CONTESTING STATE CAPTURE

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46 Cardozo L. Rev. (forthcoming 2025)

Abstract. State capture has become a general feature of the United States' political economy and its legal system—a phenomenon so ubiquitous that it penetrates even the most grassroots levels of subnational governance. This Article argues that state constitutions contain effective bulwarks against state capture, should activists, advocates, and elected officials choose to enforce them. Every state's constitution places at least some combination of limiting restraints on state legislative power. When state courts enforce them—as often they do—these restraints effectively limit what legislatures can do: they shape legislative procedure and filter out maladaptive legislative outcomes.

Existing public law scholarship has thus far overlooked the anticapture potentiality of our state constitutions' limits on legislative power. Scholarship invested in contesting state capture has focused on regulating *inputs*, especially the economic and political resources that private entities apply to extract rents from the policymaking process. Drawing on legal history and recent scholarship on American political economy, this Article demonstrates that state constitutions offer mechanisms to effectively regulate legislative *outputs* as well. To wit, by bringing state-constitutional challenges, advocates may invite state courts to review legislation deemed captured using heightened forms of scrutiny. In advancing such claims, this Article contributes to emerging public-law literatures on political power and state constitutionalism while offering critical lessons to state officials, organizers, and advocates committed to contesting state capture today.

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INTRODUCTION

Gone are the days when it might still have been claimed that American states are the "backwaters" of the federal system.[1] In recent years, state legislatures have adopted controversial measures across a wide range of issue areas—from voting and taxes to employment and healthcare—and, as litigation around these enactments has proliferated, state courts have begun to rule on issues that matter a great deal to a great number of Americans.[2]

The story behind the subnational shift in American policymaking—though interesting and well-documented[3]—is not the subject here. My aim, rather, is to assess the problems accompanying this devolution and to develop effective legal tools for the advocates, state officials, and activists they concern.

The recent rise of states as key sites of policymaking has involved a rather sharp rightward pivot in state and local law.[4] Were it the case that these changes also tracked the preferences of ordinary voters there might be considerably less cause for alarm. They do not.[5] Much of the recent flurry in state-

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[1] PAMELA WINSTON, WELFARE POLICYMAKING IN THE STATES: THE DEVIL IN DEVOLUTION 106 (2002) (explaining that scholars are much less likely to hold this view today). *Cf.* FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 5 (2010) (contending that this older narrative had always been more fact than fiction).

[2] *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1857 (2023) (observing that state courts now routinely decide on crucial issues, "[f]rom abortion to voting"). [hereinafter: Bulman-Pozen & Seifter, *Democratic Proportionality*]; JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 34-69 (2022) (analyzing the post-2010 surge in state-level policymaking across these and other salient issue areas).

[3] In explaining this shift, scholars tend to identify factors included, but not limited to federal retrenchment and gridlock, political polarization, expanding socio-economic inequality, and expanding interest group power. *See, e.g.*, Jessica Bulman-Pozen, *States of the Union*, HARV. L. REV. BLOG (Oct. 17, 2018), https://harvardlawreview.org/blog/2018/10/states-of-the-union/ ("The same polarized partisanship that hamstrings Congress… has also made the states critical… as a force setting national policy right now."); ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES AND THE NATION 174-210 (2019) (explaining the role of key, conservative, pro-business interests groups—like American Legislative Exchange Council, Americans for Prosperity, and the State Policy Network—in fomenting this this shift); GRUMBACH, *supra* note 2, at xxi, 9 (attributing the states' rise to the effects of political polarization on American federalism); *id.* at 97-122 (demonstrating that "interest group activists" like the Koch brothers substantially contributed to the recent partisan polarization of state policymaking); LEAH STOKES, SHORT CIRCUITING POLICY: INTEREST GROUPS AND THE BATTLE OVER CLEAN ENERGY AND CLIMATE POLICY IN THE AMERICAN STATES 11-12 (2020) (emphasizing the role of interest groups).

[4] *See, e.g.*, Bertrall L. Ross II & Douglass M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effect of Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 649 (explaining that the consolidation of Republican control at the state level in 2010 resulted in the proliferation of voter ID laws); HERTEL-FERNANDEZ, *supra* note 3, at 1 (identifying the same political development as the proximate cause of a wave of conservative bills and enactments, including "measures to cut back the ability of unions to engage in politics and collectively bargain; dramatically scale back access to abortions; retrench social programs like unemployment insurance, Food Stamps, and Medicaid; expand the ability of individuals to buy, carry, and use guns;… lower taxes on the wealthy and on businesses[;]… [and prevent] the passage of comprehensive health reform through the 2010 Affordable Care Act.").

[5] *See, e.g.*, GRUMBACH, *supra* note *supra* note 2, at 75 (conducting a comprehensive review state-level policy changes in salient issue areas over the past generation and finding "that only LGBT rights and marijuana policies… show clear evidence of responsiveness to public opinion"). *See also* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2 (1st ed. 2008) (finding that government policy making tracks the preferences of the wealthy and is basically non-responsive to the poor- and middle-class-sector desires); MARTIN GILENS, AFFLUENCE AND

legislative activity, as many commentators have noted, has involved the targeted preemption of progressive local policymaking.[6] More generally, moreover, scholars have found that recent state-legislative activism stands in marked contrast to actual public opinion, which—on issues ranging from gun control and labor, to health, welfare, and taxes—has remained relatively static for generations.[7] The inference to be drawn, thus, is it that it is not progressives who are driving these changes; but neither is it the emergence of a new of some new conservative-leaning mass politics. To the contrary, cutting-edge studies in American political economy demonstrate that the policy suites states now routinely implement reflect the desires and interests of a small coterie of well-resourced, conservative activists and interest groups.[8]

A key premise of this Article is that this new, anti-majoritarian localism reflects larger drifts in the American political economy toward the phenomenon recent scholarship has come to refer to "state capture."[9] Part and parcel to the United States' ongoing, and much-discussed experience of democratic erosion,[10] state capture is a political-economic concept referring to the processes, or result, of wealthy non-state actors influencing public policy to suit their own peculiar interests.[11] Initially, theorization

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INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICAN 12 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014) (same).

[6] *See*, *e.g.*, Richard Briffault, *The Challenge of the New Preemption The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (contending that these "[e]xtreme new preemption measures… strike directly at the capacity for local self-government [and] are [thus] inconsistent with the central place of local governments in our democracy"); Lauren E. Philips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2228 (2017) (contending that "state preemption restricts the power of local governments, threatens progressive innovation, and interferes with the democratic process").

[7] *See* GRUMBACH, *supra* note 2, at 75, 94.

[8] *See supra* note 3 (collecting sources).

[9] *See*, *e.g.*, SAMUEL BAGG, THE DISPERSION OF POWER: A CRITICAL REALIST THEORY OF DEMOCRACY 80 (2024); HERTEL-FERNANDEZ, *supra* note 3 at xiv; Terry Lynn Karl, *Extreme Inequality and State Capture: The Crisis of Liberal Democracy in The United States*, 4 CHINESE POL. SCI. REV. 165, 166 (2019) (contending that extreme socio-economic inequality is driving state capture in the United States); Pamela J. Clouser McCann, Douglas M. Spencer & Abby K. Wood, *Measuring State Capture*, 2021 WISC. L. REV. 1141, 1148-57 (2021) (developing an empirical standard to measure state capture and testing their theory at the state-level).

[9] *See*, *e.g.*, SAMUEL BAGG, THE DISPERSION OF POWER: A CRITICAL REALIST THEORY OF DEMOCRACY 80 (2024); HERTEL-FERNANDEZ, *supra* note 3, at xiv; Terry Lynn Karl, *Extreme Inequality and State Capture: The Crisis of Liberal Democracy in The United States*, 4 CHINESE POL. SCI. REV. 165, 166 (2019) (contending that extreme socio-economic inequality is driving state capture in the United States); Pamela J. Clouser McCann, Douglas M. Spencer & Abby K. Wood, *Measuring State Capture*, 2021 WISC. L. REV. 1141, 1148-57 (2021) (developing an empirical standard to measure state capture and testing their theory at the state-level).

[10] *See*, *e.g.*, STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (sourcing the ongoing democratic decline in the United States to the erosion of unwritten norms of governance like toleration and restraint); CONSTITUTIONAL DEMOCRACY IN CRISIS? 6 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018) (exploring whether constitutional democracies throughout the globe, including the United States, are in fact in crisis). *See also* BENJAMIN I. PAGE & PARTIN GILENS, DEMOCRACY IN AMERICA? (2017) (tracing the decline to rising socio-economic inequality); Ganesh Sitaraman, The Crisis of the Middle-Class Constitution (2017) (same); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2018) (identifying American democratic decline with the erosion of the rule of law).

[11] This Article's particular conception of state capture takes particular inspiration from the work of scholars like Samuel Bagg, Daniel P. Carpenter, David A. Moss, and Lawrence Lessig. *See* BAGG, *supra* note 9, at 79-107; DANIEL P. CARPENTER & DAVID A. MOSS, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1-22

around the problem of state capture mostly treated it as a phenomenon typical of politics elsewhere; of elite-dominated contexts like post-Soviet Russia and post-apartheid South Africa.[12] In time, however, deepening socio-economic inequality in the United States, combined with public corruption concerns following in the wake of *Citizens United v. Federal Elections Commission*,[13] prompted prominent scholars of law and politics to begin rethink that assumption (at least as applied to policymaking at the federal level).[14] And with the extension of what appears to be a kind of anti-majoritarian impulse to even the most grassroots levels of American governance it has become difficult to deny that state capture is—and perhaps always has been[15]—a basic feature of American politics.[16] On the aggregate, thus, the longstanding premise of American democratic exceptionalism now lies in tatters,[17] a fact that, in turn, poses a difficult question: what can we do?

To date, most public-law scholarship concerned with the problem of state capture has focused on what might be called the "input" side of the equation. It has sought, in the main, to remedy the problem's underlying causes. Most immediately, there are substantial bodies of scholarship focused both on decreasing the flow of money into the post-*Citizens United* political sphere[18] and on strengthening individual voting rights and election law procedure.[19] Especially in recent years, moreover, a second strand of scholarship has imagined legal mechanisms that would cultivating countervailing power qua networks of "mass-membership organizations" that could effectuate "the political voice of citizens who lack the political influence that comes from wealth"[20] On the whole, thus, approaches of this kind aim

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(David A. Moss & Daniel P. Carpenter eds., 2014); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 17, 17-20, 127-38 (2015) (developing a theory of "*dependence corruption*").

[12] *See*, *e.g.*, BAGG, *supra* note 9, at 80 (recounting the history of the concept of state capture).

[13] 558 U.S. 310 (2010).

[14] *See*, *e.g.*, LESSIG, *supra* note 11; ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014).

[15] *See*, *e.g.*, William J. Novak, *A Revisionist History of Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 11, at 40 (contending that capture was a primary concern of James Madison, as reflected in the theory of factions he provided in *Federalist* 10).

[16] *See*, *e.g.*, BAGG, *supra* note 9, at 7 (presenting the prevention of state capture as a basic goal of liberal democracy within and beyond the United States); HERTEL-FERNANDEZ, *supra* note 3, at xiv (connecting the concept of state capture to post-2010 state and local American politics).

[17] *See*, *e.g.*, AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 5-7 (2010) (explaining and critique the myth of American exceptionalism).

[18] See, e.g., RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN POLITICS 6, 247-48 (2016); LESSIG, *supra* note 11, at 238-39; Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 2 (2012).

[19] *See*, *e.g.*, JACOB EISLER, THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY 291-312 (2023) (identify partisanship and summary judgment as the most pressing dangers to the democratic legitimacy of contemporary federal election law); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1418-26 (1991) (using the Voting Rights Act to theorize minority-voting exclusion); Michael Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353 (2017) (arguing that "courts have enforced a basic norm of government neutrality when it comes to political partisanship in [federal] constitutional law"—except in the case of partisan gerrymandering) [hereinafter: Michael Kang, *Gerrymandering*]; Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1216-20, 1227-32 (1996) (defending race-conscious districting); Nicholas Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 304-23 (2014) (arguing that district boundaries should align the jurisdiction's median voter to the legislature's median member).

[20] Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 551 (2021). *See*, *e.g.*, K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 142-68 (2019); Kate Andrias, *Separations of Wealth:*

to redistribute political power in America; the best way to combat capture, they suggest is to devalue the political efficacy of money and amplify forms of political participation that are at least somewhat less mediated by wealth and capital.

If promising in some respects, however, input-concerning approaches are far from perfect. Most importantly, perhaps, they tend run up against First Amendment law, which establishes strong protections for political spending and lobbying, while, at the same time, kneecapping key sources of countervailing power, like organized labor.[21] With this in mind, approaches that focus on regulating "outputs"—i.e., the policies that captured states actually create—appear increasingly important. For instance, public-law scholars have long pointed out that mounting an effective campaign against state capture may ultimately require empowering judges to exercise "anticapture judicial review."[22] Mostly focusing on federal constitutional law and administrative procedure,[23] scholarship in this area suggests that permitting judges to apply heightened forms of scrutiny to laws and regulations deemed captured would not only open many existing laws to judicial reconsideration, but also disincentivize capture itself by generally adding to its administrative costs.[24] If private interests know that they may end up in court, the thought goes, they will be less inclined to entangle public officials in their personal affairs.[25]

While extremely promising in the abstract, however, this approach, too, tends to collide with the federal Constitution. The problem with federal judicial review is that, for generations, it has embraced

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Inequality and the Erosion of Checks and Balances, 18 U. PA. J. CONST. L. 419, 493-503 (2015); Tabatha Abu El- Haj, *Making and Unmaking of Citizens: Law and the Shaping of Civic Capacity*, 53 U. MICH. J.L. REFORM 63, 98-136 (2019); Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC'Y 393, 424 (1992) (noting that such organizations help remedy political inequality "by permitting individuals with low per capita resources to pool those resources through organization").

[21] *See*, *e.g.*, *United States v. Harriss*, 347 U.S. 612, 625 (1954) (stating that "the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government" are involved in the assessment of lobbying regulation); *Citizens United*, 558 U.S. at 365 (securing corporations the right, under the First Amendment, to spend unlimited amounts on "independent" campaign expenditures); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459-60 (2018) (holding that a public-sector employer cannot, under the First Amendment, require employees to pay union dues).

[22] *See*, *e.g.*, Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46-47,78, 80-81 (1989) (contending that the political branches vulnerability to interest group pressure undermines arguments for judicial deference and enforces the case for heightened judicial review); RICHARD EPSTEIN, TAKINGS 95 (1985) (defending the application of heightened scrutiny under the Takings Clause and Contracts Clause of the federal Constitution because "[a]ll regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state"); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849, 874-75 (1980) (contending that the Supreme Court may invalidate certain forms of "private-regarding" legislation); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1699-1700 (1984) (contending that more rigorous constitutional scrutiny may be required to invalidate legislation that rewards the raw power of interest groups).

[23] *See supra* note 22 (collecting sources). It should be noted, however, that another prominent strand of this literature focuses on statutory interpretation. *See*, *e.g.*, Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 15-18 (1984) (contending that judges should narrowly construe statutes that effect interest group transfers); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 471, 486 (1989) (same). Here, however, the most influential contribution has likely been William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279, 298-99, 303-09, 324-25 (1988) (advocating the narrow construction of statutes that concentrate benefits and widely distribute costs).

[24] *See*, *e.g.*, M. Elizabeth Magill, *Courts and Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE, *supra* note 11, at 459 (explaining the effects of anticapture judicial review on the costs of litigation).

[25] *Id.*

rational basis scrutiny.[26] According to this approach to judicial review, only suspect classes and fundamental rights receive heightened scrutiny; and "garden-variety socioeconomic legislation,"[27] by contrast, receives levels of deference that are so pronounced as to be likened "to no review at all."[28] In so far as a large swath of recent state-level enactments have been of the garden-variety kind, thus, crucial questions remain unanswered: How can we regulate the outputs of state capture? What tools remain available to advocates, activists, and state officials interested in challenging the legality of captured enactments?

Refocusing the lens from the federal level to the states, this Article recasts the current debate from the perspective of state constitutional law. Specifically, it argues that many of the policies passed in recent years by captured state legislatures may be effectively challenged under a relatively neglected features of our states' constitutions: the restraints by which virtually all of these constitutions delimit state-legislative power. Every state constitution contains various provisions requiring, for instance, that legislative enactments serve a valid public purpose, or that bills introduced into assembly be limited to a single purpose and have a clear title.[29] Acting alongside many others, these legislative restraints inaugurate state courts as venues for the contestation of state capture.[30] They grant substantial authority to judges to monitor both the procedure and substance of legislative enactments and, in so doing, pave broad avenues for anticapture litigation.[31]

Read in tandem, I shall contend, these state-constitutional provisions justify the application of kinds of anticapture judicial review that bypass the federal model's myopic commitment to rational basis scrutiny. To be sure, many state courts still march in lockstep with their federal counterparts, a point that has received much scholarly attention.[32] But as I show using recent case law, states like Arizona and Maryland have concluded that giving effect to their constitutions' restraints on legislative power requires a different approach, not rational basis scrutiny, per se, but rather tests involving the application of multiple factors and more biting forms of review.[33] By extending these alternative approaches to contest captured enactments—a practice, as I show, that has already emerged in state-

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[26] Legal scholars have long contended that rational basis review cannot sufficiently regulate state capture. *See supra* note 22 (collecting sources).

[27] Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992).

[28] *FCC v. Beach Comms., Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring).

[29] *See infra* § I.A.

[30] *See infra* § I.B.

[31] *See* §§ I.B & II.

[32] Indeed, state-constitutional scholarship since William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) has largely focused on whether state courts should or should not "lockstep," i.e., follow in the doctrinal footsteps set by the federal bench. Brennan argued in the negative. *See id.* at 503 (exhorting state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms"). But the debate very much remains an open field. *Compare*, *e.g.*, Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17–18 (2018) (contending states courts should chart their own paths), *with* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 79 (2005) (arguing they should not), *and* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1311 (2019) (book review) (same).

[33] *See infra* § II.A.

constitutional litigation—anticapture advocates may mount effective challenges against the wave of conservative legislation currently overrunning states and localities.[34]

In and of itself, more and better state constitutional litigation will not, of course, spell the end of state capture. The output-concerning strategy advanced here is not without limitation, and I devote significant discussion to its possible shortcomings in the later stages of this Article.[35] The approach for which this Article advocates, thus, is best understood as a supplement, not an alternative, to other anticapture legal reforms.[36] The problem of state capture cuts to the quick, and the fact that there is space, within the existing public-law scholarship, to think more deeply about regulating outputs by no means implies that input-side remedies should be forgotten or neglected. "[C]uring the mischiefs" of state capture today, to quote the early-anticapture theorist James Madison, will undoubtedly require a multipronged attack.[37] Yet to the extent that "removing its causes," as Madison puts it, proves to be a formidable challenge, it may behoove anticapture advocates to focus at least some of their attentions on also "controlling its effects."[38]

This Article proceeds as follows. Part I outlines our state constitutions' restraints on legislative power. Calling upon resources of legal history, it demonstrates that these provisions' authors' originally believed that they would elevate state courts as bulwarks against the state capture that was rampant in nineteenth-century America. Part II argues that giving these provisions legal effect today would requires state courts to apply heightened scrutiny when reviewing captured legislation. Drawing on recent state constitutional case law, it shows how some states have already adopted approaches of the kind promoted here and explains how other states may do so in future cases involving constitutional challenges to special interest legislation. Part III explores some of the concerns that this Article's approach might raise and concludes that a state-constitutional litigation strategy would ultimately shore up some of the key issues that the public-law literature on contesting state capture has yet to address. A brief conclusion identifies the avenues for future research in state constitutional law.

I. Contesting State Capture Then: A Lost Nineteenth-Century Strategy

Recent public-law scholarship is replete with reform proposals aimed at mitigating present-day state capture.[39] From campaign finance reform to cultivating counter-veiling power, these proposals focus primarily on regulating the input-side of the political process; they seek to down-ratchet the political influence of money and up-ratchet the influence of resources and modes of participation more closely associated with majority will.[40] Yet, looking beyond the input-paradigm, different tools could potentially be used to contest state capture and its associated harms. What if, instead, we looked to the output side of the equation? What if, for instance, government officials refused to enforce the laws that they deemed to be captured? What if, instead of focusing on whether public officials used their offices

[34] *See infra* § II.B.
[35] *See infra* § III.
[36] *See supra* notes 18-25 and accompanying text (summarizing these reforms).
[37] James Madison, Federalist *10*, *in* Alexander Hamilton, James Madison & John Jay, The Federalist Papers 48, 49 (Lawrence Goldman ed., 2008) (1788) (explaining that the problem of "factions," his term for what today we might call interest groups, could not be deracinated; and insisting, hence, that the proper role of constitutional design is to regulate its effects).
[38] *Id.*
[39] *See supra* notes 18-25 and accompanying text.
[40] *See id.*

to enrich themselves in illicit ways, courts instead focused on determining whether captured enactments ran afoul of basic constitutional procedures and principles?

State capture is hardly a new phenomenon,[41] and courts have long struggled to define their own rights and responsibilities in relation to the challenges it presents.[42] In the nineteenth century, courts commonly applied provisions of their states' constitutions to review legislative enactments for evidence of capture and even, in some cases, to strike them down.[43] Inaugurating this judicial practice, as this Part shows, was a sustained tradition of nineteenth-century politics that successfully constitutionalized a series of judicially enforceable restraints on legislative power.[44] Responding to the elevated levels of legislative distrust characteristic of an older era, nineteenth-century reformers installed new procedural and substantive guardrails into their states' constitutions, provisions that authorized the judicial review of potentially captured legislative enactments.[45]

Once a commonplace in state-constitutional adjudication, however, this nineteenth-century, output-concerning solution to state capture has largely faded from memory. Overtime, many state courts withdrew from the policymaking process and, by the same token, largely stripped their constitutions' legislative restraints of their anticapture potentiality.[46] To some extent, public-law scholarship mirrors this repression. While it has been said that "anticapture judicial review" may provide a salutary "[b]rake on [c]apture,"[47] most scholarship on the topic focuses exclusively on the courts and agencies constitutive of federal government, thereby overlooking the states.[48] Similarly, while others routinely argue that state courts should play a more active role in state policy-making than their federal counterparts, they have yet to explain the implications of this fact for contesting state capture today.[49]

To address this gap, this Part contends that some of the most important restraints on legislative power enacted by nineteenth-century constitution-makers throughout the states were created for the express purpose of empowering state courts to prevent state capture.[50] The first section sorts these restraints into two, general buckets—substantive[51] and procedural[52]—and it provides a close look at some of the provisions that fall into each.[53] The second section then explains why the authors of these

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[41] *See*, *e.g.*, Novak, *supra* note 15, at 40 (identifying the origins of capture theory in American constitutional thought with James Madison).
[42] *See*, *e.g.*, *infra* notes 108-122 (discussing, as exemplary of this fact, different nineteenth-century, state-judicial approaches to the public purpose doctrine).
[43] *See infra* §§ I.A.1-2.
[44] *See infra* §§ I.A-B.
[45] *See id.*
[46] *See infra* § I.B.2 (describing how state courts have rendered these provisions largely inoperative by applying rational-basis scrutiny to enforce them).
[47] Magill, *supra* note 24, at 405.
[48] *See supra* note 22 (collecting sources).
[49] *See*, *e.g.*, Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 2, at 1862-81; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999).
[50] *See infra* § I.A.
[51] *See infra* § I.A.1.
[52] *See infra* § I.A.2.
[53] *See infra* § I.A.

new restraints intended them to elevate state courts as bulwarks against state capture,[54] and why we might expect them to continue to play a similar function today.[55]

Overall, thus, this Part endeavors to recover an often-neglected, nineteenth-century solution to the problem of state capture. In so doing, it aspires neither to provide a comprehensive account of the mechanisms through which state constitutions mitigate against the threat of capture nor to posit that state constitutionalism is the best or only insight that opponents of contemporary state capture should glean from the period.[56] By offering historical and structural arguments, rather, it seeks to show that our state constitutions once offered powerful, anticapture resources, and thus to introduce the thought that they may continue to do so even today.

A. *Restraints on Legislative Power*

The American constitutional tradition has always, to a certain extent, been concerned with preventing well-resourced groups and individuals from deriving private advantaged from the process of public policymaking.[57] However, it was not until the nineteenth—that era of great state-constitution making[58]—that state residents would amend their constitutions to contain specific substantive and procedural restraints on lawmaking.[59] The era's evident preoccupation with legislative reform reflects several broader trends in nineteenth-century state history: stepped-up industrialization, the meteoric rise of railroads and other private corporations, an iterative series of fiscal crises, rampant political corruption, the anti-elitist valences of Jacksonian Populist political ideologies—these and other factors enforced the general distrust of state legislatures already deeply engrained in the popular American psyche.[60]

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[54] *See infra* § I.B.1.

[55] *See infra* § I.B.2.

[56] Nineteenth-century contract law, for instance, may be offer still further tools to contemporary anti-capture advocates. *See* Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. REV. L. & SOC. CHANGE 681, 682 (2011) (noting that "[w]hile we have recently tried to deal with public corruption through legislation aimed at reducing its incidence [through criminal law], nineteenth century policymakers adopted a very different tactic," turning instead to "contract law to discourage public corruption by refusing to enforce contracts that they deemed corrupt. Just as they would refuse to enforce contracts for prostitution, they would refuse to enforce contracts between public servants and private entities that undermined the integrity of representative government").

[57] *See supra* note 41.

[58] *See, e.g.*, DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 93 (1987) (describing the antebellum period as an "era of permanent constitutional revision"); G. ALLEN TARR, UNDERSTANDING STATE CONSTITUTIONS 94 (1998) ("From 1800 to 1860, thirty-seven new state constitutions were adopted. Fifteen of the twenty-four states in the Union by 1830 revised their constitutions by 1860, two of them twice .... [D]uring one decade, from 1844 to 1853, more than half the existing states held constitutional conventions.... From 1861 to 1900, twenty states revised their constitutions, some several times, adopting forty-five new constitutions in all.... Of those states that joined the Union from 1800 to 1850, only two had not revised their constitutions by century's end; altogether, ninety- four state constitutions were adopted during the nineteenth century.").

[59] *See id.* at 95 (identifying the most salient issues for nineteenth-century state constitutional reform as: "the extension of the franchise, the curtailment of legislative power, state governmental participation in promoting economic development and allocating natural resources, and the relations between state and local governments").

[60] *See, e.g.*, RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 817-18 (8th ed. 2016) (describing how states constitutionalized limits on state spending, lending, and borrowing in response to the fiscal crises of the 1830s and 1840s); TARR, *supra* note 58, at 99 (noting that the state constitutional reform agenda was shaped by "Jacksonian democracy and Populism" as well as "campaigns for... restrictions on the power of railroads and other corporations"); Hans A. Linde, *Due Process of Lawmaking*, 55 NBA. L. REV. 197, 241 (1976) (footnote omitted) ("In the

Generally speaking, nineteenth-century constitutional restraints on legislative power may be divided into two general forms: substantive restraints, which limit the kinds of policies lawmakers may enact, and procedural restraints, which define the process through which every bill must pass *en route* to becoming a law.[61] This Part reviews key examples of each of these restraints in turn.[62] Providing a high-level examination of their shared histories, texts, and structures, this it finds that they share at least one common-purpose: to better insulate state legislatures against the threat of capture.

1. Substance

A key feature of nineteenth-century constitution-making was the addition of new, substantive restraints on legislative power.[63] This section explores two such limitations that aimed, or so it is contended, at contesting state capture: special law prohibitions,[64] which stipulate that all legislation must be general in nature, and public purpose requirements, which hold that every statute must serve a valid, public (as opposed to private) purpose.[65]

It is worth mentioning, at least for context, that the two varieties of substantive restraint tend to reflect a key premise of American constitutional thought, one whose origins, as state constitutional scholars have shown, may be traced at least as far back as James Madison, and subsequently came to play a leading role in the state constitutional politics of the Jacksonian Era.[66] This was the general theory that state constitutions prohibit legislatures from enacting "special" laws—those singling out a particular person or group for special privileges or disadvantages—and demand, concomitantly, that all

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19th century, the reaction to legislative recklessness, ignorance, logrolling, and corruption led to constitutional strictures on the forms and procedures of enactment, some of which we now find inappropriate.").

[61] *See*, *e.g.*, Martha Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 103 (2001); (contrasting procedural and substantive limitations); *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 PUBLIUS 91, 91-92 (1987) (same) [hereafter: Williams, *State Constitutional Limits*].

[62] *See infra* §§ I.A.1 & 1.A.2.

[63] *See*, *e.g.*, TARR, *supra* note 58, at 117 ("Loss of faith in the judgment and probity of legislators led state constitution-makers to impose increasingly stringent procedural and substantive restrictions on state legislatures and to transfer powers from state legislatures to other officials or to the people directly.")

[64] *See infra* § I.A.1.a.

[65] *See infra* § I.A.1.b.

[66] HOWARD GILLMAN, CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 30 (1993) (contending that a general principle of Jacksonian Era state judicial review was the Madisonian notion that any law promoting the interests of factions over those of the public "was to be considered the most vivid and authoritative example of illegitimate and unrepublican government"); *id.* at 10 (contending that nineteenth-century state courts established this view in the "public purpose" doctrine by which they distinguished between valid economic regulation and illegitimate forms of state power); Madison, *supra* note 37, at 49 (defining a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 9 (1996) ("Nineteenth-century America was a *public* society in ways hard to imagine after the invention of twentieth-century privacy. Its governance was predicated on the elemental assumption that public interest was superior to private interest. Government and society were not created to protect preexisting private rights, but to further the welfare of the whole people and community."); Melissa Saunders, Equal Protection, Class, Legislation, and Colorblindness, 96 MICH. L. REV. 245, 249 (1997) (distinguishing this Jacksonian state constitutional tradition from the "vested rights" doctrine, and contending that it came to form the basis of the Republican Party's antithesis to slavery and the Black Codes); TARR, *supra* note 58, at 126 (noting that the "state constitutions characteristic of the late nineteenth century reflected a desire to assert a public interest against ordinary politics").

state action serve a valid "public purpose."[67] By adding special legislation prohibitions and public purpose requirements to their states' constitutions, nineteenth-century reformers empowered state judges to intervene when lawmakers enacted statutes advantaging particular, private entities at public expense.[68]

a. Special Legislation

Early state constitutions plainly manifest the principle that state legislatures could not grant any member of the community special privileges and that state action could be thought legitimate only if it was of some benefit to the public.[69] For instance, Massachusetts' first and only constitution states that "Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men....";[70] and Section IV of the 1776 Virginia Bill of Rights asserts that "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[71]

From the beginning, however, these principles stood more or less at odds with established legislative practice.[72] Beyond the well-known fact that racial slavery, property qualifications for political participation, and extreme wealth inequality were the order of the day,[73] there was also the less commonly acknowledged reality that the vast proportion of state legislation could be classified as "special," "local," or "private" because it singled out particular individuals or groups for the receipt of special advantages or disadvantages.[74] While these statutes were extremely wide-ranging, but they also

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[67] GILLMAN, *supra* note 66, at 33-45; Saunders, *supra* note 66, at 247-48.

[68] *See infra* § I.B (explaining state courts' role in enforcing their constitutions' restraints on legislative power).

[69] *See, e.g.*, Justin Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725 (2012) ("The earliest state constitutions insisted that legislatures could act only for the public benefit, but their language reflects the framers' sense that they were merely memorializing an inescapable principle of natural law."); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (noting that "most states have generally applicable provisions prohibiting special and local laws, the grant of special privileges, or discrimination against citizens in the exercise of civil rights or on the basis of sex") [hereafter: Williams, *Equality Guarantees*].

[70] MASS. CONST. art. VII (1780).

[71] VA. CONST. Bill of Rights § 4 (1776).

[72] *See* Long, *supra* note 69, at 726 (arguing that "legislatures simply could never rightly allocate communal resources to private parties, almost as a matter of definition"); Williams, *Equality Guarantees*, *supra* note 69, at 1199 (identifying "a great gap between their rhetoric and reality" in the fact that "[s]lavery and great disparities in wealth and political participation were the order of the day" and contending that "[e]quality among colonists was not the point of this early political argument; rather, the effort was to attain equality of colonists with their British contemporaries").

[73] *See, e.g., id.*; TARR, *supra* note 58, at 84-85 (discussing the ubiquity of property-based voter qualifications in eighteenth-century state constitutions).

[74] *See, e.g.*, Charles Chauncey Binney, Restrictions upon Local and Special Legislation in the United States, 41 AM. L. REG. & REV. 721, 726 (explaining that "local" laws applied to specific localities, and discussing the original, British common law distinction between "public (or general)" laws, those that "received judicial notice in the courts and were binding upon all of the public who might happen to be affected by them," from "private (or special)" ones, as those that "required to be pleaded and proved like any other facts, and did not bind those who were strangers to them unless by express words or a necessary implication of the intention of Parliament"); Robert M. Ireland, The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States, 46 AM. J. LEGAL HIST. 271, 272 (2004) ("A delegate to the 1872-1873 Pennsylvania constitutional convention asserted that between 1866 and 1872, the Pennsylvania legislature enacted 475 general laws and 8,755 special laws, while the *New York Times* reported in the same year that almost ninety percent of the New York legislative output for the previous four years had been special legislation."); Long, *supra* note 69, at 725-26 ("In Indiana... nearly 90%... of the legislative output of 1849-50 was private laws."); Farah Peterson, Expounding the Constitution, 130

tended to fall into certain established buckets, like the granting of divorces and awarding of corporate charters.[75]

By the early-nineteenth century, many state residents had grown to intensely resent the practice of special legislation.[76] For one, it was seen as leading to inefficiencies and impairing legislative scrutiny.[77] Typically, state representatives would be flooded by hundreds special legislation requests, both from private individuals and groups and from local officials within their jurisdictions.[78] Since they had neither the time nor resources to review these requests, let alone debate them with one another, state officials tended simply to "enact" them.[79] This was made possible, as Professor Anthony Schutz has explained, by the general practice of "logrolling," or "legislative courtesy"—the tacit "understanding developed among legislators that the proposing legislator's peers would not resist the proposed legislation, so long as the proposing legislator would not resist similar bills from his or her peers."[80]

In time, special legislation practices came to be seen as a "perennial fountain of corruption."[81] At the 1872-73 Pennsylvania Constitutional Convention, for instance, participant Francis Jordan charged that "[b]ribery, or the buying and selling of votes" grew out of and was "inseparately [sic] connected with special legislation," and that his state's legislature had been overtaken by a lobby of "selfish and mercenary men" seeking "special privileges" and "valuable rights," and who would "pay for them… hence the mercenary traffic in legislation."[82] Channeling similar sentiments, an Illinois constitution-maker argued that special legislation would "fill the lobbies of our State Capitol with corruptionists"; a Californian labeled it as "the greatest source of corruption in our legislative halls"; and an Alabamian

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YALE L.J. 2, 8 (2020) (noting that "it was not unusual [in the early-nineteenth century] for the number of private [or special] acts to vastly outstrip the number of public acts in a given state-legislative session").

[75] *See*, *e.g.*, Ireland, *supra* note 74, at 281, 289; Peterson, *supra* note 74, at 8; John C. Teaford, *Special Legislation and the Cities, 1865-1900*, 23 AM. J. LEGAL HIST. 189, 191-92 (1979).

[76] Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEG. 39, 59 (2013).

[77] *Id.* at 59-60.

[78] *See*, *e.g.*, Teaford, *supra* note 75, 191 (explaining that "city councils, city attorneys, chambers of commerce, good-government groups, and lawyers serving urban contractors or real estate speculators drafted special legislation for the urban areas," with the result that "[h]arried state solons [were] confronted by eight or nine hundred bills during a sixty-day session," and thus "did not make law so much as enact it").

[79] *Id.*

[80] *See*, *e.g.*, Schutz, *supra* note 76, at 59 (contending that "'legislative courtesy' or 'logrolling' was common in the nineteenth century and was one of the primary reasons why constitutional drafters decided that special lawmaking was problematic"). *See also* Ireland, *supra* note 74, at 275 ("The tradition of legislative courtesy and log-rolling meant that the process of special legislation was basically undemocratic. The general public seldom received notification of pending special legislation and often learned of such legislation only after it had been enacted."); Teaford, *supra* note 75, 192 ("It was an unwritten rule that the member from the locality affected introduced local bills, and amendments or suggestions from members residing elsewhere were rare.").

[81] JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 542 (1888). *See also* Ireland, *supra* note 74, at 276 ("The same newspaper charged that Louisville city officials and corporations had secured privileges by special legislation enacted without notice to the public. A Maryland constitutional reformer charged in 1864 that influential persons routinely secured special legislative privileges without notice to those parties who were injured by enactments. The secret nature of the process of special legislation threatened representative government and smacked of monarchical dictator in the opinion of a delegate to the Illinois Constitutional Convention 1869-1870.").

[82] *Quoted in* Ireland, *supra* note 74, at 277.

constitution-maker at his state's 1901 convention contended that special legislation practices "have been in the past and will continue to be in the future the prolific sources of corruption."[83]

These charges do not seem to have been lacking in basis. As Philadelphia lawyer Charles Chauncy Binney recalls in his 1894 treatise on special legislation, one of the effects of the practice was that "private schemes were often pushed through the legislatures by unscrupulous men, to the sacrifice of public interests, each separate locality was liable to unwise interference in its affairs, and distracting changes of its governmental system, and the law, as to many matters, was thrown into confusion."[84] Private interests often resorted to creative means to influence their state officials. "Anticipating demand for particular types of charters," writes political scientist Rosalind Lorraine Branning,

> lobbyists [in Pennsylvania] not uncommonly put through the charters, then offered them for sale to the interested parties.... The legislature at times helped these hucksters of 'floating' charters by refusing to enact charters for persons wishing to incorporate so that they would have to purchase at enhanced prices charters already authorized.[85]

In response, thus, nearly every state amended its constitution to restrain its legislature's authority to enact special laws. Michigan became the first to do so explicitly in 1850, with an amendment specifically focused on road-building statutes.[86] The following year, Indiana would become the first state to institute a prohibition that was more "wide-ranging," covering to a list of topics including "county and township business."[87] Over the subsequent decades, Indiana's model became the norm, as state after state drew up prohibitions extensively listing off-limits subject areas.[88] Thus, and with the aim of preventing the capture of their legislative bodies,[89] the constitutions of most states in the Union today expressly limit special legislation.[90]

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[83] *Quoted in id.*

[84] CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6 (1894). *See also* Long, *supra* note 69, at 726 (suggesting that "the quantity of 'private bills' and the easy advantages they offered to well-connected supplicants attracted pernicious influences to the state houses").

[85] ROSALIND LORRAINE BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 42 (1960).

[86] JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 40 (2018).

[87] *Id.*

[88] *Id.*

[89] To be clear, rationales for limiting special legislation are also relatively wide-ranging. *See, e.g.* DINAN, *supra* note 86, at 40-41 (arguing that these prohibitions were primarily intended to protect city power against overbearing state legislatures); Charles C. Little & James Brown, *Special Legislation*, 25 AM. JUR. & L. MAG. AM. 317, 318 (1841) (contending that these prohibitions are meant to relieve legislatures from having to investigate private claims, an activity to which they are not "not favorably constituted"); Schutz, *supra* note 76, at 59 (identifying the four primary rationales for special legislation prohibition appearing in the scholarly literature as: (1) remedying a lack of "legislative scrutiny" and preventing "logrolling"; (2) promoting legislative legitimacy; (3) making the legislative process more efficient; and (4) promoting predictability). Further, some commentators who acknowledge that state capture may have been an important purpose of these provisions do not think that it was their primary purpose. *See, e.g.*, *id.* at 57 (arguing that the primary problem these prohibitions sought to remedy was a deficit in "the legislature's ability to identify objects in legislation" and that "legislative favoritism is more properly characterized as one consequence of the legislature's power to provide individuals with legislation").

[90] *See* ALA. CONST. art. IV, §§ 104-111; ALASKA CONST. art. II, § 19; ARIZ. CONST. art. IV, § 19; ARK. CONST. art. II, § 3, amend. 14; art. V, § 25; CAL. CONST. art. IV, § 16; COLO. CONST. art. V, § 25; FLA. CONST. art. III, §§ 10, 11; GA. CONST. art. III, § VI, para. IV; HAW. CONST. art I, § 21; IDA. CONST. art. III, § 19; ILL. CONST. art. IV, § 13; IND. CONST. art. IV, §§ 22, 23; IOWA CONST. art. I, § 6, ART. III, §§ 30, 31; KAN. CONST. art. II, § 17; KY. CONST. §§ 3, 59, 60; LA. CONST. art. III, § 12; ME. CONST. art. IV, pt. 3, § 13; MD. CONST. art. III, § 33; MASS. CONST. pt. I, art. VI, amend. art. LXII, § 1; MICH. CONST. art. IV, §§ 29, 30; MINN. CONST. art XII, §§ 1, 2; MISS. CONST. art. IV, §§ 87-90; MO. CONST. art. III, §§

b. Public Purpose

Beyond prohibiting special laws, nineteenth-century reformers added a variety of provisions to their state constitutions explicitly requiring that all enacted legislation serve a valid public purpose.[91] The major focus of these additions was to restrain how states provide financial assistance to private businesses.[92] The New York State Constitution is typical: it provides that "[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking"[93] and that no "county, city, town, village or school district shall give or loan any money or property or in aid of any individual, or public or private corporation or association or private undertaking."[94] And many states supplement these general public purpose requirements by restricting gift-giving,[95] borrowing,[96] lending,[97] and other specific forms of assistance.[98] Today—and as a consequence of these nineteenth-century amendments—virtually all state constitutions place at least some limits on public finance,[99] and where they do not, state courts have discovered that public purpose doctrines accomplishing basically the same effect lie latent in their states' constitutions.[100]

39-42; MONT. CONST. art. V, § 12; NEB. CONST. art. III, § 18; NEV. CONST. art. IV, §§ 20, 21; N.J. CONST. art. IV, § 7, para. 9; N.M. CONST. art. IV, §§ 24, 26; N.Y. CONST. art. III, § 17; N.C. CONST. art. I, § 32, art. II, § 24; N.D. CONST. art. I, § 21, art. IV, § 13; OHIO CONST. art. I, § 2, art. II, § 26; OKLA. CONST. art. V, §§ 46, 51, 59; OR. CONST. art. I, §§ 20, 23; PA. CONST. art. I, § 17, art. III, § 32; R.I. CONST. art. VI, § 11; S.C. CONST. art. III, § 34; S.D. CONST. art. III, § 23, art. VI, § 18; TENN. CONST. art. XI, § 8; TEX. CONST. art. I, § 3, art. III, § 56; UTAH CONST. art. VI, § 26; VA. CONST. art. I, § 4, art. IV, §§ 14, 15; WASH. CONST. art. I, §§ 8, 12, art. II, § 28; W.VA. CONST. art. VI, § 39; WIS. CONST. art. IV, § 31; WYO. CONST. art. III, § 27.

[91] Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L. J. 907, 911 (2003) [hereafter: Briffault, *The Disfavored Constitution*]; TARR, *supra* note 58, at 111-12.

[92] *Id.* at 908-09.

[93] N.Y. CONST. art. VII, § 8.

[94] *Id.* at art. VIII, § 1.

[95] *See* Matthew D. Mitchell et al., *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions* 65–76 (Mar. 24, 2020), https://www.mercatus.org/research/working-papers/outlawing-favoritism-economics-history-and-law-anti-aid-provisions-state (noting that all state constitutions—save Alaska, Connecticut, Illinois, Kansas, and Vermont—have Gift Clause provisions); Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 REGENT U. L. REV. 1, 1 (2023) (identifying these provisions as "Anti-Gift Clauses").

[96] *See* Nadav Shoked, *Debt Limit's End*, 102 IOWA L. REV. 1239, 1251 (2017) ("Mostly in state constitutions, but sometimes in statutes, states place a cap on the amount of debt a municipality may assume, or set special procedures for debt issuance."); *id.* at 1251-52 (summarizing the ways in which these limits appear in state constitutions).

[97] *See*, *e.g.*, Briffault, *The Disfavored Constitution*, *supra* note 91, at 910-11.

[98] *See*, *e.g.*, COLO. CONST. art. XI, §§ 1, 2 (prohibiting state and local governments from giving or lending credit to private firms or from becoming shareholders in public or private corporations); N.Y. CONST. art. VII, § 8 (same); ROBERT S. AMDURSKY & CLAYTON P. GILETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE 84 (1992) (explaining that state constitutions also commonly require that any public debts incurred serve a public purpose).

[99] *See*, *e.g.*, Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143 n.1 (1993) (reporting that every state except for Kansas, Maine, South Dakota, and Wisconsin have such provisions) BRIFFAULT & REYNOLDS, *supra* note 60, at 663-88 (noting that Kansas, Maine, South Dakota, and Wisconsin all adhere to the public purpose doctrine).

[100] *See Id.* To gloss them somewhat crudely, it may be said that these provisions and doctrines function to mirror states' "takings" clauses: where the latter prohibit the appropriation of private property absent a valid public purpose, the former require that any gift, loan, or expenditure of public property must be justified under the same principle. *See*, *e.g.*, Long, *infra* note 69, at 721 (making this comparison with respect to takings clauses and special legislation prohibitions). It is worth mentioning that the parallel between state constitutional public purpose requirements their eminent domain powers under the federal Constitution has become especially poignant since *Kelo v. New London*, 545 U.S. 469 (2005), when the Court expanded the Fifth Amendment's "public use" requirement to include any use that would benefit the public. *Kelo*, 545 U.S.

On the whole, these public purpose requirements first began to be constitutionalized in response to financial crises arising from states' overinvestment in economic development in the 1820s and 1830s.[101] The massive economic success of New York's Eerie Canal, which was completed in 1825, inspired a wave of public works across the states, as governments over the subsequent decades attempted to boost their local economies by subsidizing private industry to develop turnpikes, canals, and railroads.[102] The severe contraction of the economy during the Panic of 1837 led states who had borrowed heavily to fund these projects to default on their debts, with four states—Arkansas, Florida, Michigan, and Minnesota—repudiating their debts either partially or in whole.[103] Disturbed by these developments, reformers amended their states' constitutions to restrain legislatures from spending, gifting, and lending public money, extending lines of credit, or investing public funds in business corporations without a valid public purpose.[104]

Arguably, public purpose requirements have never functioned to impede legislative will.[105] States quickly discovered that they could circumvent the first round of public purpose amendments simply by delegating the power to assist private enterprise to local governments.[106] Once established, this ad hoc workaround undoubtedly contributed to subsequent governmental overspending, fiscal crisis, and a second round of public purpose amendments extending aid limitations to localities.[107]

State courts also did their own part to ensure that public spending could, for the most part, continue unabated, as we see in the mid-nineteenth-century case establishing the public purpose doctrine, *Sharpless v. Mayor of Philadelphia*.[108] *Sharpless* concerned a state constitutional to several legislative acts authorizing the City of Philadelphia to buy stock in specific railroad corporations with funds raised by issuing bonds.[109] In his opinion for the Pennsylvania Supreme Court, Chief Justice Jeremiah Sullivan Black noted that no specific provision within his state's constitution expressly forbade the legislature's actions.[110] Rather than resting his argument there, however, he contended further that legislative power could not be exercised in the private interest:

> Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to

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at 484 (holding that "[b]ecause" an "[economic development] plan unquestionably serves a public purpose, the takings challenged… satisfy the public use requirement of the Fifth Amendment.").

[101] Briffault, *The Disfavored Constitution*, *supra* note 92, at 911-12; TARR, *supra* note 58, at 111-12.

[102] Briffault, *The Disfavored Constitution*, *supra* note 92, at 911.

[103] *Id.*

[104] *Id.* at 911-12.

[105] *Id.* at 912 ("The public purpose requirement was never a complete bar to government financial assistance to the private sector.").

[106] *Id.* at 912.

[107] *See* TARR, *supra* note 58, at 114.

[108] 21 Pa. 147 (1853). *See also* Briffault, *The Disfavored Constitution*, *supra* note 92, at 909 ("Judicial interpretations have effectively nullified the public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors.").

[109] *See* Rubin, *supra* note 99, at 148; *id.* at 148-49 (discussing this landmark ruling as the origin of the public purpose doctrine)

[110] 21 Pa., at 164.

> objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder.[111]

But the Chief Justice ultimately held that, as applied, the states' aid to private railroads served a public purpose.[112] As he explained, the court's ruling hinged not "on the nature or character of the person or corporation whose intermediate agency is to be used," but on the "ultimate use, purpose, and object for which the fund is raised."[113] In this case, he explained, "[t]he public has an interest in such a road" because it provides "comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."[114]

Further, he clarified that it was in no way the court's duty to ascertain whether—or police the extent to which—private interests had influenced the legislature's enactments.[115] It was not oblivious to the fact that legislative power "will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large" or that the "ultra-enterprising spirit" of the era had only recently "carried the state to the verge of financial ruin[,]… produced revulsions of trade and currency in every commercial country[,]… [and] is tending now, and here, to the bankruptcy of cities and counties."[116] It his view, however, such dangers were properly addressed by "the masses of the people" and thus were "entitled to no influence" in the court's ultimate decision.[117] "However clear our convictions may be, that the system is pernicious and dangerous, we cannot put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it."[118]

However, the Supreme Court of Pennsylvania's decision to ignore the evident threat of capture was not generally representative of nineteenth-century public purpose adjudication. The next major state case developing the public purpose doctrine, *People v. Township of Salem*,[119] came out the opposite way on an almost identical fact pattern.[120] The decision for the majority of the Michigan Supreme Court was authored by one who was amongst the most influential legal minds of his time, Chief Justice Thomas McIntyre Cooley. In striking down the Township Board of Salem's scheme to issue and execute bonds to aid in the construction of a privately owned and operated railroad, he reminds readers plainly that "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[121] He then held unconstitutional the township's plan to "tax its citizens to make a donation to a railroad company" because it could reasonably be inferred that the ultimate benefits incurred by the public would be "incidental."[122]

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[111] *Id.* at 168-69.
[112] *Id.* at 169.
[113] *Id.* at 150.
[114] *Id.* at 169.
[115] *Id.* at 159.
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] 20 Mich. 452 (1870), *abrogated by* Advisory Opinion Re 1976 PA 295 & 1976 PA 297, 401 Mich. 686, 259 N.W.2d 129 (1977).
[120] *Id.* at 489.
[121] *Id.* at 487.
[122] *Id.* at 489.

2. Procedure

In addition to placing specific, substantive limits on legislative power, nineteenth-century reformers sought to reign in wayward legislatures by constitutionalizing additional restraints on legislative process.[123] This section focuses on single-subject and clear title rules. Like their substantive counterparts, it argues, these procedural restraints were part of a broader, state constitutional movement to address legislative excess by protecting the policymaking process against private interest influence.

Chronologically speaking, Illinois and Michigan became the first states to adopt reforms of this kind, adding subject-specific single-subject and clear title rules to their constitutions in 1818 and 1843 respectively.[124] In 1844, New Jersey became the first state to adopt a general, single-subject requirement, precipitating an era in which "the idea spread quickly" across the states.[125] Today, thus, forty-three states—every state excepting North Carolina and the New England states—have at least some form of the rule in their constitutions.[126] The provision included in the Minnesota Constitution of 1857, which stipulates that "[n]o law shall embrace more than one subject, which shall be expressed in its title."[127] It requires that any bill introduced be limited to one subject only and, generically, simultaneously affirms that all bills include titles that clearly and accurately reflect their contents.[128]

Nineteenth-century reformers adopted these and other procedural restraints in response to the general problem of state capture driving their addition of substantive limits to legislative power.[129] As Professor Robert F. Williams puts it, they were "response[s] to perceived state legislative abuses," including, *inter alia*, "[l]ast-minute consideration of important measures; logrolling; mixing substantive provisions in omnibus bills; low visibility; and hasty enactment of important, and sometimes corrupt, legislation; and the attachment of unrelated provisions to bills in the amendment process."[130]

As discussed previously, nineteenth-century constitution-makers associated logrolling with the generally disreputable special legislation paradigm.[131] It should be clarified, however, that logrolling does

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[123] *See* Dragich, *supra* note 61, at 103 (contrasting substantive and procedural limitations); Williams, *State Constitutional Limits*, *supra* note 61, at 91-92.

[124] Millard H. Ruud, *"No Law Shall Embrace More than One Subject"*, 42 MINN. L. REV. 389, 389-90 (1957); *See also* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment,* 1999 UTAH L. REV. 957, app. A (noting that forty of forty-three states' single subject rules also contain clear title requirements and that Arkansas, Illinois, and Indiana are the exceptions).

[125] Denning & Brooks, *supra* note 124, at app. A.

[126] Ruud, *supra* note 124, at 390.

[127] *See*, *e.g.*, MINN. CONST. art. IV, § 27 (1857).

[128] *See*, *e.g.* Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALBANY L. REV. 1629, 1633 (2019) (noting that single-subject provisions almost always include clear title requirements in the same sentence) [hereafter: Briffault, *The Single-Subject Rule*].

[129] *See*, *e.g.*, Williams, *State Constitutional Limits*, *supra* note 61, at 92.

[130] *Id.* Western legal history also reflects longstanding antipathies toward practices of this kind. *See*, *e.g.*, ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATES 548 (1922) (noting that early examples of single-subject requirements may be found in Roman law). Contemporary commentators express similar sentiments even today. *See*, *e.g.*, Briffault, *The Single-Subject Rule*, *supra* note 128, at 1629 (remarking that contemporary critics of omnibus legislation in Congress often point out that state constitutions prohibit it).

[131] *See supra* note 80 and accompanying text.

not inherently reflect capture.[132] Since it practice essentially facilitates the passage of legislation with minority support, it functions mostly to augment the influence of whichever underlying interests are already in play.[133] The perception that logrolling enforces state capture thus makes sense primarily in contexts where there is reason to believe these interests are exerting undue influence over the political process and pushing it in directions that sacrifice the public interest to amplify private advantage. Riders, for their part, do not even have the potential to enforce majoritarian rule.[134] When minorities attach riders to popular legislation, they pursue their interests without, as would have been the case in logrolling contexts, having to trade votes.[135] Ideas of this kind find direct expression in the text of New Jersey's path-setting 1844 single-subject rule.[136] The point, as its states, was ultimately "[t]o avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other."[137]

The clear title stipulations generally included, as Professor Martha Dragich has argued, likewise "reflect a widespread concern with special interest legislation in the nineteenth century."[138] These requirements originally date to Georgia's experience with the so-called "Yazoo Land Fraud" of 1795.[139] Back in 1783, Georgia's extensive territory included most of what is now Alabama and Mississippi.[140] A decade or so later, however, four companies managed to bribe the Georgia legislature to sell them about thirty million acres of the state's western lands at the fire-sale price of one and a half cents per acre.[141] In part, the legislature had managed to slip the land transfer passed the public's watchful eye by burying it in a deceptively and confusingly titled act.[142] So great was the public's ire when they realized what had occurred that they amended the Constitution of Georgia, in 1798, to include the nation's first clear title requirement: "No law or ordinance shall pass containing any matter different from what is expressed in the title thereof."[143]

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[132] *See*, *e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 51-57 (2000) (contending that logrolling can promote majority representation); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 172 (2000) (same); JAMES N. BUCHANON & GORDON TULLOCK, THE CALCULUS OF CONSENT 132-34 (1965) (same).

[133] *See*, *e.g.*, Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 804, 836 (2006) ("If legislators accurately represent all of their constituents, then… legislators and citizens will generally experience the same effects from vote trading. But this is unrealistic. Preferences vary, and among the constituents of a given legislator, some will benefit from a particular vote trade while others will suffer harm. At the extreme, legislators may trade votes in order to curry favor with powerful interest groups but leave most of their constituents—and society as a whole—worse off.").

[134] *See*, *e.g.*, Gilbert, *supra* note 133, at 839-40.

[135] *See*, *e.g.*, *id.*

[136] *See* N.J. CONST. art 4, § 7, cl. 4.

[137] *Id.*

[138] Dragich, *supra* note 61, at 116.

[139] *See*, *e.g.*, Denning & Smith, *supra* note 124, at 966.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 966 n.9 (providing the title of the Yazoo Act: "An Act supplementary to an Act, entitled an Act for appropriating a part of the unlocated territory of this State, for the payment of the late State troops, and for other purposes therein mentioned; declaring the right of this State to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes").

[143] *Quoted in id.* at 966.

B. *Anticapture Judicial Review in the States*

The previous subsection demonstrated that a key purpose of implementing constitutional restraints on legislative power was to prevent state capture.[144] But this raises an important question: who should enforce our state constitutions' legislative restraints? Both the history and structure of these provisions indicates a strong preference for state courts.[145] If, to modern ears, this point sounds somewhat obvious,[146] it nonetheless bears emphasizing here. The fact that state constitutions require enforcement by non-judicial actors might lead some to think that the review authority of state courts should be somewhat limited.[147] Further, the elevation of state courts as venues for the enforcement of constitutional restraints on legislative power is by no means a costless proposal.[148] Anyone interested in leveraging state courts to contest state capture should, as I do, take such concerns to heart. But before discussing problems that might surround anti-capture litigation,[149] it is important first to clarify way it makes sense to think that state courts are authorized to enforce the limits their constitutions establish on legislative power.

1. Historical Indications

The state constitutional conventions that reigned in state legislative power also expanded the role of state judges in the constitutional system.[150] This, in addition to views expressed by convention participants,[151] suggests the that judges would play a crucial role as enforces of states' reformed constitutions.

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[144] *See supra* § II.A.

[145] *See infra* §§ I.B.1-2.

[146] For example, the idea of judicial review has long stood as a central feature of American constitutional theory. *See*, *e.g.*, W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 156–57 (1919) (noting that state courts traditionally took their constitutional obligations in this respect seriously); Jessica Bulman-Pozen & Miriam Seifter, The Democracy Principle in State Constitutions, 119 MICH. L. REV. 859, 908 (2021) (contending that state courts were traditionally seen bulwarks against state-officials overreach) [hereafter Bulman-Pozen & Seifter, *Democracy Principle*]; Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PENN. L. REV. 1104, 1121 (1976) (explaining the Federalists' belief that installing life tenure for federal judges in the federal Constitution would permit the latter to function as an independent check on the excesses of the political branches); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207 (1983) (observing the longevity of state judicial review).

[147] *See*, *e.g.*, Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 146, at 909 (noting that "the state constitutional tradition is one that empowers the people of the states directly"); Williams, *State Constitutional Limits*, *supra* note 61, at 113 ("State constitutional restrictions are aimed in the first instance at the law-makers themselves, who are bound by their oath of office to uphold the constitution.").

[148] *See*, *e.g.*, Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995) (citation omitted) (contending that judicial elections pose a distinctive "majoritarian difficulty" in so far as "[f]irst, the rights of individuals and unpopular minority groups may be compromised by an elective judiciary" and "[s]econd,... the impartial administration of 'day-to-day' justice may be compromised"); David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 278 (2008) (observing that "[i]f judicial selection is the most heavily discussed topic in the entire legal literature, the outstanding theme of the discussion may be disdain for elective judiciaries.") (citations omitted). *See also Brandt v. Pompa*, 200 N.E.3d 286, 287–88 (Ohio 2022) (Fischer, J., dissenting to the majority's denial of a motion to reconsider) (contending that state courts must avoid judicial "activism").

[149] *See infra* § III.

[150] *See infra* notes 152-158 and accompanying text.

[151] *See infra* notes 159-169 and accompanying text.

Perhaps the most important way in which nineteenth-century state-constitutional developments augmented judicial power was through the establishment of elected judiciaries.[152] Across an important body of state-constitutional history, Professor Jed Shugerman has documented how these reforms aimed both at increasing judicial independence and at increasing judges authorities as against wayward, captured legislatures.[153]

State constitutional amendments requiring judicial elections first began to appear in the early-nineteenth century in response to public corruption and capture in states like Georgia, Indiana, Mississippi, and New York.[154] Georgia's constitutionalization of judicial elections in 1812 was part of its response to the Yazoo Land Fraud included the adoption of districted circuit courts with popularly elected judges.[155] Similarly, Indiana's 1816 adoption of electoral selection for its intermediate appellate judiciary had been pushed by a group known as the "Poor Frontiersman" seeking to take power away from the state's "Aristocrats."[156] And, similarly, Mississippi's adoption of judicial elections for its supreme court in 1832—the first policy of its kind in the nation—was the outcome of a successful campaign by a group known as the "Whole Hogs" to rest power from their own state's economically dominant "Aristocrats."[157] And their adoption by constitutional convention in New York in 1846—an event precipitating their mass constitutionalization throughout the states—was intended to disrupt "national economic depression, state overspending, and insider corruption."[158]

Unsurprisingly, thus, the records from the many nineteenth-century state constitutional conventions suggest that participants were keenly interested in elevating state courts as bulwarks against legislative hubris.[159] Exemplary in this respect were the Illinois and Ohio constitutional conventions of

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[152] *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1070–75 (2010) (describing how, beginning in the early-nineteenth century, states substantially forswore the practice judicial selection by gubernatorial appointment for popular elections) [hereafter: Shugerman, *Economic Crisis*]

[153] *See*, *e.g.*, Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. FORUM 18, 24-25 (2022); Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1070–75 (2010) [hereafter: Shugerman, *Economic Crisis*]; JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 8 66, 84-102 (2012) (explaining the importance of popular anti-capture sentiments for the establishment of elected judiciaries, and emphasizing that "[i]n various combinations, economic elites, political insiders, the dueling parties, and the general public distrusted each other more than they distrusted judges, so they were willing to entrust judges with more power and in dependence as a hedge against the other groups and the political branches of government").

[154] Shugerman, *Economic Crisis*, *supra* note 153, at 60, 53-64 (describing Georgia's adoption of judicial elections in response to the Yazoo Land Fraud and Mississippi's adoption as the outcome of a successful campaign led by a group known as the "Poor Frontiersman" to take power away from the state's "Aristocrats"); SHUGERMAN, *supra* note 153, at 66, 84-102 (explaining that Mississippi's adoption of a judicial elected supreme court in 1832—the first policy of its kind in the nation—a impelled by a populist group, the "Whole Hogs," who were seeking to rest power from their own state's economically dominant "Aristocrats").

[155] Shugerman, *Economic Crisis*, *supra* note 152, at 60.

[156] *Id.* at 63-64; MISS. CONST. art. IV, § 2 (1832) ("The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The legislature shall divide the state into three districts, and the qualified electors of each district shall elect one of said judges for the term of six years.")

[157] SHUGERMAN, *supra* note 153, at 84-102.

[158] Jed Shugerman, *Countering Gerrymandered Courts*, *supra* note 153, at 25.

[159] *See* SHUGERMAN, *supra* note 153, at 105-06 ("The conventions offered powerful mandates for more judicial review: a mandate for creating new substantive and procedural limits on legislative power, and a mandate for creating a new institution (the elected judiciary) to make those paper limits a reality.").

1847 and 1850-51 respectively.[160] At the Illinois convention future Supreme Court Justice David Davis suggested that establishing judicial elections would entail that state courts could intervene more comfortably because they "would always receive the support and protection of the people."[161] Those adhering to Davis's views, as the subsequent response of delegate John Dement reflects, were specifically motivated by the "distrust of the Legislature," which Shugerman describes as the prevailing "mood" of the period.[162] Dement then criticized the viability of judicial elections as simply redistributing power from lawmakers to judges, a change that would by no means prevent the fact that giving "a few men" power may lead them to "become corrupt."[163]

Or, consider the views expressed in *The New Constitution*, an influential series of pamphlets that populist Democrat Samuel Medary published in 1849 to encourage a constitutional convention in Ohio.[164] These essays, as Shugerman emphasizes, focused on electoral judiciaries' "relative independence from the legislature" and "railed against legislative excesses."[165] Medary believed that elevating the judicial role in constitutional enforcement would specifically treat the special-legislation-agency problem of "over-legislation," which he called "[t]he great evil of all free governments."[166] By expanding and popularizing judicial review, he further explained, "the people" would gain a powerful avenue by which to "prevent the Legislature from heaping debts upon us" and combat a system predicated upon private interests "bribing men to become hypocrites, and to rob us, as has been done in our public works, where knaves have made fortunes in a few years out of the tax-ridden, oppressed people."[167]

When Ohio held a constitutional convention in 1850-51, at least one delegate prominently channeled these views in his proposal for an elected judiciary:

> Whereas, There is a deep and just dissatisfaction amongst the people in regard to appointments to office—especially by the legislative department of government; converting that body, as they do to some extent, into a mere political arena, embittering the feelings of party spirit, and corrupting the pure fountain of legislation; Therefore—
>
> *Resolved*, That the new Constitution provide for the election of all State, County, and Township officers immediately by the people.[168]

The new Ohio constitution resulting from 1850-51 convention simultaneously established an elected state judiciary and imposed new restraints on legislative powers in the form of special legislation prohibitions and limits on economic regulation.[169]

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[160] THE ILLINOIS CONSTITUTIONAL DEBATES OF 1847 (1847); 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-1851 (1851).
[161] *Id.* at 461-62 (remarks of delegate David Davis).
[162] *Id.* at 752; SHUGERMAN, *supra* note 159, at 106.
[163] THE ILLINOIS CONSTITUTIONAL DEBATES OF 1847, *supra* note 160, at 752.
[164] *See* SAMUEL MEDARY, THE NEW CONSTITUTION (1849).
[165] SHUGERMAN, *supra* note 153, at 107.
[166] MEDARY, *supra* note 164, at 257.
[167] *Id.* at 268.
[168] 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-1851 86 (J. V. Smith reporter, 1851) (remarks of delegate J. Milton Williams).
[169] SHUGERMAN, *supra* note 153, at 109.

2. Structural Considerations

In recent years, public law scholars have often noted how the restructuring of judicial power across the this nineteenth-century offers compelling reasons to think that state courts should play a substantial role enforcing state constitutions against state legislatures even today.[170] Thus far, the most prominent commentator in this respect has perhaps been Professor Helen Hershkoff, who, in a series of influential articles, has encouraged state courts to exploit their unique status as democratically elected wards of state common law to detach themselves from the theories and practices of the federal bench.[171] Focusing on the example of social and economic rights enforcement, Hershkoff argues that states courts should apply heightened forms of scrutiny in cases where constitutional rights are unlikely to be enforced through the legislative process.[172]

Situated alongside the anti-capture agenda of nineteenth-century state constitutional reform suggests a strong case for extending Hershkoff's argument for heightened scrutiny to the judicial enforcement of state-constitutional restraints on legislative power.[173] Specifically, the application of heightened scrutiny to policies challenged under these provisions finds substantial justification under the view that they almost certainly will not be enforced adequately under a rational basis approach.[174] Indeed, scholars of state constitutions routinely opine that state courts' enforcement of these provisions under rational basis scrutiny has largely defanged them, condemning them to symbolic redundancy.[175] First, state courts have largely converted their constitutions' special legislation prohibitions into state-level recapitulations of the federal Equal Protection Clause.[176] In treating cases arising under these provisions as "conventional economic-classification equal protection problems," as Professor Justin Long argues, state courts have blinded themselves to the crucial task of "think[ing] seriously about

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[170] Professor Mark Tushnet advanced a version of this claim nearly three decades ago in Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669, 1669 (1988) (suggesting it makes sense to "think that judges subject to periodic election may be justified in using relatively free wheeling methods of interpretation, while life tenured judges should use more stringent ones… [M]ajoritarian constraints up, interpretive constraints down; or, conversely, majoritarian constraints down, interpretive constraints up").

[171] *See*, *e.g.*, Hershkoff, *Positive Rights*, *supra* note 49, at 1137; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842 (2001) (disputing state courts' deference to federal justiciability doctrine) [hereafter, Hershkoff, *"Passive Virtues"*].

[172] *See* Hershkoff, *Positive Rights*, *supra* note 49, at 1169-94.

[173] *See supra* note 171.

[174] *See infra* notes 176-188 and accompanying text.

[175] *See id.*

[176] *See*, *e.g.*, Long, *supra* note 69, at 726; Conor D. Woodfin, *Preserving the Virginia Constitution's Prohibition on Special Legislation*, 27 GEO. MASON. L. REV. 905, 908, 906 (2020) (noting the absence of existing judicial will to adopt more "activist" interpretations of special legislation prohibitions and that this tendency, in Virginia, has "effectively nullifie[d] independent Virginia rights"). This approach has also affected many of the other equality guarantees lodged in each state's constitution. *See*, *e.g.*, JEFFERY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 3-4 (2008) (observing that state courts tend to interpret their constitutions' "privileges or emoluments" prohibitions, equal rights amendments, segregation prohibitions, and "common benefit" requirements in ways that directly mimic the federal Equal Protection Clause); Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for Equal Protection Review of Regulatory Legislation Emerging Issues in State Constitutional Law*, 69 TEMPLE L. REV. 1247, 1247n.3 (collecting cases that equate judicial review under Washington Constitution's ban on special privileges and immunities with review under the Equal Protection Clause); Williams, *Equality Guarantees*, *supra* note 69, at 1197 (noting that while most states equate their constitutions' equality guarantees with federal equal protection doctrine, some courts have developed their analyses).

remedies."[177] That is, modeling special legislation prohibition doctrine after the Equal Protection Clause may render courts unable, or unwilling, to consider questions falling outside the federal paradigm, like whether challenged legislation may provide some "rare benefit for the plaintiff's adversary or an unjustly particularized burden on the plaintiff."[178]

Similarly, when it comes to enforcing their constitutions public purpose requirements, state courts have adopted a path modeled after Chief Justice Black's opinion in *Sharpless*, thus forgoing the more searching alternative charted out by Chief Justice Cooley in *Township of Salem*. The general approach, as Briffault has argued, has been to proceed under "a posture of extreme deference to state legislatures" by "finding that a broad range of goals fall under the rubric of public purpose, and that legislative determinations… are to be accepted as long as they are 'not… irrational'."[179] This has entailed, on the one hand, the judicial exploitation of the fact that creative lawyers can virtually always imagine some conceivable public purpose under which a statute may be sheltered and, on the other, the abnegation of any judicial authority to evaluate how well challenged policies actually pursue their stated aims. Today, thus, states' constitutional public purpose requirements "are largely rhetorical": "State legislatures define what public purposes are and receive great deference when they determine that a particular program promotes the public purpose."[180]

Procedural restraints have fared little better. Though courts in recent decades have perhaps found single-subject rule violations more often than previously,[181] they have, over the previous half century or so, usually "given a liberal interpretation" to the provision and "rejected most single-subject challenges to state legislation."[182] Here, the basic approach has typically been to apply what is essentially a version of rational basis scrutiny.[183] To assess whether an enactment's various provisions fall within a single "subject," courts test for "germaneness,"[184] that is, they ask whether its potentially disparate subject matter is rationally related to one another or whether there is a "general subject" to which they all apply.[185] The chief danger inhering in this approach, of course, is that it risks rendering the constitutional provision a "dead letter"[186] on the seeming presumption that its purpose was to "leave enforcement of the requirement to the legislature itself."[187]

Compounding this tendency, as Dragich points out, is that fact that even when plaintiffs use their state constitutions to bring distinct procedural claims—e.g., separate single-subject and a clear title challenges—courts often treat them "as if they were the same," often by using the statute's title to make inferences about the potential unity of its subject matter.[188] Of course, in subordinating clear title

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[177] Long, *supra* note 69, at 14.
[178] *Id.*
[179] Briffault, *The Disfavored Constitution*, *supra* note 92, at 914 (*quoting Delogu v. State*, 720 A.2d 1153, 1155 (Me. 1998)).
[180] Briffault, *The Disfavored Constitution*, *supra* note 92, at 914.
[181] *See* Denning & Smith, *supra* note 124, at 996–97; Dragich, *supra* note 61, at 107–08.
[182] Briffault, *The Single-Subject Rule*, *supra* note 128, at 1630-31.
[183] *See* Dragich, *supra* note 61, at 123 (noting that even in "ordinary speech," "[t]he words 'subject' and 'purpose'… are sometimes used interchangeably").
[184] *Id.* at 1640-42.
[185] *Id.* at 1640-41.
[186] *Porten Sullivan Corp. v. State*, 568 A.2d 1111, 1118 (Md. 1990).
[187] Briffault, *The Single-Subject Rule*, *supra* note 128, at 16344 (suggesting that it is "odd" to think that the provision was intended to call upon legislatures to police themselves).
[188] Dragich, *supra* note 61, at 123 (looking, in particular, at the Missouri Supreme Court).

analyses to a single-subject test amounts to the same thing as collapsing them into the rational basis approach that is definitive of the latter.[189]

At least in practice, the suggestion thus seems to be, constitutional restraints on legislative power can do very little so long as they are enforced under extremely deferential levels of judicial review. And what this implies, in turn, is that rather than enforcing these provisions against capture judges too-often use them to enshrine special legislation under the protective mantle of state constitutional law. And yet this tendency, if unfortunate, is by no means compulsory under state constitutional law. If anything, this brief examination of some of the historical and tendencies of nineteenth-century state constitutional law seems to point in a different direction; to suggest, rather, that state courts should step up and provide fora for popular majorities and their chosen representatives to strike down special interest legislation as unconstitutional.

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What we have seen, in the foregoing, is that nineteenth-century state-level reformers installed powerful restraints on legislation and that they did so in order to elevate state courts as venues in which state legislative capture could be contested. What remains to be seen, and what the following sections consider, is what those restraints may imply for contemporary legal practice, that is for anticapture litigation in an era largely characterized—and compromised—by endemic special interest politics.

II. Contesting State Capture Now: Contemporary Applications

Especially in recent decades, state judges have tended to disfavor the idea that their constitutions authorize them to intercede against legislative enactments.[190] Despite a sustained tradition of constitutional scholarship contending that state courts and constitutional jurisprudence are different from their federal counterparts,[191] state-level judges often insist that they must proceed with extreme deference, a value they tie closely to the notion that they should, for the most part, by implementing the federal doctrine of rational-basis scrutiny.[192] And yet, as this Part demonstrates, not all states have gone that way.[193] Freeing themselves of the sclerotic hold of the federal lockstep, states like Arizona, Pennsylvania, and Maryland have advanced innovative doctrinal mechanisms that promise to better enforce their constitutions' restraints on legislative power.[194] In the sections that follow, I use recent case law from these and other jurisdictions to discuss these state-constitutional approaches, and indicate how they might be extended to pressing, contemporary state-level debates concerning democracy and work.[195]

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[189] *See supra* notes 181-187 and accompanying text.
[190] Citing.
[191] *See, e.g.*, *supra* notes 32 & 49 (collecting sources).
[192] *See, e.g.*, Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 2, at 1885 (noting that, "[s]tate litigants and courts frequently invoke this framework" even though "[i]t is too deferential to state legislatures and executives, whom state constitutions task state courts with monitoring on behalf of the people, and too absolutist in its conception of individual rights, which must be understood in the context of other rights and communal welfare").
[193] *See infra* §§ II.A-B.
[194] *See infra* § II.A.
[195] *See infra* § II.B.

A. *Recent Case Law*

Even today, it is not uncommon for state courts to note that protecting against state capture is an important purpose of their constitutions' legislative restraints.[196] More importantly still, some courts have intentionally constructed doctrinal mechanisms to give them effect, like tests requiring the consideration of multiple, relevant factors or the application of heightened scrutiny.[197] Still more the exception than the norm, these state-court practices matter for what they exemplify: that state judges may enforce their constitutions' legislative restraints and that various models already exist as tools for future constitutional adjudication.

1. Rational Basis with Bite

> "[W]hen the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[198]

The argument that judges should apply heightened forms of scrutiny when reviewing captured legislation or agency decisions is among the most common themes in debates on federal anticapture judicial review that emerged in 1980s-era public-law scholarship.[199] Meanwhile, state constitutional scholars have pointed out that deferential rational basis scrutiny may not give sufficient effect to state constitutional rights.[200] Arguably, however, public law scholarship today might stand to give more attention to the fact that the judicial enforcement of state constitutional restraints on legislative power may also require elevated forms of review.[201] Indeed, recent state constitutional developments demonstrate innovative approaches to balancing the need to check captured legislation against the value of legislative deference.

In recent years, however, the Arizona Supreme Court has concluding that enforcing it's the Arizona Constitution's public purpose requirements requires that it take a more searching look at legislation challenged under its Gift Clause.[202] Take, for instance, *Turken v. Gordon*,[203] a case concerning the constitutionality of the City of Phoenix's agreement to pay a private corporation as much as $97.4 million to assist it in developing of a commercial hub in a master-planned community, wherein the Arizona Supreme Court concluded that the agreement likely violated the public purpose requirements of the Arizona Constitution.[204] Phoenix had entered into the agreement in order to secure future sales

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[196] *See infra* §§ A.1-2.
[197] *See id.*
[198] *People ex rel. Detroit & H.R.R. v. Township Board*, 20 Mich. 452, 487 (Sup.Ct.1870) (Cooly, J.).
[199] *See*, *supra* note 22 (collecting sources).
[200] *See*, *e.g.*, Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 2, at 1862-81; Hershkoff, *supra* note 49, at 1137.
[201] In recent scholarship, perhaps the closest instantiation of this view is Bulman-Pozen and Seifter's contention that state-constitutional restraints on legislative power instantiate a basic, judicially enforceable principle of democracy. *See* Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 146, at 875-76, 893-94.
[202] *See*, *e.g.*, *Turken v. Gordon*, 224 P.3d 158 (Ariz. 2010); ARIZ. CONST. art. 9, § 7. Recent local government scholarship has highlighted this case as exemplary of the fact that state courts may give the public purpose doctrine teeth without usurping legislative power. *See* BRIFFAULT, REYNOLDS, DAVIDSON, SCHARFF & SU, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 720-21 (9th ed., 2022).
[203] 224 P.3d 158.
[204] *Id.* at 160.

tax revenue from the future retail space, and structured the subsidy as a payment for parking access.[205] In 2007, Meyer Turken filed suit against the city and developer in concert with several Phoenix taxpayers and business owners, alleging that the agreement violated their constitution's Gift Clause, Equal Privileges and Immunities Clause, and Special Laws Clause.[206]

While each of these anticapture mechanisms arguably implicates the public purpose doctrine,[207] the court focused its attention on the Gift Clause. To interpret the clause, the court began by recalling its original, anti-capture purpose: "[the Gift Clause] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880" and "it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business."[208]

Given the Gift Clause's anti-capture purposes, it then suggested, it makes sense to apply heightened scrutiny in challenges arising thereunder.[209] Specifically, the Arizona Supreme Court enforces the Gift Clause using a two-pronged test involving: (1) a deferential look at whether the program serves a public purpose; and (2) a more searching inquiry into the directness of the benefits that would flow back to the city.[210] Under this test, the legislature receives wide birth to decide the purposes of its enactments while still reserving authority for courts to assess the relationship between ends and means. Prong two, it thus explained, means that the benefits flowing back to the city, as "compared to the expenditure," may not be "'so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity'."[211] Applying this test, the *Turken* court then ruled that the agreement should fail under prong two's more challenging standard for two reasons: first, the "indirect benefits" that the city hoped to recoup through anticipated sales tax revenues could not be taken as consideration; and, second, the value of the parking spaces was not equal to the subsidy it had granted the developer, the agreement ultimately constituted an unconstitutional "gift."[212]

Similarly, state courts are also developing tests for enforcing their constitutions' procedural restraints on legislative power while maintaining a posture of deference toward elected lawmakers. One of the most important examples, in recent years, is the Pennsylvania Supreme Court's evolving single-subject doctrine.[213] Like many states, Pennsylvania enforces this provision with reference to the standard of "germaneness," or the idea that there must be a "commonality between the provisions contained in the legislation, such that the various parts of the bill can be fairly regarded as working

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[205] *Id.* at 160-61.
[206] *Id.* at 161; ARIZ. CONST. art. 9, § 7; art. 2, § 13; art. 4, pt. 2, § 19.
[207] *See*, *e.g.*, Sandefur, *supra* note 95, at 308-337 (explaining Arizona's Gift Clause public purpose jurisprudence); Williams, *Equality Guarantees*, *supra* note 69, at 1217-18 (noting that, back in the nineteenth century, state constitution's equality provisions were generally seen as preventing "class legislation," or enactments that "include or exclude persons from a statute's reach be rational in light of the legislative purpose.").
[208] *Turken*, 223 Ariz. 342, at 346 (*quoting Thaanum v. Bynum Irrigation Dist., 72 Mont.* 221, 232 (1925)).
[209] *Id.* at 345 (providing that "a governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity") (*quoting Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346, 687 P.2d 354 (1984)) (internal quotation marks excised).
[210] Id.
[211] *Id.* at 345 (internal citations omitted).
[212] *Id.* at 350, 351.
[213] PA. CONST. art. 3, § 3.

together to accomplish a singular purpose."[214] What makes the Pennsylvania Supreme Court's single-subject jurisprudence noteworthy, however, is its attempt to strike a balance between smoking out state capture and deferring to legislative will.[215]

Back in 2003, in a case entitled *City of Philadelphia v. Commonwealth of Pennsylvania*,[216] the court had observed that its current germaneness test was been too deferential to give the Pennsylvania Constitution's single-subject requirement adequate effect.[217] Up to then, its test singly required that challenged legislation "assessed according to whether the court can fashion a single, over-arching topic to loosely relate the various subjects included in the statute under review."[218] Since virtually any enactment could be justified thereby, it explained, the test rendered the requirement "impotent to guard against the evils that… [the single-subject requirement] was designed to curtail."[219] Only two years later, however, in a case called *PAGE v. Commonwealth of Pennsylvania*,[220] the court tacked sharply in the opposite direction, concluding that its germaneness test was not in need of revision as it accorded appropriately with its "extremely deferential" approach to constitutional challenges.[221]

The court's 2023 decision in *Weeks v. Department of Human Services*[222] reflects its desire to establish a "middle-course framework" that incorporates elements of *City of Philadelphia*'s skepticism with *PAGES*' deference.[223] Indeed, the court's sharply divided ruling very much reflects that Pennsylvania's Article III jurisprudence is very much still up for debate.[224] What matters for our purposes, however, is what we can learn from the Pennsylvania Supreme Court's attempts to grapple with and implement its constitution's anti-capture potentialities. Like the Arizona and Maryland

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[214] *Weeks v. Dep't of Hum. Servs.*, 302 A.3d 678, 696 (Pa. 2023). The case first setting out this standard in Pennsylvania constitutional law is *Payne v. School District of Borough of Coudersport*, 168 Pa. 386, 31 A. 1072 (1895), wherein the court set forth the following reasoning:

> Few bills are so elementary in character that they may not be subdivided under several heads; and no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough.... Those things which have a "proper relation to each other," which fairly constitute parts of a scheme to accomplish a single general purpose, "relate to the same subject" or "object." And provisions which have no proper legislative relation to each other, and are not part of the same legislative scheme, may not be joined in the same act.

Id. at 1074.

For a recent discussion of other states' versions of the germaneness test, *see* Briffault, *The Single-Subject Rule*, *supra* note 128, at 1640-42.

[215] *See*, *e.g.*, *Weeks*, 302 A.3d at 719 (Wechet, J., dissenting) ("So openly have our cases contradicted each other at times that language used pejoratively in one case has been cited as a legal truism in others.") (discussing *City of Philadelphia v. Com.*, 575 Pa. 542 (2003) and *Commonwealth Pennsylvanians Against Gambling Expansion Fund*, Inc. v. Com., 583 Pa. 275 (2005) [hereinafter cited as *PAGE*, 583 Pa.]).

[216] 575 Pa. 542 (2003).

[217] *Id.* at 575.

[218] *Id.*

[219] *Id.* at 588. *See also id.* at 574-76; 575 n.18 (defining these evils as logrolling and riders, practices that result in deceptive legislation and negate the governor's veto powers).

[220] *PAGE*, 583 Pa. 275 (2005).

[221] *Id.* at 293.

[222] 302 A.3d 678 (Pa. 2023).

[223] *Id.* at 697 n. 19 (attributing this "middle-course" approach to its earlier decision in *City of Philadelphia*).

[224] In *Weeks*, the majority ought to establish a "middle-course framework" for its germaneness test, one that would permit it to balance its commitment to legislative deference against these provisions' anti-capture purposes. *Weeks*, 302 A.3d 697. *See also id.* at 697 n. 19 (attributing this "middle-course" approach to its earlier decision in *City of Philadelphia*, 575 Pa.).

supreme courts, its decisions in the past decades appear to be demonstrative of a desire to balance two important constitutional commitments: contesting state capture and legislative deference.[225]

2. Multi-Factor Tests

A second way in which state courts might give doctrinal effect to their constitutions' legislative restraints is by developing historically grounded multi-factor tests. Compared to the idea of applying heightened scrutiny, approaches of this kind have received comparatively less attention in the public law scholarship on anticapture judicial review.[226] Perhaps the most proximate alternative to multi-factor tests is what Professor Frank Michelman has called "*per se*" or "*categorical substantive review*," which involves courts "ascertain[ing] whether the project entails in any degree the use" of a strictly unconstitutional practice, "and on that basis grants or denies relief."[227] What makes multi-factor tests unique, however, is that they guide courts to search the legislative record for not one but several possible indicators of state capture, and permits courts a degree of flexibility in determining, ultimately, whether to uphold challenged legislation.[228]

A good example of this is Maryland's unique approach to reviewing subsidies for economic development under its constitution's prohibition on special legislation.[229] In the 1981 case of *Cities Services v. Governor*,[230] the Maryland Court of Special Appeals established the existing multi-factor test for enforcing the Maryland Constitution's ban on special legislation.[231] *Cities Services* concerned the constitutionality of an exception for mass merchandisers included in a state statute prohibiting petroleum producers and refiners from operating in Maryland.[232] Voting unanimously, the Court of

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[225] *See Weeks*, 302 A.3d at 719 (Wechet, J., dissenting) (noting this point).

[226] Of course, anticapture judicial review theories may assert that heightened scrutiny will be justified primarily in the presence of certain factors. *See*, *e.g.*, Sunstein, *Naked Preferences*, *supra* note 199, at 1699-1700 (contending that heightened scrutiny may be triggered by a finding that a legislative enactment was motivated by impermissible naked preferences).

[227] Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 161 (1977) (identifying this approach as a model public-purpose test); *id.* at 166n.55 (collecting and discussing examples of the application of this approach in state case law).

[228] *See*, *e.g.*, *Cities Serv. Co. v. Governor, State of Md.*, 290 Md. 553, 568–71 (1981) (applying a multi-factor test to find that a divestiture law's mass-merchandiser exception violated the Maryland Constitution's ban on special legislation).

[229] *See*, *e.g.*, *Howard Cnty. v. McClain*, 254 Md. App. 190, 198-204 (2022) (applying the test set forth in *Cities Serv.*, 290 Md. to find that a zoning regulation amendment was a form of impermissible special legislation); *Trustees of Walters Art Gallery, Inc. v. Walters Workers United, Council 67, AFSCME, AFL-CIO, No. 2070*, Sept.term,2022, 2024 WL 4500973, at *28–29 (Md. Ct. Spec. App. Oct. 16, 2024) (Getty, J., dissenting) (contending that, under *Cities Services*, an ordinance incorporating a body of trustees to control a private donor's art collection did not violate the Maryland Constitution's prohibition on special laws).

[230] *Cities Serv.*, 290 Md.

[231] *Id.* at 568–71.

[232] *Id.* at 555–56. Maryland's "Divestiture Law" provided that:

> [A]fter July 1, 1974, no producer or refiner of petroleum products shall open a retail service station in Maryland and operate it with company personnel or a subsidiary company . . . [and] after July 1, 1975, no producer or refiner of petroleum products shall operate any retail service station in Maryland with company personnel or a subsidiary company, regardless of when the station may have been opened, and that all stations must be operated by retail service station dealers.

Id. (*citing* MD. CODE ANN., art. 56, § 157E(b), (c), (g), (h), and (i) (1957, 1979 Repl. Vol., 1980 Cum. Supp.)). Its included mass merchandiser exception

> exempted from the divestiture requirement a retail service station in operation on January 1, 1979, that was operated by a subsidiary of a petroleum producer or refiners of January 1, 1979, on a year to year basis as long as the

Special Appeals found that the exemption to be violative of Article III, section 33 of the Maryland Constitution, which provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law."[233]

In his opinion for the court, Judge John Cole Eldridge broke with the test for special legislation established in Maryland case law, which he believed had culminated in a dead-end.[234] In its stead, he created a new, two-pronged, purposes- and factors-based test, one which remains good law in Maryland today.[235] Under prong one, (1) the court must begin by recalling that the original purpose of this prohibition was "to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others[.]"[236] Under prong two (2), Judge Eldridge then explained, courts must consider a series of non-individually-conclusive "considerations and factors,"[237] which he enumerated as follows:

(a) "whether [the underlying purpose of the legislative enactment] was actually intended to benefit or burden a particular member or members of a class instead of an entire class";

(b) "[w]hether particular individuals or entities are identified in the statute";

(c) "[t]he substance and 'practical effect' of an enactment";

(d) "[i]f a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation";

(e) "[t]he public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest"; and

(f) "whether [the legislative enactment is] arbitrary and without any reasonable basis[.]"[238]

Applying this test, the court found that the mass merchandiser exemption to be a clear case of unconstitutional special legislation.[239] Because, in its view, the legislative record showed clear evidence that "the exemption was sought" by the very business that stood to become its "sole beneficiary" the

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subsidiary's gross revenues from petroleum products sold in Maryland are less than two percent of the subsidiary's gross revenues from all retail operation in Maryland.

Id. at 557–58 (*citing* MD. CODE ANN., art. 56, § 157E(c)(2) (1957)).

[233] MD. CONST. art. III, § 33.

[234] *Cities Serv.*, 290 Md. at 567-68 (noting that the tests special legislation tests established in previous Maryland case law were "not particularly helpful" and also "provide[d] no mechanical rule for deciding cases").

[235] *See, e.g., See, e.g., Trustees of Walters Art Gallery, Inc. v. Walters Workers United, Council 67*, AFSCME, AFL-CIO, No. 2070, Sept.term,2022, 2024 WL 4500973, at *28-29 (Md. Ct. Spec. App. Oct. 16, 2024) (Getty, J., dissenting) (pointing out the majority had failed to consider the validity of a charter under the Maryland Constitution's ban on special legislation, which would have required that they apply the multi-factor test established in *Cities Serv.,* 290 Md.).

[236] *Cities Serv. Co.*, 290 Md. at 568. Prong one may also be interpreted as one of the non-conclusive factors that Pennsylvania courts consider when determining whether the special legislation ban has been violated. *See, e.g., Trustees of Walters Art Gallery*, Sept.term,2022, 2024 WL 4500973, at *28 (Md. Ct. Spec. App. Oct. 16, 2024) (Getty, J., dissenting) (contending that the Maryland General Assembly did not enact a special law when it chartered a private corporation to manage real property and art willed to the City of Baltimore by a private individual because it "did not benefit any specific individual" and did not "risk granting '[an individual] with sufficient influence … an undue advantage over others'." *Quoting Cities Serv.,* 290 Md. at 569.).

[237] *Cities Serv.*, 290 Md. at 569–70.

[238] *Id.* (internal citations omitted).

[239] *Id.* 570.

exemption contradicted the special legislation prohibition's anti-capture purposes, as well as factors (a), (c), (d), (f), and (g).[240]

The approaches developed by Arizona, Pennsylvania, and Maryland are exemplary of the fact that not all state courts have abandoned their constitutions' restraints on legislative power to redundancy. To the contrary, the heightened scrutiny and multifactor tests that these state courts routinely apply show that courts may not only use these provisions to check special interest legislation but also do so while leaving existing legislative authority largely intact.

B. *Contemporary Debates*

In recent years, the influence private interests state-level policymaking concerning democracy and work has been particularly intense. Well-resourced individual activists, like the Koch Brothers, and interest groups, like the American Legislative Exchange Council (ALEC), a private non-for-profit dedicated to promoting conservative, pro-business policy across the states, have applied their considerable influence to generate enactments that redraw districting maps and establish strict voter ID laws.[241] And they influenced the creation of laws preempting progressive employment laws[242] like Right-to-Work acts (RTWAs) across a majority of the states.[243] In states like Wisconsin, Ohio, and Kentucky, progressive litigants regarding these new laws as exemplary of state capture have—with little success—attempted to have them struck down under their states' constitutional restraints on legislative power.[244]

Should these progressive litigants have prevailed? How should courts have ruled in these and similar controversies? How should they approach those arising under their states' constitutional restraints on legislative power in the future? With these questions in mind, this section considers how litigation of this kind might fair if more state courts were to apply the kinds of heightened scrutiny and multi-factor tests described advanced in Arizona, Pennsylvania, and Maryland.[245]

1. Partisan Gerrymandering

How should state courts navigate the present-day phenomenon of extreme partisan gerrymandering? In the 2018 case of *Rucho v. Common Cause*,[246] the Supreme Court held that while partisan gerrymandering is not justiciable as a federal matter it might be so lower down the federal system, where "state constitutions can provide standards and guidance for state courts to apply."[247] Since then, however, state courts since have taken *Rucho*'s advice in contradictory directions. Consider the flip-flopping comportment of the Supreme Court of North Carolina. In the 2022, when Democrats held a 4-3 majority, the court built on *Rucho* to find that partisan gerrymandering was both cognizable and unconstitutional under a host of state constitutional provisions enshrining the right of

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[240] *Id.*
[241] *See, e.g.*, HERTEL-FERNANDEZ, *supra* note 3, at 2-3 (noting that "[o]f the 62 ID laws states considered during the 2011 and 2012 legislative sessions, more than half were proposed by [ALEC] lawmakers"); *id.* at 23 ("If it's voter ID, it's ALEC.").
[242] *See, e.g., id.* at 239-41; *id.* at 41 (concluding that "the combination of state power over preemption, coupled with the troika's cross- state reach, severely curtails the ability of blue cities located within red states to take action on their own").
[243] *See, e.g., id.* at 143-46.
[244] *See, e.g., Zuckerman v. Bevin*, 565 S.W.3d 580, 600 (Ky. 2018) (applying rational basis scrutiny to uphold the Right to Work Act as a reasonable mechanism for "promot[ing] economic development… [and] job growth, and… [as] remov[ing] Kentucky's economic disadvantages in competing with neighboring states").
[245] *See supra* § II.A.
[246] 588 U.S. 684 (2019).
[247] *Id.* at 719.

North Carolinians to "substantially equal voting power."[248] A year later, however, Republicans flipped the court, achieving a 5-2 Republican majority that would subsequently determine to rehear the case and issue a blanket reversal.[249] To do so, the new court contended that *Rucho* offered anything but a narrow, federal exception to the general justifiability of partisan gerrymandering claims. Instead, they found, *Rucho* was best read as "insightful and persuasive" precedent for its view that state courts were just as unable to field such claims as their federal counterparts.[250]

Which of these decisions was correct? Arguably, the legislative restraints enshrined in the North Carolina Constitution way in favor of the former, or, at least, their view that partisan gerrymanders are justiciable. The North Carolina Constitution's limitations on special legislation forbid enactments for private purpose;[251] and its Public Purpose Clause[252] and Exclusive Emoluments Clause[253] require that legislation explicitly promote the general welfare as opposed to private interests.[254] As they do in virtually every state in the union, provisions of this kind restrict North Carolina's legislature to enacting measures that serve a valid public purpose.[255]

Had the *Harper* litigants challenged their legislature's partisan gerrymander under these provisions, they would have forced the North Carolina Supreme Court to confront a difficult question: to what extent, if ever, can a partisan gerrymander be said to serve a public purpose? While public purpose

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[248] *See Harper v. Hall*, 380 N.C. 317, 390 (2022) (hereinafter *Harper I*) (locating this right in the North Carolina Constitution's "free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights").

[249] *See Harper v. Hall*, 384 N.C. 292, 314 (2023) (hereinafter *Harper II*); *id.* at 381-82 (Earls, J., dissenting) ("To be clear, this is not a situation in which a Democrat-controlled Court preferred Democrat-leaning districts and a Republican-controlled Court now prefers Republican-leaning districts. Here, a Democratic-controlled Court carried out its sworn duty to uphold the state constitution's guarantee of free elections, fair to all voters of both parties. This decision is now vacated by a Republican-controlled Court seeking to ensure that extreme partisan gerrymanders favoring Republicans are established."); Hansi Lo Wang, *A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NAT. PUB. RADIO (Apr. 28, 2023), https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court (explaining the decision's relationship to the Supreme Court of North Carolina's rightward swing).

[250] *Id.* at 314.

[251] *See, e.g.*, *Mitchell v. N. Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144 (1968) ("The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. If, however, an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary.").

[252] N.C. CONST. art. V, §§ 2(1) & (&) ("The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.... The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.").

[253] N.C. CONST. art. 1, § 35 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.").

[254] *See, e.g.*, *Blinson v. State*, 186 N.C. App. 328, 340–41, 651 S.E.2d 268, 277–78 (2007) (noting that its charge is not to determine the "primary motivation" of a statute but to assess whether it will "promote the welfare of a state or local government and its citizens") (*quoting Maready v. City of Winston-Salem*, 342 N.C. 708, 724 (1996)); *Peacock v. Shinn*, 139 N.C. App. 487, 496 (2000) (explaining that, under the Exclusive Emoluments Clause, "a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group").

[255] *See, e.g.*, *Maready v. City of Winston-Salem,* 342 N.C. 708, 467 S.E.2d 615 (1996) (discussing the Public Purpose Clause); Peacock v. Shinn, 139 N.C. App. 487, 533 S.E.2d 842 (2000) (explaining that determining a violation under the Exclusive Emoluments Clause requires assessing whether a benefit given in consideration of public services was intended to benefit a private individual or group as opposed to the public welfare).

justifications can be extremely wide-ranging, they are not unlimited in scope.[256] Indeed both the former-Supreme Court Justice John-Paul Stevens and Professor Kang have both argued that partisan gerrymandering cannot be so justified.[257] Indeed, as Justice Stevens emphasized in a dissenting opinion in the 2004 case of *Vieth v. Jubelirer*, partisan gerrymandering should not even survive rational basis scrutiny because "an acceptable rational basis can be neither purely personal nor purely partisan."[258]

To find that partisan gerrymanders are not justiciable under state constitutions is to hold that certain public acts may be purely and exclusively private-regarding. Such a conclusion, however, would not only run contrary to the entire thrust of nineteenth-century state-constitutional reform,[259] but also that history's living legacy as it exists in "state common law courts" tendency, as Professor Hershkoff puts it, to "to hear an array of [political] questions that would be nonjusticiable under federal law."[260] Indeed, as she notes, state courts routinely "inquire into the propriety of legislative enactment" and "participate in decisions involving fiscal matters… [and] budget practices."[261]

Of course, the fact that partisan gerrymandering should almost certainly be justiciable does not mean that state-level district-drawing—or even district drawing that redistributes partisan advantages—would be per se invalid under state constitutional law. It may well be possible to find public-purpose justifications for certain instances of partisan gerrymandering.[262] Moreover, even in more extreme instances, courts will still face the difficult, if familiar task, of determining burdens of proof. Here, however, they will have much to draw upon, including the standards established in their public purpose doctrines and existing racial gerrymandering case law. They may also look to the innovative steps that states area already taking with respect to this question, like the "Fair Districts Amendment" (FDA)[263] that Floridians added to their state's constitution in 2010 with "the goal of… requir[ing] the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations."[264]

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[256] *See*, *e.g.*, Briffault, *The Disfavored Constitution*, *supra* note 92, at 912 (noting that, "[d]uring its heyday" in the late-nineteenth century, "the public purpose requirement operated to constrain the scope of state and local government").
[257] Michael Kang, *Gerrymandering*, *supra* note 19, at 354 (contending that "[p]artisanship simply does not count… as a legitimate government interest to justify official government decisionmaking" and that "[i]f the government cannot offer a legitimate state purpose beyond partisanship, then the redistricting should be unconstitutional under equal protection, even under rational basis, irrespective of how extreme the gerrymander's partisan effects."); *Vieth v. Jubelirer*, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting) (contending that "the Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose").
[258] *Vieth*, 541 U.S. at 325 (Stevens, J., dissenting).
[259] *See infra* § I.
[260] Hershkoff, *"Passive Virtues," supra* note 171, at 1863.
[261] *Id.* at 1864-65.
[262] *See*, *e.g.*, Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 3 Utah L. Rev. 859, 863 (2010) (arguing that "congressmen who rely on the state legislatures to draw their districts have an incentive to be responsive not only to their electorate, but also to state and local interests more generally while governing because state officials wield a tremendous amount of power over the prospect of reelection"); *cf. Note, A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 Harv. L. Rev. 1196, 1198 (2004) (contending that partisan gerrymandering violates federalism principles).
[263] FL. CONST. art. 3 § 21.
[264] *Advisory Opinion to Att'y Gen. re Standards For Establishing Legislative Dist. Boundaries*, 2 So. 3d 175, 181 (Fla. 2009). According to *Rucho*, FDA was somewhat exceptional. *See Rucho*, 584 U.S. at 719. Read in light of the anti-capture protections shared across state constitutions broadly speaking, however, the amendment was largely declarative: its statement that "No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent" basically explains how the principles of legislative power that nineteenth reformers had already made sure to

2. Voter ID Laws

A second major debate in recent years is the explosion of restrictive voter ID statutes across the states.[265] While proponents of these laws argue that they are necessary anti-fraud mechanisms.[266] Opponents commonly point out both that there is very little voter fraud of this kind and that they unnecessarily burden the administration of local elections;[267] and they commonly stress that voter ID laws suppress political participation,[268] with especially adverse consequences for African Americans, Native, student, and elderly voters.[269]

How should state courts rule on the constitutional validity of voter ID laws? Consideration of our state constitutions' anticapture legislative restraints would seem cast these enactments in a highly critical light. Perhaps most straightforwardly, their self-evidently partisan nature would seem to suggest that they run into the same kinds of public-purpose problems as partisan gerrymanders. Indeed, evidence of voter ID laws' partisan nature appears not only, at times, in statements made by the officials who sponsor them,[270] but also in the fact that they did not emerge and begin to proliferate until 2010, when the Republican Party seized control of both houses in twenty-six state legislatures, along with twenty-nine governorships, and have not since stopped.[271]

Furthermore, political scientists have identified strong, empirical data attesting to their pro-Republican effects.[272] In a pathbreaking 2016 study, political scientists Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson used data from the Cooperative Congressional Election Study to demonstrate that voter ID laws passed between 2006 and 2014 strongly correlate with racial gaps in voting participation.[273] In general elections, they reported, the turnout gap between Latinos and whites is more

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constitutionalize should apply in election law. FLA. CONST. art. III, § 21(a). As such, the litigation battles that have since been waged under the FDA are of immense importance for state judges across the nation. Pressed by interest groups on either side, Florida courts are now asking and answering questions of great relevance to state courts generally speaking.

[265] As of 2024, thirty-six states require that voters show at least some form of identification at the polls. *See Voter ID Laws*, NAT'L CONF. ST. LEGS. (Feb. 2, 2024), https://www.ncsl.org/elections-and-campaigns/voter-id.

[266] *See, e.g.*, *id.*

[267] *See id.*

[268] *See, e.g.*, Justin Grimmer & Jesse Yoder, *The Durable Differential Deterrent Effects of Strict Photo Identification Laws*, 10 POL. SCI. RSCH. & METHODS 453, 453 (2021).

[269] *See, e.g.*, *What's So Bad about Voter ID Laws?*, LEAGUE OF WOMEN VOTERS (May 23, 2023); https://www.lwv.org/blog/whats-so-bad-about-voter-id-laws; John Kuk et al., *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 10 POL. GRP. & IDENTITIES 126, 126 (2022) (using nation-wide county-level data on voter turnout to demonstrate that the racial turnout gap grew when states enacted strict voter ID laws).

[270] *See, e.g.*, Aaron Blake, *Republicans Keep Admitting that Voter ID Helps Them Win, for Some Reason*, WASH. POST: THE FIX (Apr. 7, 2016) https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans- should-really-stop-admitting-that-voter-id-helps-them-win [https://perma.cc/XBM2-WVGK] (including examples of conservative lawmakers expressing their partisan interests in voter ID laws)

[271] Ross II & Spencer, *supra* note 4, at 647 (contending that "the history of these new voter suppression laws suggests that lawmakers had partisan electoral advantage as their primary goal"); *id.* at 648-52 (explaining how the history and circumstantial evidence surrounding voter ID laws demonstrates their partisan nature).

[272] *See, e.g.*, William D. Hicks et al., *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RSCH. Q. 18, 18 (2015) (finding, in a comprehensive analysis of voter ID laws enacted between 2001 and 2012, that they were motivated both by the aim of partisan control and by their specific, electoral contexts); Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363, 363 (2016) (using validated voting data from the Cooperative Congressional Election Study to demonstrate that voter ID laws' disadvantages skew toward racial minorities and that they enforce the Republican Party's agenda).

[273] *Id.* at 365.

than twice as large in strict voter ID states (13.%%) than it is in non-strict ID states (4.9%).[274] Similarly, the Asian-white turnout gap in strict ID states is almost twice as much (11.5%) than in non-strict states (6.5%) while the Africa-American-white gap is 5.1% is strict ID states and 2.9% in non-strict ID states.[275] Especially in close elections, as Professors Bertrall 292 and Douglass Spencer have argued, these racial gaps may be enough to tip elections in favor of Republicans with mostly white supporters running against Democratic candidates supported by voters of color.[276]

In so far as voter ID laws may be said to "to guard against fraud, the perception of fraud, and to otherwise protect the integrity of elections," litigants and courts will perennially find it easier to justify them under state constitutions' public-purpose requirements than they will in the case of partisan gerrymanders.[277] Still, as we saw in the approach articulated by the Arizona Supreme Court in *Turken*, acknowledging that a law may be justified as serving a public purpose need not, in and of itself, result in its being found constitutional.[278] By applying devices like the second prong of the *Turken* test, courts may ask whether the benefits of voter ID laws flow directly to the public, or whether, instead, they do so only indirectly.[279]

Or, state courts may in the future elect to take inspiration from the multi-factor tests like the one used by the Supreme Court of Maryland to enforce its constitutions' ban on special legislation.[280] In so doing, they might ask such question as whether a challenged voter ID law was "actually intended to benefit or burden" a particular political party (factor a); what its "substance" and "practical effect" actually is (factor c); whether "a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation" (factor d); whether there was a "public need and public interest underlying the enactment" (factor e); and "whether [the legislative enactment is] arbitrary and without any reasonable basis" (factor f).[281]

Factor (d) of the *Cities* especially important in light of the well-documented process by which recent voter ID laws, virtually all of which were drafted and pushed by ALEC and its associates, have been passed.[282] ALEC's principal strategy, as political scientist Alexander Hertel-Fernandez has painstakingly documented, has been to offer conservative state legislators a deep library of model bills, whose enactment they and their cohort organizations support with research, lobbying, grassroots mobilization, and lavish professional networking opportunities.[283]

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[274] *Id.* at 364.
[275] *Id.* at 367.
[276] Ross II & Spencer, *supra* note 4, at 646.
[277] *Id.* at 647; *see also* Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM L. REV. 739, 741, 743– 46 (2015) (explaining the anti-fraud defense of voter ID laws).
[278] *See supra* notes 209-212 and accompanying text.
[279] *See id.*
[280] *See supra* notes 234-240 and accompanying text.
[281] *Howard Cnty.*, 254 Md. App. at 198 (*quoting Cities Serv.*, 290 Md. at 569-70 and noting that "[n]o one factor is conclusive").
[282] For a detailed account of ALEC's "model bill" strategy as applied to the enactment of voter ID, right to work, and stand-your-ground laws, *see* HERTEL-FERNANDEZ, *supra* note 3, at x– xiii, 5, 10, 13, 15, 23, 32, 35, 41, 48, 51– 2, 54, 57– 9, 64– 77, 79– 83, 90– 111, 114, 127– 9, 156, 158, 176, 189, 199, 205, 209, 240, 246, 248, 258– 64, 286– 7.
[283] *See id.* at 4-5 (explaining how ALEC and its sister organizations, Americans for Prosperity and the State Policy Network, collude to support the passage of conservative, pro-business legislation at the state level).

Minnesota's 2010 voter ID enactment is representative of ALEC's basic script. In the wake of that year's election cycle, Minnesota Representative and ALEC state chairwoman introduced new voter ID legislation.[284] Associated Press reporting revealed that her bill shared striking similarities with ALEC's signature model voter ID legislation.[285] But, in interviews, Mary Kiffmeyer balked at the proposition that her bill might have been written by the organization, and ALEC, for its part, insisted that it "never campaigned to promote these policies in the states."[286] Of course, their assertion was in significant part a splitting of hairs: as Hertel-Fernandez has noted, it is precisely through supplying "model bills" en masse that ALEC "lobb[ies] state legislatures."[287] The point, however, is that the factual record establishing ALEC's involvement in the passage of these policies is now extremely robust, and thus available as a tool in litigation for proving the involvement of special interests in legislation of this kind.

Overall, finally, it might be said, taking inspiration from Arizona's and Maryland's approaches to special interest legislation may be particularly important in this issue area because litigants still commonly push state courts to review voter ID regulations under the federal *Anderson-Burdick* test.[288] A basically toothless form of rational basis review, this test asks courts to weigh these laws' burdens to electoral participation against their purported benefits.[289] The problem, however, is voter ID laws may effect systemic changes to American democracy while, in each instant case, appearing to do very little. As Professor Jacob Eisler argues in his recent, remarkable book, *The Law of Freedom*, voter ID laws may "impose a relatively trivial administrative requirement on individual voters… [they] can modulate which groups participate in elections" and, in so far as election results shape law, "indirectly determine… substantive policies."[290] Arizona's and Maryland's tests model approaches ask courts to do more than deferentially balance costs and benefits, and, in so doing, offer alternative—potentially stronger—protections against capture.

3. Right-to-Work Acts

In addition to voter ID laws, scholars now recognize the expansion of right-to-work acts (RTWAs) as yet another example of a successful ALEC's success in capturing state-level policymaking.[291] Perhaps the most notorious example of these laws—which authorize employees to work without joining a

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[284] Alexandra Tempus, *Voter ID Drive Part of Quiet, Well-Funded National Conservative Effort*, MPR NEWS (Mar. 5, 2012, 4:01 AM), https://www.mprnews.org/story/2012/03/04/voter-id-alec [https://perma.cc/P7YJ-DTU3].
[285] *Id.*
[286] *Id.*
[287] HERTEL-FERNANDEZ, *supra* note 3, at 13.
[288] *See Burdick v. Takashi*, 504 U.S. 428, 441 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983). For an example of recent state constitutional litigation demanding the application of this standard, *see Secretary Montana Democratic Party v. Jacobsen*, 545 P.3d 1074, 1084 (2024) ("[T]he Secretary urges us to adopt the federal Anderson-Burdick balancing test when deciding cases under the Montana Constitution's right to vote Montana.").
[289] *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189–90 (2008); Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 149 (2018).
[290] EISLER, *supra* note 19, at 31-32.
[291] *See, e.g.*, HERTEL-FERNANDEZ, *supra* note 3, at 143-46 (explaining how ALEC, SNP, and AFP coordinate to push for the enactment of RTWAs across the states); Ariana R. Levinson et al., *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEG. 457, 459-60 (2017) (noting that ALEC's state-level push for RTWAs "would require unions and employers to navigate a tapestry of right-to- work and non-right-to-work municipalities").

union[292]—has been Wisconsin's "Act 10,"[293] which then-Wisconsin Governor and long-time ALEC affiliate, Scott Walker signed into law in 2011.[294] As RTWAs have proliferated—they are, as of now, enacted in twenty-six states and Guam[295]—labor and civil rights groups have repeatedly brought challenges asking state courts to rule on their constitutionality.[296] Here, too, giving effect to the anticapture aims of state constitutional restraints on legislative power could have important implications the future of these enactments.

To date, a key challenge faced by RTWA opponents is that the former apply economic classifications, which means that judges will be encouraged to review them using deferential rational basis tests.[297] Even if rational basis is the correct test to apply to such laws, however, not all such standards are created equal, entailing that courts must still determine which version of the test to use.[298] In the RTWA context, this question became central in *Zuckerman v. Bevin*,[299] a 2017 case before the Supreme Court of Kentucky. *Zuckerman* concerned the constitutionality of a Kentucky RTWA

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[292] *See Right-to-Work Resources*, NAT'L CONF. ST. LEGS. (Dec. 19, 2023), https://www.ncsl.org/labor-and-employment/right-to-work-resources.

[293] Act 10, A.B. 11, 2011 Leg., Jan. 2011 Special Sess. (Wis. 2011).

[294] *See* Ed Pilkington, *Scott Walker, First Alec President? Long Ties to Controversial Lobby Raise Concern*, GUARDIAN (Aug. 4, 2015), https://www.theguardian.com/us-news/2015/jul/22/scott-walker-alec-2016-election [https://perma.cc/W6DQ-MJAP]; Clay Barbour & Mary Spicuzza, *Gov. Walker Signs Budget Bill Limiting Bargaining Rights, Rescinds Layoff Notices*, WIS. ST. J. (Mar. 11, 2011), https://madison.com/news/state-regional/government-politics/madison.com/tncms/admin/action/main/preview/site/news/local/govt-and-politics/gov-walker-signs-budget-bill-limiting-bargaining-rights-rescinds-layoff-notices/article_cef20214-4bff-11e0-b67d-001cc4c03286.html. Itself large bill based in part on existing state employment and labor laws, the Center for Media and Democracy revealed that Act 10 closely tracked anti-union mechanisms proposed in ALEC's model Public Employee Freedom Act and Public Employer Payroll Deduction Policy Act. CTR. FOR MEDIA & DEMOCRACY, ALEC EXPOSED, WISCONSIN: THE HIJACKING OF A STATE 5 (2012), https://www.alecexposed.org/w/images/c/cd/ALEC_Exposed_in_Wisconsin.pdf [https://perma.cc/AU5Y-X2X8].

[295] *See Right-to-Work Resources*, *supra* note 292; *See Right to Work States*, NAT. RT. WORK LEGAL DEF. FOUND. (2024), https://www.nrtw.org/right-to-work-states/ (identifying twenty-seven current right to work states as Alabama, Arizona, Arkansas, Florida, Georgia, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

[296] *See, e.g.*, *Summary of Recent Litigation Against Right to Work Laws*, NAT. RT. WORK LEGAL DEF. FOUND. (Oct. 29, 2020), https://www.nrtw.org/wp-content/uploads/2020/11/CONCISE-SUMMARY-OF-LITIGATION-AGAINST-ltrhd.pdf. Unions have challenged the constitutionality of their states' RTWAs in several states—mostly without success—and litigation in Kentucky and Wisconsin has explicitly involved state constitutional anticapture protections. *See id.* (summarizing legal challenges to RTWAs and finding that, as of October, 2020, none had been successful); Michael Sainato *"We Were Demonized": Labor Unions Win Big in Ruling on Wisconsin's Act 10*, GUARDIAN (Dec. 8, 2024), https://www.theguardian.com/us-news/2024/dec/08/wisconsin-unions-court-restores-collective-bargaining-rights (noting that Wisconsin unions recently convinced a Dane County judge to overturn Act 10, but that Republicans have repealed the ruling).

[297] *See, e.g.*, *Zuckerman v. Bevin,* 565 S.W.3d 580, 595 (Ky. 2018) (explaining that "[r]ational basis review is appropriate for evaluating… [a Kentucky RTWA] since… [t]he Supreme Court long ago held that, under federal law, union membership is not a suspect classification triggering strict scrutiny"); Hershkoff, *Positive Rights*, *supra* note 49, at 1153 ("Most, but not all, of economic life falls under the rubric of rationality review.").

[298] *See, e.g.*, Bulman-Pozen& Seifter, *Democratic Proportionality*, *supra* note 2, at 1891-92 (noting that many state courts have rejected "toothless rational basis review" in favor of alternatives, including: reasonableness and non-arbitrariness tests; sliding or more "fluid" scales of scrutiny; and balancing tests); *see id.* at 1892 nn. 209-10 (collecting exemplary state case law).

[299] 565 S.W.3d 580 (Ky. 2018).

holding that no employee hired after January 9, 2017 was required to become or remain a due-paying union member.[300] In 2017, Kentucky union members represented by Fred Zuckerman and William Londrigan brought suit, arguing, *inter alia*, that the statute violated § 59 of the Constitution of Kentucky, which forbids the General Assembly from passing "special acts" across a variety of areas including "labor, trade, mining or manufacturing."[301]

In *Zuckerman*, a narrow 4-3 majority of the Kentucky Supreme Court upheld the RTWA's constitutionality by applying an extremely deferential standard of rational basis review.[302] It was true, it acknowledged, Kentucky's special legislation prohibition had been originally created to prevent "arbitrary and irrational legislation that favors the economic self-interest of the one or the few over that of the many."[303] However, it then explained, in a 1998 case called *Yeoman v. Community Health Policy Board*,[304] it had determined that all legislation is general not special in nature as long as (1) it applies equally to every member of its target class and (2) its classifications are "distinctive and natural reasons supporting the classification."[305] Applying *Yeoman*, the court then found that the RTWA is a species of general, not special, legislation for two reasons.[306] First, it explained, "it applies to all employers and all employees, both public and private," "does not single out any particular union, industry or employer," and "applies statewide."[307] Second, it then elaborated the RTWA also pursues the legitimate aim of "promot[ing] economic development."[308]

Joined by two of her colleagues on the bench, Judge Michelle M. Keller wrote an impassioned dissent arguing that, because Kentucky's RTWA qualifies as a form of constitutionally disfavored special legislation, the majority should have applied a more searching rational basis test.[309] Beginning with history, she first pointed out that Kentucky's special legislation ban had originally been created in order to stop the legislature from establishing "special privileges for those with wealth and power sufficient to sway the Assembly and to ensure equality under the law."[310] The aim of limiting

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[300] The text of Kentucky's RTWA reads as follows:

> (a) Notwithstanding subsection (1) of this section or any provision of the Kentucky Revised Statutes to the contrary, no employee shall be required, as a condition of employment or continuation of employment, to:
> 1. Become or remain a member of a labor organization;
> 2. Pay any dues, fees, assessments, or other similar charges of any kind or amount to a labor organization; or
> 3. Pay to any charity or other third party, in lieu of these payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges required of a labor organization.
> (b) As used in this subsection, the term "employee" means any person employed by or suffered or permitted to work for a public or private employer.

KY. REV. STAT. ANN. § 336.130(3) (West).

[301] *Id.* at 586, 587 n. 9; KY. CONST. § 59.

[302] *Id.* at 600.

[303] *Id.* at 599.

[304] *Yeoman v. Com., Health Pol'y Bd.*, 983 S.W.2d 459 (Ky. 1998)

[305] *Zuckerman*, 565 S.W.3d at 600 (*citing Yeoman*, 983 S.W.2d at 466 ("[T]he law must apply equally to all in a class and that there be distinctive and natural reasons supporting the classification. Otherwise the legislation is constitutionally invalid and must be struck as impermissible special legislation.").

[306] *Id.*

[307] *Id.*

[308] *Id.*

[309] *Id.* at 615 (Keller, J., dissenting).

[310] *Id.* at 611 (*quoting White v. Manchester Enterprise, Inc.*, 910 F.Supp. 311, 314 (E.D. Ky. 1996)).

"[u]nbridled legislative power,"[311] which, in the nineteenth century "had become the captive of special interest groups, [312] forms the basis of Kentucky's special legislation test under *Yeoman*'s two-part test, which, she reminded the court, requires "the party claiming the validity of the classification to show that there is a valid nexus between the classification and the purpose for which the statute in question was drafted."[313]

In this case, she then reasoned that such nexus had not been shown.[314] While, to her mind, the RTWA's declared "economic development" purpose was plausibly constitutional,[315] it was not sufficiently related to its underlying classificatory scheme, which arbitrarily distinguished between members of its object classes.[316] Rather than applying to employers and employees generally, she noted, the RTWA only affected the contract rights of those "associated with labor organizations," and, what is more, exempts all who had been union members prior to January 9, 2017.[317] But "[a]ssuming the General Assembly intend[ed] economic development in the general sense, and not just non-union economic development," she queried, "why would it choose to enact a law that, by the Commonwealth's own admission, will not affect non-union employers and employees because those private organizations have never received or compelled payment of money from members or nonmembers? The Commonwealth's own arguments for classifications and for justifications of the RTWA fail to pass constitutional muster."[318]

For our purposes, Judge Keller's dissenting riposte is important not only because it won significant support on the bench (falling but one vote shy of a winning majority) but also because it demonstrates how courts and litigants may apply their constitution's special legislation prohibitions to challenge state capture. In so far as the anticapture purposes of Kentucky's special legislation trace to the historical context typical of most such bans,[319] courts and litigants should feel comfortable applying Judge Keller's analysis and the tradition of Kentuckian constitutional jurisprudence it represents. When it comes to state capture, courts ultimately have a choice. They may proceed deferentially, or they may decide to demand more from their legislatures. This is by no means to say that courts should simply defer to labors' demands. In other contexts, perhaps, courts might have reason to worry that labor, not business, has achieved undue influence in the policymaking process.[320] As the proliferation of RTWAs perhaps suggests, however, that day has yet, as a general matter, to arrive.

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[311] *Id.*
[312] *Id.* (*quoting Tabler v. Wallace*, 704 S.W.2d 179, 184 (Ky. 1985)).
[313] *Id.* at 614 (*quoting Yeoman*, 983 S.W.2d at 468).
[314] *Id.* at 615.
[315] *Id.*
[316] *Id.* at 614.
[317] *Id.*
[318] *Id.* at 615.
[319] *See supra* § I.A.1.a.
[320] Today, for example, such concerns are sometimes raised with respect to public sector unions. *See*, *e.g.*, PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 83-114 (2023) (contending that public sector unions apply unduly influence to extract rents from the policymaking process); *Gilmore v. Gallego*, 552 P.3d 1084, 1089-94 (Ariz. 2024) (finding that a memorandum of understanding between a police union and the City of Phoenix providing paid release time violated the public purpose doctrine associated with the Gift Clause of the Arizona State Constitution).

III. CONSTITUTIONAL CHALLENGES IN CAPTURED COURTS

In suggesting that we need not focus single-mindedly on regulating inputs, this Article advocates for a "both and" approach to the problem of present-day state capture. In highlighting ways in which captured legislatures' policy outputs may run afoul of our states' constitutional restraints on legislative power, its aim has not been to displace input-concerning strategies but to expand our understanding of what it could mean to contest state capture today. If valuable as an often-overlooked supplement to existing approaches, however, anticapture judicial review is not without its limitations. As this Part explains, critics of this approach may worry that it will be frustrated by existing conditions of capture[321] while, at the same time, reenforce American juristocracy.[322] Or, broadly speaking, they may simply hold that judicial review, in and of itself, is not an effective anticapture mechanism.[323] Such concerns are real, and significant, and anyone interested in contesting state capture through state-constitutional litigation should take them seriously. On careful consideration, however, they do not, in aggregate, disprove the viability of anticapture litigation.

A. *Judicial Capture*

A key suggestion arising from the substantial literature on state and local politics is that state courts are arguably just as captured as their legislative counterparts.[324] In a recent, important book, *Free to Judge: The Power of Campaign Money in Judicial Elections*, Professors Michael Kang and Joanna Shepherd demonstrate through a comprehensive empirical study of state-judicial elections that private expenditures on judicial campaigns shape judicial decisionmaking in statistically significant ways.[325] "[A]veraged over all judges," they report, "each $10,000 contribution from a business increases the odds of a judge casting a pro-business vote by about 1 percent."[326] Partisanship plays an important role as well.[327] As they put it, "campaign contributions to state supreme court justices, from the Democratic and Republican Party coalitions"—that is, coalitions of interest groups with partisan alignments—"are significantly predictive of the justices' voting on the bench."[328] They also find that similar patterns hold in criminal justice contexts.[329] Specifically, the more money private interest groups expend on attack ads focusing on criminal justice, the less sympathetically state judges seeking reelection rule on behalf of

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[321] *See infra* § III.A.
[322] *See infra* § III.B.
[323] *See infra* § III.C.
[324] *See, e.g.*, MICHAEL KANG & JOANNA SHEPHERD, FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS 95 (2023) (contending that private interests substantially influence state judicial behavior); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 626 (1994) (discussing the prevalence of state capture in state and local appropriation); GRUMBACH, *supra* note 2, at 75-84 (summarizing this literature to explain how "[l]ower [l]evels of [g]overnment [a]dvantage the [p]owerful").
[325] *See* KANG & SHEPHERD, *supra* note 324, at 10 (explaining that their study includes "comprehensive data over three decades of state supreme court decisions, ranging over the 1990s to the 2010s, as well as all the campaign contributions given to the elected judges deciding those cases across the fifty states"); *id.* at 95 (concluding that contributions from business groups, major parties, and other organized interests predicts state judicial voting). *See also* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (finding that "campaign contributions from business groups," partisan judicial elections, "are… associated with judicial votes in favor of business interests").
[326] *Id.* at 11; 84-87.
[327] *Id.* at 87-90.
[328] *Id.* at 88; *see also id.* at 92 (reporting that "Republican justices are more likely to favor their own party in election cases by a statistically significant margin compared to Democratic justices, controlling for other factors.").
[329] *Id.* at 74-82.

criminal defendants.[330] In other words, they find that "money matters a lot," and that, "[w]hether it comes from business groups, the major parties, or other interest groups as part of a party coalition, campaign money predicts how elected justices later vote. Money gets what it wants in judicial elections."[331]

To a certain extent, Kang and Shepherd's findings appear to disprove the nineteenth-century theory that electoral judiciaries would be immune to capture.[332] Indeed, states are no longer "backwaters" and state judicial elections are no longer "sleepy" "low-key" affairs."[333] As the star of state politics has risen in the American constitutional system, its dynamics have assumed the shape of "organized combat," the rough-and-tumble war of interest group politics once associated primarily with the federal political branches.[334] The question thus raised is whether state courts' susceptibility to outside influence renders them inoperative as sites suitable for the contestation of state capture.[335] Of course, it is at least "theoretically possible" that state judges' increasing dependence on outside interests would increase their visibility and, in so doing, potentially deter their affirmance of certain "seeming quid pro quos."[336] But Kang and Shepherd's findings seem to suggest that state judges are at least prone to a kind of "subtle" favoritism toward those upon whose resources their reelection depends.[337]

What this means, however, is not that anticapture constitutional challenges are impossible, but that litigants will need to think carefully about the specific conditions under which they bring their complaints. Key to Kang and Shepherd's findings, for example, are that state judges are particularly susceptible to capture when reelections are looming, anticapture advocates might try as much as

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[330] *Id.* at 77 (reporting that "in a state with 2000 total ads to start, sympathy for criminal defendants, as measured by voting for the defendant in a supreme court appeal, goes down by 2 percent on average as the number of television ads doubles"). *See also* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (examining over 22,000 Pennsylvania criminal cases to find that judges impose longer sentences the closer they are to standing for reelection); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107, 128-30 (2007) (finding that Kansas judges facing partisan elections issue more punitive rulings than those only facing retention elections).

[331] *Id.* at 95.

[332] *See supra* § II.B.

[333] *See, e.g.*, *supra* note 1 and accompanying text; Pozen, *supra* note 148, at 300 ("The rapid rise in campaign spending, the aggressive outreach done by interest groups and political parties, and the politicization of campaign speech have transformed many judicial races from sleepy, low-key affairs into high-stakes, high-salience affairs.").

[334] *See* JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 116–36, 138, 259–62, 271–73, 275, 291–93, 295, 300–301 (2010) (describing and applying the theory of American politics as organized combat); STOKES, *supra* note **Error! Bookmark not defined.**, at 5 (arguing that "organized combat between interest groups is at the heart of American politics").

[335] *See, e.g.*, Croley, *supra* note 148, at 725 (contending that judicial elections may compromise judicial impartiality); Pozen, *supra* note 148, at 290-93 (contending that elected judiciaries may tend toward favoritism); Shugerman, *Countering Gerrymandered Courts*, *supra* note 153 at 23 (contending that the partisan districting of state supreme courts means that state judges are not more majoritarian than state legislatures); *cf.* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1774 (2021) (contending that "it is hard to see elected judges as being systematically countermajoritarian in the same way that many state legislatures are") [hereafter: Seifter, *Countermajoritarian Legislatures*].

[336] Pozen, *supra* note 148, at 302.

[337] *See supra* notes 325 to 331 and accompanying text; Pozen, *supra* note 148, at 302 (noting that judicial "favoritism can be subtle" and that "judges' sympathies for the legal views of their supporters will often be hard to extricate from their sympathies for the supporters themselves-and even not-so-subtle favoritism will not always disqualify a judge or undermine a judge's reelection chances").

possible to align their litigation with off-seasons,[338] and that, at least in recent years, Republican-controlled state courts have been more susceptible to capture than Democratic ones.[339] This suggests that anticapture advocates must, as much as is feasible, match their litigation to election off-years, and bring challenges in fora where judicial partisanship can work in their favor. Of course, this means also having to contend the fact that longstanding trends toward political polarization have resulted politically homogenous state governments.[340] Currently, for example, Montana is the only state in the union with a Democratic supreme court and Republican legislature.[341] In so far as this pattern holds, anticapture litigation will have to transpire under suboptimal conditions, for instance, in states where Republican-control in the legislative branch is at least partially offset by politically heterogeneous supreme courts.[342]

B. *Juristocracy*

A second set of major complaints may be organized under the general heading of "juristocracy," which Professor Ran Hirschl described as the potentially suspect tendency of modern constitutional reform to "transfer[] unprecedented amount[s] of power from representative institutions to judiciaries."[343] Today, of course, this concern takes on heightened importance light of the Supreme Court's sharp, rightward turn,[344] general repudiation of deference as an established norm of judicial decisionmaking,[345] shameful dalliances with a class of ultra-wealthy private patrons,[346] the expansion of federal judicial power,[347] and the consolidation of the federal bench under the rule of conservative and business-friendly interests.[348] With these facts in mind, that is, the juristocracy complaint may be

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[338] *See* KANG & SHEPHERD, *supra* note 324 at 120-24 (finding that campaign finance money influences state judicial behavior more when judges are soon to face reelection).

[339] *Id.* at at 93 (reporting evidence that Republican judges in recent years to favor their own party than are Democrats in cases where the outcome distributes short-term, partisan advantages).

[340] *See* GRUMBACH, *supra* note 2, at 42-44 (explaining how political polarization concomitantly resulted in gridlock in federal politics and the expansion of state-level policymaking by politically homogenous state governments).

[341] *See 2024 State Partisan Composition*, NAT'L CONF. ST. LEGS. (Nov. 27, 2024) https://www.ncsl.org/about-state-legislatures/state-partisan-composition (reporting the current partisan composition of state legislature); *State Judicial Elections, 2024*, BALLOTOPEDIA, https://ballotpedia.org/State_judicial_elections,_2024 (reporting the results of state judicial elections as of 2024).

[342] *See supra* note 341 (describing the current composition of state legislatures and judiciaries).

[343] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2009).

[344] *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 97 (2024) (contending that, equipped with a new "nearly bulletproof majority," a defining trend of recent Supreme Court decisions has been "to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity except the Supreme Court itself").

[345] *See, e.g.*, *id.* at 115 (contending that the Roberts Court is particularly "dangerous" because it "rejects stare decisis,... does not defer to considered policy decisions simply because it disagrees with them,... throws out established judicial procedure to take and decide cases that it wants whether or not there is a live dispute or whether the facts or the courts below present those cases for resolution").

[346] *See, e.g., Senate Judiciary Committee Releases Revealing Investigative Report on Ethical Crisis at the Supreme*, S. COMM. ON JUD. (Dec. 21, 2024), https://www.judiciary.senate.gov/press/releases/senate-judiciary-committee-releases-revealing-investigative-report-on-ethical-crisis-at-the-supreme-court (outlining recent evidence of Justices Alito's and Thomas's flagrant conflicts of interest, gift acceptances, and failures to disclose).

[347] *See, e.g.*, Lemley, *supra* note 344, at 97.

[348] *See, e.g.*, John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-

rephrased along the following lines: shouldn't we worry about reproducing federal-judicial pathologies at the state level?

Looking back toward nineteenth-century state-constitutional development, it is clear that the expansion of state-judicial power went hand-in-hand with restraining legislatures.[349] Both then and in recent state constitutional scholarship, such reforms have defended as measures that improve the representative character state and local democracy—at least in contexts where judges hold office by popular election.[350] And if these views are correct, then the democratic concerns surrounding juristocracy concerns may simply not be as pronounced in the states as they are when it comes to the federal government.

But state courts, as recent empirical evidence strongly suggests, are no more immune to capture than any other branch of state governance.[351] And what this implies is that the identification of an institutional body that is wholly liberated from politics, and thus deserving of democratic trust, cannot, at least at present, be made in good faith. Rather, the fact that countermajoritarian concerns classically associated with federal courts do not apply straightforwardly, or "with the same force"[352] means substantially less when one acknowledges the extent to which state and local policymaking may be as—if not more—prone to capture than anywhere else.[353] If state capture, at present, may be operating through all of our state institutions, then there is no more reason to fear subnational judicial supremacy than legislative or executive supremacy. From the perspective of capture, the distribution of power only matters if, in the final analysis, it actually prevents monied minorities from overriding popular majority will. Under certain conditions, I have suggested, state courts can play such an anticapture role more than they currently do,[354] but only, it seems, if state courts reclaim a more active role in the policymaking process.[355]

C. *The Limits of Judicial Review*

A further source of potential skepticism regarding this piece's proposed approach concerns the utility of judicial review as an anticapture mechanism. In a recent contribution, , Professor Mary Elizabeth Magill outlines some of the most important limitations of this approach,[356] and though her specific area of concern is federal administrative law, the shortcomings she stresses my apply just as much to the anticapture strategy that I have thus far developed and defended:

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presidents-in-appointing-federal-judges/ (analyzing the 226 federal judicial appointments that President Trump made during his first term); *Factbox: Donald Trump's legacy—Six Policy Takeaways*, REUTERS (Oct. 30, 2020), https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK/ (noting that President Trump used his judicial appointments power to flip the ideological composition of the Eleventh Circuit, Second Circuit, and Third Circuit).

[349] *See supra* § II.B.

[350] *See*, *e.g.*, Shugerman, *Countering Gerrymandered Courts*, *supra* note 153 at 24-26 (explaining nineteenth-century justifications for judicial elections); Seifter, *Countermajoritarian Legislatures*, *supra* note 335, at 1771-73 (identifying theoretical reasons to think that elected judiciaries encourage majoritarianism today).

[351] *See supra* notes 338 to 342 and accompanying text.

[352] Seifter, *Countermajoritarian Legislatures*, *supra* note 335, at 1771-73 (identifying theoretical reasons to think that elected judiciaries encourage majoritarianism today); Hershkoff, *"Passive Virtues,"* supra note 171, at 1839-40.

[353] *See*, *e.g.*, Gillette, *supra* note 324, at 626; GRUMBACH, *supra* note 2, at 75-84.

[354] *See supra* notes 338 to 342 and accompanying text.

[355] *See supra* § II.B.2.

[356] Magill, *supra* note 47.

> Judicial review is status quo protecting; judicial review is reactive; judicial review is only available ex post and with respect to discrete decisions; judicial review is systematically less available in cases in which capture may be a real risk; and judicial review is not designed to screen for the subtle cases of regulatory capture, whether capture is defined as non-welfare-enhancing regulation or regulation that departs from the median voter.[357]

These limitations are important, and anticapture advocates active at the must take them seriously. Yet, as I explain in what follows, they do not obviate the necessity of a state-constitutional response to the problem of widespread capture in state and local politics.

Magill is correct to point out that judicial review tends to be "conservative" in the sense that it is "status[-]quo" preserving, and thus that it may tend to enforce rather than amend the existing distribution of rights and privileges against redistribution.[358] There is certainly something to this criticism, especially when one considers that it is the status-quo disrupting potential of input-concerning strategies that make campaign finance reform and the cultivation of countervailing power so important. Yet the status quo-preserving character of judicial review also indicates one of the potential strengths of anticapture judicial review, which operates principally, as Magill observes, by "add[ing] costs to . . . change."[359] In so far as judicial review makes state capture more costly, it may also lead private interests to invest less in influencing the state-legislative process; or at the very least, consider treading more carefully in the political sphere.

It is also true that contesting state capture through constitutional litigation must be an intrinsically "reactive" strategy; it must proceed an existing harm, and thus always, in a sense, play catch up.[360] Yet reactivity in a state-political landscape that is already, at a basic level, captured terrain, is also not specific to judicial review. Because state capture is now a deeply engrained feature of state and local policymaking, any anticapture interventions applied today, even those focused on the regulation of inputs, must arrive after the fact. In such a context, providing a constitutional path to reform is important because it offers the possibility of reaction where it might not otherwise exist. Only in a world where state capture is rare indeed does it become necessary to worry that judicial review usually occurs retrospectively.

Finally, Magill is also correct contesting state anticapture through judicial review will be limited by the domain of judicial power itself, or the rights and duties that states' constitutions attach to judicial officers.[361] What makes anticapture litigation under states' constitutional restraints on legislative power promising, however, is that, unlike input-concerning strategies that seek to eliminate illicit forms of private influence, it is relatively unconcerned with specific mechanisms of capture this or that entity may seek to apply. When it comes to capture, what matters is not that some private entity used this or that strategy but that they actually influenced the passage of laws favoring their interests above those of the public. Where anticapture judicial review will tend to fall short, arguably, is not in cases of

[357] *Id.* at 404.
[358] *Id.*
[359] *Id.* at 405.
[360] *Id.* at 410.
[361] *Id.* at 417-18.

affirmative capture but in cases of "drift," that is, when lawmaking or regulatory bodies advantage private interests above public ones through forbearance.[362]

To this charge—indeed, to each of the foregoing challenges—I respond in common: it will be sufficient, for my purposes, if state constitutions come to be understood as protecting us against the damage that private corporations have already, and in well-documented ways, inflicted through state capture. Of course, this strategy is far from perfect and should not by any means treated as the singular approach to contesting state capture today. In an environment characterized by systemic capture, anticapture litigation may seem to be a frustratingly piecemeal response, one inherently limited to chipping away at the problem one law at the time. Some of the most important potential remedies to state-legislative capture—like increasing scarce, legislative resources—are not ones best advanced through the courts.[363] But if there are real horizons to the constitutional strategy I propose, they are by no means devastating; the great need not become the enemy of the good.

Conclusion

The phenomenon of state capture is ubiquitous in contemporary state-level politics. Through a diverse repertoire of mechanisms—some explicit, some implicit; some verging on criminal, some mundane—private individuals and corporations influence the laws governing state and local communities. In recent decades, this fact has had devastating implications for ordinary Americans and their democratic institutions. Represented in the activities of groups like ALEC, AFP, and SNP, state capture increases socio-economic inequalities, amplifies interpersonal violence, and impedes political participation—especially at the expense of our society's poor and racialized communities.

The problems of capture, though serious, are also not new. As we have now seen, the quiet revolution of state constitution-making that transpired in the antebellum period bequeathed us with powerful tools that we can use to combat state capture today. The restraints they placed on legislative power are potent weapons in the battle against money in politics. Rather than policing the influx of capital, we can, under their authority, challenge the constitutionality of the legislation it produces.

Contesting state capture today must, of necessity, involve a multi-pronged approach. State constitutional challenges will be most effective when combined with other strategies, especially those directed at mobilizing popular, countervailing power and enhancing political rights. By combining broad-based political engagement with targeted litigation, we might still stand a chance of liberating our captured states—and ourselves.

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[362] *See, e.g.*, Daniel P. Carpenter, *Detecting and Measuring Capture*, *in* Preventing Regulatory Capture, *supra* note 11, at 62 (distinguishing, in regulatory contexts, the phenomena of capture and "drift," or the "happenstance[s] of… otherwise neutral public policy process[es]"); Hacker & Pierson, *supra* note 334 at 83-90 (describing the "drift" as "the failure of government to respond to new economic realities). *See also* Magill, *supra* note 24, at 416 (noting that anticapture judicial review may also be insufficient in cases in which the aggrieved party may not be said to exist because industry insiders have so effectively barred entry to potential competitors).

[363] *See, e.g.*, Hertel-Fernandez, *supra* note 3, at 259-61 (suggesting that one of the most effective ways to combat state capture today would be to increase state legislators' salaries, increase the time of legislative sessions, and provide legislators with more staffers).