiring voters to present a photo ID requirement).

6. *State Democracy Research Initiative Hosts 5th Annual Public Law in the States Conference*, UNIV. OF WIS. L. SCH. (June 11, 2025), <https://statedemocracy.law.wisc.edu/events-summary/2025/state-democracy-research-initiative-hosts-5th-annual-public-law-in-the-states-conference/> [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); Allie Boldt, Miriam Seifter & Robert Yablon, *Foreword: Special Issue on Public Law in the States*, 2023 WIS. L. REV., no. 5 at 1485 (special issue); Miriam Seifter, Robert Young & Bree Grossi Wilde, *Foreword: Special Issue on Public Law in the States*, 2024 WIS. L. REV. 1441, 1441.

A. JUDICIAL INSIGHTS

The Conference's keynote judicial panel featured five state supreme court justices: Justice C. Shannon Bacon (New Mexico Supreme Court), Justice Peter Killough (Maryland Supreme Court), Justice Bill Mims (Virginia Supreme Court, senior status), Justice Paige Petersen (Utah Supreme Court), and Chief Justice Loretta Rush (Indiana Supreme Court). In a discussion moderated by the State Democracy Research Initiative's Faculty Co-Director, Rob Yablon, the justices addressed judicial selection methods and the impact of those methods on collegiality and consensus building; the need to strengthen efforts to provide access to justice, including by broadening the practice of law to paraprofessionals and raising salaries for public defenders; and ongoing security concerns and threats to the judiciary.

B. STATE PUBLIC LAW AND DEMOCRACY

This Special Issue includes one piece presented at a panel on "State Public Law in Democracy." In *Problems of Compliance in Election Law*, Lisa Manheim examines the role of variable compliance standards in election law—specifically strict compliance versus substantial compliance. Professor Manheim argues that these doctrines are necessary to resolve the tension between the complex legal governance of elections and the inevitable occurrence of irregularities. Although the purpose-driven approach of substantial compliance standards may seem difficult to square with the rise of modern textualism, Manheim nonetheless argues that these compliance standards are worth keeping: "Attempting to remove these standards from the doctrine would, accordingly, introduce more problems than it would solve."⁷ She also suggests, among other things, that lawmakers consider codifying compliance standards and that courts be more precise in their analysis.

This panel also featured remarks by Bryna Godar on her article *Disenfranchisement Creep*,⁸ which describes overlooked ways that states improperly disenfranchise voters, both through formal, legalistic measures and informal hurdles. She further argues that these forms of disenfranchisement sometimes violate state constitutional limits and that state constitutional litigation may provide a corrective. To round out the panel, Joy Milligan and

7. Lisa Manheim, *Problems of Compliance in Election Law*, 2025 WIS. L. REV. 1321, 1325.

8. Bryna Godar, *Disenfranchisement Creep*, 112 VA. L. REV. (forthcoming 2026) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5172792).

Bertrall Ross presented an early-stage work exploring whether states can offer instructive case studies for a comprehensive redrafting of the United States Constitution to ensure participation of minorities, women, and others previously excluded from the framing process.

C.STATE CONSTITUTIONS

The conference's next panel focused on additional aspects of state constitutional law, including discussion of one piece that appears in this Special Issue. In *State Constitutions and the Right to Gender Autonomy*, Katie Eyer proposes that advocates should pursue a right to gender autonomy—the freedom to self-determine and express one's gender without government interference—through state constitutions and courts rather than relying on the currently unreceptive federal courts moving the right from “‘off the wall’ to ‘on the wall.’”⁹ By drawing a parallel to how the LGBTQ movement secured marriage and sexual autonomy rights in part through incremental state-level victories, Eyer argues that state constitutions, which often have more expansive protections for privacy, liberty, and autonomy, offer a promising pathway to incorporate gender autonomy into mainstream constitutional law, as illustrated by a recent developments in Montana. Eyer sees potential for advocates to move the idea of a state constitutional gender autonomy from “‘off the wall’ to ‘on the wall.’”¹⁰

The panel also featured discussion of two other works-in-progress. Franciska Coleman presented *Are the Adjuncts Alright?*, an empirical research project that explores the extent to which professors believe they have academic freedom. Coleman suggested state constitutions as alternative vehicles for constitutionalizing academic freedom. Separately, Nathan Fleming presented an essay examining a proposed constitution in 2016 for D.C. statehood, comparing that constitutional framework to those of other federal capitals that function as city-states, including Berlin, Brussels, and Vienna.

D.STATE COURTS

Our panel on “State Institutions” featured three of the essays in this Special Issue. In *Lockstepping Structure*, Darrell A. H. Miller explores the practice of “lock-stepping,” where state courts mechanically adopt federal constitutional interpretations despite

9. Katie Eyer, *State Constitutions and the Right to Gender Autonomy*, 2025 WIS. L. REV. 1293, 1293.

10. *Id.*

significant differences between state and federal constitutions. Specifically, the essay focuses on “the phenomenon of lock-stepping once the question turns from rights to structure.”¹¹ Professor Miller argues that reliance on federal precedent when addressing structural matters is theoretically unsound because state constitutions often have distinct structural features that have distinct origins and serve distinct purposes. While acknowledging that federal constitutional limits, primarily the Due Process Clause of the Fourteenth Amendment, set an outer boundary for state institutional design, the essay calls for state judges to develop their own state-specific approaches grounded in their unique constitutional texts, histories, and values.

In *History and Tradition in Constitutional Interpretation: Resistance in the States*, Serena Mayeri analyzes how state courts, in interpreting state constitutions’ protection of abortion rights, are resisting the narrow historical methodology used by the U.S. Supreme Court in *Dobbs v. Jackson Women’s Health Organization*. Professor Mayeri critiques the *Dobbs* majority’s approach to history as one that “masquerade[s] as objective and impartial but is in fact opportunistic and antidemocratic, freezing constitutional meaning in a time when a majority of American adults had no political voice.”¹² In contrast, many state courts, in both pre- and post-*Dobbs* opinions, are employing critical approaches to history, viewing the past as a resource for evolving rights and recognizing historical discrimination as a “negative precedent” to be overcome. Even in courts adopting *Dobbs*’ methodology, Mayeri demonstrates how advocates are often successful in arguing for a history and tradition of protecting women’s lives and health, leading some state courts to find a right to abortion at least when the life or health of the woman is at risk. While recognizing retrenchment in some other state courts, Mayeri nonetheless concludes that “state courts provide a crucial, albeit limited, backstop against invocations of history that would turn back the clock.”¹³

Finally, in *Tort Logics for State Constitutional Injuries*, Sarah L. Swan examines the legal debate surrounding whether state constitutions contain an implied right of action for damages for state constitutional violations. After recounting state court approaches to evaluating such claims, Professor Swan argues that common-law tort claims are inadequate substitutes for state constitutional claims

11. Darrell A. H. Miller, *Lockstepping Structure*, 2025 WIS. L. REV. 1379, 1381.

12. Serena Mayeri, *History and Tradition in Constitutional Interpretation: Resistance in the States*, 2025 WIS. L. REV. 1351, 1355.

13. *Id.* at 1379.

because state constitutional injuries are not private disputes, but rather inherently political wrongs concerning the relationship between the government and its citizens. Swan proposes that state constitutional tort liability should be understood as beginning precisely where state tort claims acts end, suggesting that those “governmental” actions typically excluded from state tort liability due to sovereign immunity should instead fall under the distinct purview of state constitutional tort to ensure accountability for abuses of power. While Swan recognizes that the line between state tort claims and state constitutional torts may at times be difficult to discern, she proposes a test that focuses on the performance of discretionary functions or the exercise of government power: “[W]hen states act in a wrongful manner as public actors or ‘governmentally,’ a circumstance that is explicitly excluded from most state tort claims acts, claims should not automatically fall into a sphere of immunity, but rather into a sphere of potential state constitutional liability.”¹⁴

E. STATE INSTITUTIONS

The final essays in this Special Issue concern “State Institutions.” In *The Next Chapter in Health Care Federalism: Expanding Medicaid from the Ground Up*, Michelle Wilde Anderson and Lina Volin propose a strategy for expanding health insurance coverage in states that have refused to adopt the Affordable Care Act’s (ACA) Medicaid expansion, particularly in the wake of significant federal funding cuts to the program in 2025. Told through the lens of hospitals and health care facilities in Jackson, Mississippi, the authors argue that this new political and fiscal reality necessitates shifting the focus from states to local governments—specifically cities and counties—as partners to the federal government in health care reform. To accomplish this, the essay explores three potential policy models: statutory changes to Medicaid to allow local opt-in, solutions modeled after the ACA Marketplace infrastructure that allow local entities to establish an optional insurance program operating alongside the marketplace, and enhanced federal grantmaking to localities. Ultimately, the essay seeks to encourage new political alliances between local governments, health care providers, and federal officials to mitigate rising uninsurance rates and protect the economic viability of health care services in opt-out states. “Alliances of hospitals and other major care providers working with county and federal officials may

14. Sarah L. Swan, *Tort Logics for State Constitutional Injuries*, 2025 WIS. L. REV. 1405, 1432.

be position to drive a new generation of health care coverage for low-income Americans.”¹⁵ This panel also included Liz Sepper’s early-stage work, *The Promise of the Public*, in which she explores challenges to state public accommodations laws and trends in state court decisions.

The final essay in this Special Issue, *Local Government Standing as State Standing*, by Katharine Cooney and Katherine Mims Crocker, was discussed last year at our 2024 Public Law in the States Conference. The piece points out a paradox in standing doctrine for cities: “Municipalities themselves must respect federal constitutional rights . . . , [b]ut while local governments are thus subject to the same constitutional burdens as states, they do not always enjoy the same benefits,” including standing to sue on behalf of their citizens.¹⁶ Recognizing that “municipalities [are] well situated to pursue affirmative litigation on behalf of a citizenry with whom they are physically and metaphysically close,” Cooney and Mims Crocker argue that “standing law should take the foundational conception of local governments as arms of the state seriously,” and view city standing as the same as state standing.¹⁷ In support, Cooney and Mims Crocker illustrate how a city’s proprietary interests, sovereign interests, and quasi-sovereign interests, like that of a state’s, support this altered test.

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Collectively, the essays in this Special Issue shine a light on public law in the states in an effort to enrich dialogue and to encourage further exploration of state-level issues at this pivotal time in our country’s history.

15. Michelle Wilde Anderson & Lina Volin, *The Next Chapter in Health Care Federalism: Expanding Medicaid from the Ground Up*, 2025 WIS. L. REV. 1223, 1239.

16. Katharine Cooney & Mims Crocker, *Local Government Standing as State Standing*, 2025 WIS. L. REV. 1255, 1257–58.

17. *Id.* at 1258.

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