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## The Democracy Principle in State Constitutions

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# THE DEMOCRACY PRINCIPLE IN STATE CONSTITUTIONS

Jessica Bulman-Pozen\* & Miriam Seifter\*\*

*In recent years, antidemocratic behavior has rippled across the nation. Lame-duck state legislatures have stripped popularly elected governors of their powers; extreme partisan gerrymanders have warped representative institutions; state officials have nullified popularly adopted initiatives. The federal Constitution offers few resources to address these problems, and ballot-box solutions cannot work when antidemocratic actions undermine elections themselves. Commentators increasingly decry the rule of the many by the few.*

*This Article argues that a vital response has been neglected. State constitutions embody a deep commitment to democracy. Unlike the federal Constitution, they were drafted—and have been repeatedly rewritten and amended—to empower popular majorities. In text, history, and structure alike, they express a commitment to popular sovereignty, majority rule, and political equality. We shorthand this commitment the democracy principle and describe its development and current potential.*

*The Article's aims are both theoretical and practical. At the level of theory, we offer a new view of American constitutionalism, one in which the majoritarian commitment of states' founding documents complements the antimajoritarian tilt of the national document. Such complementarity is an unspoken premise of the familiar claim that the federal Constitution may temper excesses and abuses of state majoritarianism. We focus on the other half of the equation: state constitutions may ameliorate national democratic shortcomings. At the level of practice, we show how the democracy principle can inform a number of contemporary conflicts. Reimagining recent cases concerning electoral interference, political entrenchment, and more, we argue that it is time to reclaim the state constitutional commitment to democracy.*

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## INTRODUCTION

Fear of democratic decline is all around us.<sup>1</sup> A growing literature offers different diagnoses of what ails American democracy. Some focus on severe economic or social inequality,<sup>2</sup> while others decry the smashing of norms of fair play<sup>3</sup> or the erosion of the rule of law.<sup>4</sup> A common concern, however, is that the few are wresting control from the many.

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1. See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); CONSTITUTIONAL DEMOCRACY IN CRISIS? (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

2. See, e.g., BENJAMIN I. PAGE & MARTIN GILENS, *DEMOCRACY IN AMERICA?* (2017); GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION* (2017).

3. See, e.g., LEVITSKY & ZIBLATT, *supra* note 1.

4. See, e.g., TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Daron Acemoglu & James A. Robinson, *The Constitution Won't Save American Democracy*, PROJECT SYNDICATE (Sept. 4, 2019), <https://www.project-syndicate.org/commentary/only-social-mobilization-can-save-american-democracy-by-daron-acemoglu-and-james-a-robinson-2019-09> [<https://perma.cc/N8R6-456V>].

The United States Constitution seems to be part of the problem. Although a number of both classic and recent works have described a federal constitutional commitment to democracy,<sup>5</sup> commentators increasingly conclude that “[t]he US Constitution will not save American democracy”<sup>6</sup> and, indeed, that “the Constitution’s text and the Supreme Court’s jurisprudence makes democratic erosion more, not less, likely.”<sup>7</sup>

In this Article, we argue that there is a vital but neglected constitutional response to democratic decline. State constitutions furnish powerful resources for addressing antidemocratic behavior. These constitutions “will not save” us either. But they do provide a stronger foundation for protecting democracy than their federal counterpart. In text, history, and structure alike, they privilege “rule by the people,” and especially rule by popular majorities.

In one sense, a call to consider state constitutions is nothing new. For decades, prominent jurists and scholars have advocated turning to state constitutions to protect individual rights.<sup>8</sup> In the 1970s, for example, scholars began to write about a “new judicial federalism” in which state courts would step in as the federal judiciary receded.<sup>9</sup> Yet these scholars have been met with skepticism: Are state courts well suited to protect individual rights? After all, critics have observed, state constitutions are committed to majoritarianism, which might render protection for unpopular minorities elusive.<sup>10</sup>

This now-familiar debate may have obscured a simpler point about state constitutions, one that has particular significance today: precisely because they are committed to popular majority rule, state constitutions can help counter antidemocratic behavior. In contrast to the federal Constitution, for example, state constitutions expressly confer the right to vote and to participate in free and equal elections, and they devote entire articles to electoral processes. They provide for numerous executive officials and judges to be

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5. See, e.g., JOHN HART ELY, *DEMOCRACY & DISTRUST* (1980); Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014).

6. Acemoglu & Robinson, *supra* note 4; see also Meagan Day & Bhaskar Sunkara, Opinion, *Think the Constitution Will Save Us? Think Again*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/opinion/constitution-founders-democracy-trump.html> [<https://perma.cc/ZH36-FZPC>].

7. GINSBURG & HUQ, *supra* note 4, at 4.

8. See, e.g., JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

9. See generally ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113–232 (2009).

10. See, e.g., Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1702 (2010) (“State constitutions are generally more majoritarian than the United States Constitution . . . . Advancing individual liberties and furthering equality is thus inherently more problematic under state constitutions because it puts the rights of the minority more in the hands of the majority.”).

elected by popular majority vote. They seek to prevent legislative favoritism and allow the people to engage in direct self-rule through initiatives and referenda.<sup>11</sup>

These and numerous other features yield a powerful democratic commitment, a composite of constitutional text, history, and structure we term the *democracy principle* as a shorthand. Some state courts have recognized this principle, both recently and in the past. In this Article, we offer a fuller treatment, elaborating the many ways state constitutions advance popular self-rule and explaining both where the democracy principle has been appreciated and where it has been overlooked or ignored.

Of course, critics of the new judicial federalism are correct that majority rule may pose its own problems. State majorities' invocations of sovereignty, in particular, are indelibly connected to slavery and persisting racial injustice.<sup>12</sup> In focusing on popular majorities, we do not deny the need for protection of minority rights. But it is also wrong to equate majority rule with discrimination. Today, attempts to obstruct popular majorities—for example, through extreme partisan gerrymanders and overrides of ballot initiatives—frequently disadvantage people of color.<sup>13</sup> If it is a mistake to place too much faith in the democracy principle, it is a greater mistake to neglect it.

Recent years have seen a rash of antidemocratic behavior across the country—efforts to thwart popular majority rule that have nothing to do with protecting vulnerable minorities or individual rights. Lame-duck state legislatures have stripped popularly elected governors and attorneys general of their powers. State officials have overridden initiatives adopted by the people to circumvent unresponsive governments on healthcare, criminal justice, and campaign finance. State legislatures have adopted extreme partisan gerrymanders that devalue the vote and undermine political equality.<sup>14</sup> State constitutions—as implemented by judges or by politicians, activists, or the public at large—offer legal responses to these behaviors. Indeed, state courts have recently held unconstitutional partisan gerrymanders in North Caroli-

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11. See *infra* Part I (describing the state constitutional commitment to democracy).

12. See *infra* notes 181–187 and accompanying text.

13. Two recent examples are North Carolina's gerrymandering practices and the Florida legislature's gutting of Amendment 4, which would have restored the voting rights of certain persons with felony convictions. See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1472–74 (2017) (describing the entwinement of partisanship and race in the context of districting); *Rayson v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.) (Sotomayor, J., dissenting from denial of application to vacate stay) (recounting the history of Florida's Amendment 4); Ari Berman, *Unlock the Vote: Inside the Unlikely Movement that Could Restore Voting Rights to 1.4 Million Floridians*, MOTHER JONES (Nov. 2018), <https://www.motherjones.com/politics/2018/10/inside-the-unlikely-movement-that-could-restore-voting-rights-to-1-4-million-floridians/> [<https://perma.cc/2A6D-UL3Z>] (discussing the discriminatory origins of felon-disenfranchisement laws and their disproportionate impact on Black voters).

14. See *infra* Part III (exploring these state actions).

na and Pennsylvania,<sup>15</sup> but the state commitment to democracy extends further than existing cases recognize.

Because state officials have been responsible for many of the most troubling actions across the United States in recent years, state constitutions address a problem that is national in scope. Just as antidemocratic actions have rippled across states, leading some to decry the states as “[l]aboratories of [o]ligarchy”<sup>16</sup> or potential “laboratories of authoritarianism,”<sup>17</sup> prodemocratic constitutional responses in one state readily inform those in another. These responses shape the federal government as well because the federal Constitution relies on states as units of representation and administrators of elections.

The democracy principle can also shed light on American constitutionalism more generally. State and federal constitutions present alternative visions, but so too they are complements, parts of the whole of American constitutionalism.<sup>18</sup> For example, insofar as the federal Constitution worries particularly about majoritarian abuses and state constitutions worry about minority faction, they may work together to respond to both the tyranny of the majority and minority rule. Yet while courts and scholars have long recognized the federal Constitution’s promise of tempering state majoritarianism, they have not similarly appreciated the ways in which state constitutions may respond to national democratic shortcomings—at least if state constitutions are properly understood.

Part I of this Article describes the state constitutional commitment to democracy. Part II brings in the federal Constitution, considering both how state constitutions may help us reason differently about American constitutionalism and how state and federal constitutions are best understood as complementary. Part III takes up practical applications, explaining state constitutional responses to a variety of contemporary conflicts, from gerrymandering to lame-duck entrenchment to legislative overrides of ballot initiatives.

## I. DEMOCRACY AND STATE CONSTITUTIONS

Scholars of state constitutions have long recognized in passing that they privilege popular majorities. Daniel Elazar speaks of their “emphasis on di-

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15. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801–02 (Pa. 2018); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

16. Matt Ford, *The GOP’s Laboratories of Oligarchy*, NEW REPUBLIC (Dec. 4, 2018), <https://newrepublic.com/article/152515/gops-laboratories-oligarchy> [<https://perma.cc/27T2-C5N9>].

17. LEVITSKY & ZIBLATT, *supra* note 1, at 2.

18. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 3–5 (2006); CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS* 2 (2008); Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988).

rect, continuing consent of popular majorities,”<sup>19</sup> for example, while Douglas Reed notes their “penetrability by democratic majorities,”<sup>20</sup> and Emily Zackin argues that they have struck a “more majoritarian balance than their federal counterpart.”<sup>21</sup> Because much writing about state constitutions has concerned efforts to protect individual rights, this embrace of popular majorities is often bemoaned or downplayed when it is discussed at all.<sup>22</sup> Yet it warrants attention as a feature, not a bug, both of state constitutions themselves and of the broader landscape of American constitutionalism.

This Part describes state constitutions’ distinct democratic commitment.<sup>23</sup> After explaining our holistic interpretive approach, which tailors familiar modalities of text, history, and structure to the state context, we make three main claims. First, popular sovereignty is the animating, fundamental principle of state constitutions. From the very beginning, these constitutions have proclaimed that all government power resides in the people, and they have regularly refined and expanded channels for unmediated expressions of popular sovereignty. Second, state constitutions widely understand the people to be a body that governs through majority rule. With respect to constitutional adoption and amendment, as well as both direct democracy and voting for representative institutions, state constitutions treat the majority as the best approximation of the people and indicate that the preference of the majority is to prevail in the face of political disagreement. Third, state constitutions embrace a distinctive vision of political equality. These constitutions propose that all members of the political community share in the power to influence government and further seek to foreclose forms of special treatment by government, understanding equality as both a necessary input and output of political institutions.

As a shorthand, we describe these interrelated state constitutional commitments to popular sovereignty, majority rule, and political equality as the *democracy principle*. Although this tripartite definition is certainly not the only understanding of democracy, an exemplary essentially contested concept,<sup>24</sup> it accords with extensive commentary.<sup>25</sup> Moreover, this understand-

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19. Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, PUBLIUS, Winter 1982, at 11, 12.

20. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 887 (1999).

21. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 25 (2013).

22. See, e.g., Chemerinsky, *supra* note 10, at 1702.

23. Our discussion is specific to the fifty states, but the democracy principle may have broader purchase in American constitutionalism. See, e.g., P.R. CONST. pmbl. (LEXIS Law Publishing, LexisNexis through Dec. 2005) (“The democratic system is fundamental to the life of the Puerto Rican community. We understand that the democratic system of government is one in which the will of the people is the source of public power, the political order is subordinate to the rights of man, and the free participation of the citizen in collective decisions is assured.”).

24. W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 183–87 (1956).

ing of “rule by the people” leaves open room for contestation with respect to both the three subsidiary commitments we identify and the overarching concept of democracy itself.

It may be helpful in this respect to analogize the democracy principle to more familiar constitutional concepts, such as federalism or the separation of powers. Each of those constitutional concepts has textual, historical, and structural hooks, and scholars and jurists widely view them as defining features of the federal Constitution, even as they lack express definition.<sup>26</sup> Moreover, both federalism and the separation of powers are operationalized through a variety of subsidiary doctrines—such as the anticommandeering doctrine for federalism and presidential removal requirements for the separation of powers—as well as through canons of construction and avoidance. Commentators spar over the correct parameters for those doctrines, but they do not hesitate to agree that they are discussing constitutional doctrines. The democracy principle has comparable status. Even as disagreements may ensue over its precise content and application, there should be little question that it is a defining feature of state constitutions.

#### A. *Interpreting State Constitutions*

Before we explore the democracy principle, a few words are in order about our interpretive approach. In many respects, our method is a familiar holistic one that looks to text, history, and structure (and weaves in doctrinal and prudential considerations as we turn to specific applications),<sup>27</sup> but a few notable departures follow from the fact that these are state constitutions we are expounding.

Most obviously, there is the question of constitutions, plural. Given fifty different state constitutions, adopted and amended by different people, in different places, at different times, is it possible to describe a shared state constitutional commitment? Although we recognize variance across the

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25. See generally ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34 (1956) (“Running through the whole history of democratic theories is the identification of ‘democracy’ with political equality, popular sovereignty, and rule by majorities.”); AUSTIN RANNEY & WILLMOORE KENDALL, DEMOCRACY AND THE AMERICAN PARTY SYSTEM 23–39 (1956) (defining democracy in terms of “popular sovereignty,” “political equality,” “popular consultation,” and “majority rule”); Jon Elster, *Introduction* to CONSTITUTIONALISM AND DEMOCRACY 1, 1 (Jon Elster & Rune Slagstad eds., 1988) (“Democracy I shall understand as simple majority rule, based on the principle ‘One person one vote.’”). This definition tracks longstanding descriptions of democracy, from Aristotle’s to Locke’s to Lincoln’s, and more. See DAHL, *supra*, at 34–35 (collecting definitions).

26. See, e.g., Amar, *supra* note 5, at 30 (“[T]he phrases ‘separation of powers’ and ‘checks and balances’ appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically.”); Richard H. Fallon, Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 968 (2017).

27. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE (1982) (describing modalities of constitutional argument); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (arguing for the integration of interpretive approaches); *infra* Part III (considering particular applications).



states—including provisions, histories, and politics that are unique to particular jurisdictions or shared by only a subset of the states—we nonetheless believe that it is reasonable, and ultimately more instructive, to speak of a common democracy principle.

First, as Section I.B canvasses, state constitutions contain many identical or substantially similar provisions. Call it “massive plagiarism,”<sup>28</sup> “stare decisis,”<sup>29</sup> or an “imitative art,”<sup>30</sup> but this is no accident. From the eighteenth century until the present, drafters of state constitutional provisions have consulted and copied other states’ foundational texts. The earliest state constitutions were reproduced in widely circulated compilations, which “facilitated the first wave of constitution-making after the Revolution and produced an enduring trait of American constitution-making: a clear instinct for comparison, modeling, and borrowing.”<sup>31</sup> Although some of the borrowing demonstrated a regional character, much more of it did not. At Nevada’s 1864 Convention, for example, a delegate noted that in “following the line of the California Constitution, we are only following in that of the . . . Constitution of the State of New York; a State which has given her Constitution to very many of the western States of this Union.”<sup>32</sup>

Second, state constitutions have been drafted, replaced, and amended in response to national historical developments. Scholars tend to believe that “the date of a constitution’s adoption is usually a better indicator of its content than the region in which it originated.”<sup>33</sup> Here, too, though, the tradition is multifarious: the frequent rewriting and amendment of state constitutions means that most reflect numerous historical periods, not a single one. In particular, as Section I.C discusses, the Jacksonian Era, Reconstruction, the Progressive Era, and the Reapportionment Revolution were fertile times for constitutional conventions across the states following the initial eighteenth-century founding moment.<sup>34</sup> Constitutional provisions adopted during these periods were more likely to reflect “coordinated efforts

28. JOAN WELLS COWARD, *KENTUCKY IN THE NEW REPUBLIC* 166 (1979).

29. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 224–25 (1950).

30. John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 *TEX. L. REV.* 1615, 1617 (1990).

31. Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 *HASTINGS CONST. L.Q.* 199, 207–08 (2000). State conventions often provided compilations of existing state constitutions for all delegates. *See id.* at 200. In the twentieth century, the National Municipal League began to publish a model state constitution, underscoring the idea of a unified state constitutional project, although the impact of this document was not comparable to state constitutions themselves. *See* G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 152–53 (1998).

32. OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEVADA, ASSEMBLED AT CARSON CITY, JULY 4TH, 1864, TO FORM A CONSTITUTION AND STATE GOVERNMENT 16 (S.F., Frank Eastman 1866) (statement of Charles DeLong) [hereinafter *NEVADA 1864 DEBATES*].

33. TARR, *supra* note 31, at 91.

34. *See generally* DINAN, *supra* note 18, at 7–11, tbl.1-1 (offering a periodized overview and noting dates of state constitutional conventions).

of national social movements, working through states,” than interests unique to a particular jurisdiction or region.<sup>35</sup>

Finally, the fact that national movements frequently did (and continue to) work through the states relates to another reason for perceiving a shared state constitutional commitment that we take up in the next Part: their common relationship to the federal Constitution.<sup>36</sup>

Without denying differences among state constitutions, we accordingly believe it is plausible to posit a shared democracy principle. The need for state-specific context and nuance should not dissuade us from understanding a distinct American constitutionalism located in the states. This constitutionalism, and especially its difference from and possibly complementary relationship to the federal Constitution, can only be fully appreciated by studying the states together. In pursuing this approach, we therefore align ourselves with prominent scholars of state constitutional law who discern a shared “state constitutional tradition” or embrace a “trans-state constitutional theory.”<sup>37</sup> Although most of this work has a different focus from our own, the rich accounts of John Dinan, G. Alan Tarr, and Robert Williams particularly inform our understanding.<sup>38</sup> We likewise follow the approach of state courts, which have long looked to other states in interpreting their constitutions.<sup>39</sup> The democracy principle we explore below admits of state-by-

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35. ZACKIN, *supra* note 21, at 31; *see, e.g.*, ELISABETH S. CLEMENS, *THE PEOPLE’S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890–1925* (1997). As we have each suggested in prior work, state law and policy more generally tend to reflect the American people operating in a federal system more than the views of distinct state peoples. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953 (2014). For scholars advancing variants of this view with respect to state constitutional law specifically, *see* JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS* (2005), and Paul W. Kahn, *Commentary, Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

36. *See infra* Part II.

37. DINAN, *supra* note 18, at 5; Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 301 (1998); *see also, e.g.*, THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* (Boston, Little, Brown & Co. 1868); GARDNER, *supra* note 35, at 21; Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945 (1994); Kahn, *supra* note 35, at 1160.

38. *See, e.g.*, DINAN, *supra* note 18; TARR, *supra* note 31; WILLIAMS, *supra* note 9.

39. *See, e.g.*, G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988) (discussing interstate borrowing); James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 790 (2003) (finding that more than a third of cases studied “cited decisions from other states when interpreting . . . state constitutional provisions”); Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 792–804 (1981) (concluding, in a study of state court decisions between 1870 and 1970, that each state “owes highest allegiance to its own case law, but also makes liberal use of outside cases . . . enough to support the idea that [state supreme courts] regard themselves as siblings of a single legal family, speaking dialects of a common legal lan-

state variation and can only be applied with attention to a particular constitution's text, history, and structure, but its core components are remarkably consistent.

To derive these components, we tailor our interpretive approach to the state context. State constitutions tend to be quite long and detailed, especially as compared to their federal counterpart, so we begin with their specific provisions.<sup>40</sup> We then seek to make sense of copious text by incorporating structural and historical interpretation. While “holistic, structural”<sup>41</sup> approaches are most familiar in federal interpretive practice when text is sparse—for example, with respect to federalism and the separation of powers<sup>42</sup>—a structural approach to state constitutions helps to harmonize ample text. State constitutions’ plentiful text facilitates the “close and perpetual interworking between the textual and the relational and structural modes of reasoning” that Charles Black advocated but that is often difficult for the federal document.<sup>43</sup>

This plentiful text follows in part from state constitutions’ frequent amendment. Although certain provisions of eighteenth-century state constitutions persist, the story of state constitutionalism is a story of continual change. Tens of new states, hundreds of new constitutions, and thousands of amendments<sup>44</sup> complicate any account of the eighteenth century as a central reference point. Prominent debates concerning species of originalism in fed-

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guage”); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 23 (1988) (“The prevailing practice has been for the courts in one state to consider, and often cite in support of their own decisions, the developing jurisprudence in other states.”). Some courts encourage litigants to cite out-of-state decisions. See, e.g., *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (indicating that litigants should brief constitutional decisions from other states); *State v. Jewett*, 500 A.2d 233, 237 (Vt. 1985) (“The advocate may also use a sibling state approach in state constitutional argument. This involves seeing what other states with identical or similar constitutional clauses have done.”).

40. Alabama’s is the longest at nearly 400,000 words; the vast majority fall between 10,000 and 100,000 words. ALA. CONST.

41. Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1262 (2001); see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969) (defining structural interpretation as drawing “inference[s] from the structures and relationships created by the constitution in all its parts or in some principal part”); see also, e.g., BOBBITT, *supra* note 27, at 74.

42. From *McCulloch v. Maryland*’s “confidence” analysis, 17 U.S. (4 Wheat.) 316, 428–29 (1819), to *Alden v. Maine*’s atextual sovereign immunity, 527 U.S. 706, 713 (1999), to *Murphy v. NCAA*’s recent reaffirmation of the anticommandeering principle, 138 S. Ct. 1461 (2018), these structural interpretations turn to architecture in the absence of (and sometimes in the teeth of) text. See generally Amar, *supra* note 5 (noting that federalism and the separation of powers emerge from a holistic reading of the federal Constitution).

43. BLACK, *supra* note 41, at 31; see Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215, 225–29 (2016) (discussing “institutional structuralism” in state constitutional interpretation).

44. JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 23 (2018).

eral constitutional interpretation thus find less traction at the state level; meanwhile, attending to changes over time is more informative. Our historical discussion accordingly focuses on revision and replacement, considering how high-level commitments have assumed different expressions as state populations have responded to perceived shortcomings.

### B. Provisions

We begin with an overview of widely shared provisions that inform the democracy principle. The list that follows is not exhaustive. In particular, we do not canvass provisions also found in the federal Constitution, such as rights to petition, assembly, and jury trial, as our aim is to highlight distinctive aspects of state constitutions. Moreover, we reserve consideration of provisions that more indirectly instantiate a democratic commitment, such as guarantees of public education<sup>45</sup> and restrictions on private as well as public discrimination.<sup>46</sup> But the following provisions offer a starting point for exploring the state constitutional commitment to democracy:

(1) *Source & Ends of Political Power.* Every state constitution but New York's<sup>47</sup> includes an express commitment to popular sovereignty. The most common formulation declares that "all political power is inherent in the people."<sup>48</sup> Other constitutions maintain that "all political power is vested in and derived from the people"<sup>49</sup> or that government "originates with the peo-

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45. See, e.g., ZACKIN, *supra* note 21, at 67–105; Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 772–94 (2018) (describing state education clauses as essential to equality and self-rule).

46. See, e.g., Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 20–21 (1993).

47. New York's first constitution contained such a proclamation. N.Y. CONST. of 1777, art. I ("[N]o authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.").

48. ALA. CONST. art. I, § 2; ALASKA CONST. art. I, § 2; ARIZ. CONST. art. II, § 2; ARK. CONST. art. 2, § 1; CAL. CONST. art. II, § 1; CONN. CONST. art. I, § 2; FLA. CONST. art. I, § 1; IDAHO CONST. art. I, § 2; IOWA CONST. art. I, § 2; KAN. CONST. bill of rights, § 2; KY. CONST. § 4; MICH. CONST. art. I, § 1; NEV. CONST. art. 1, § 2; N.J. CONST. art. I, § 2.a; N.D. CONST. art. I, § 2; OHIO CONST. art. I, § 2; OKLA. CONST. art. 2, § 1; S.D. CONST. art. VI, § 26; TEX. CONST. art. I, § 2; UTAH CONST. art. I, § 2; WASH. CONST. art. I, § 1. Some states simply state that "all power is inherent in the people." IND. CONST. art. I, § 1; ME. CONST. art. I, § 2; OR. CONST. art. I, § 1; PA. CONST. art. I, § 2; TENN. CONST. art. I, § 1; WYO. CONST. art. 1, § 1. For other slight variations, see HAW. CONST. art. I, § 1 ("All political power of this State is inherent in the people . . ."); MINN. CONST. art. I, § 1 ("Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent . . ."); and VT. CONST. ch. I, art. 6 ("That all power being originally inherent in and co[n]sequently derived from the people . . .").

49. COLO. CONST. art. II, § 1; MISS. CONST. art. 3, § 5; MO. CONST. art. I, § 1; MONT. CONST. art. II, § 1; N.M. CONST. art. II, § 2; N.C. CONST. art. I, § 2; S.C. CONST. art. I, § 1; see also MASS. CONST. declaration of rights, art. V; N.H. CONST. pt. I, art. 8; VA. CONST. art. I, § 2; W. VA. CONST. art. III, § 2.

ple”<sup>50</sup> or derives its power “from the consent of the governed.”<sup>51</sup> This idea of popular sovereignty is linked not only to the people’s initial creation of state constitutions but also to their ongoing right to change them: most state constitutions expressly refer to the right of the people to “alter” (or “reform” or “modify”) or “abolish” the very constitutions and governments they create.<sup>52</sup> These constitutions also connect popular sovereignty to the pursuit of the common good. For example, they provide that “[g]overnment is instituted for [the people’s] protection, security, and benefit”<sup>53</sup> or that “all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”<sup>54</sup>

(2) *Suffrage*. Every state constitution confers the right to vote.<sup>55</sup> Arizona’s provision is framed most indirectly, declaring that “[n]o person shall be entitled to vote . . . unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the peri-

50. GA. CONST. art. I, § 2; LA. CONST. art. I, § 1; *see* MD. CONST. declaration of rights, art. 1.

51. ILL. CONST. art. I, § 1; NEB. CONST. art. I, § 1; WIS. CONST. art. I, § 1. Delaware’s popular sovereignty clause is found in its preamble, DEL. CONST. pmbl., and Rhode Island’s quotes George Washington, R.I. CONST. art. I, § 1.

52. ARK. CONST. art. 2, § 1; CAL. CONST. art. II, § 1; COLO. CONST. art. II, § 2; CONN. CONST. art. I, § 2; DEL. CONST. pmbl.; GA. CONST. art. I, § 2; IDAHO CONST. art. I, § 2; IND. CONST. art. I, § 1; IOWA CONST. art. I, § 2; KY. CONST. bill of rights, § 4; ME. CONST. art. I, § 2; MD. CONST. declaration of rights, art. 1; MASS. CONST. declaration of rights, art. VII; MINN. CONST. art. I, § 1; MISS. CONST. art. 3, § 6; MO. CONST. art. I, § 3; MONT. CONST. art. II, § 2; NEV. CONST. art. 1, § 2; N.H. CONST. pt. I, art. 10; N.J. CONST. art. I, § 2; N.D. CONST. art. I, § 2; OHIO CONST. art. I, § 2; OKLA. CONST. art. 2, § 1; OR. CONST. art. I, § 1; PA. CONST. art. I, § 2; R.I. CONST. art. I, § 1; S.C. CONST. art. I, § 1; S.D. CONST. art. VI, § 26; TENN. CONST. art. I, § 1; TEX. CONST. art. I, § 2; UTAH CONST. art. I, § 2; VT. CONST. ch. I, art. 7; VA. CONST. art. I, § 3; W.VA. CONST. art. 3, § 3; WYO. CONST. art. 1, § 1.

53. Twenty-three states have this or similar language. *See, e.g.*, CAL. CONST. art. II, § 1; CONN. CONST. art. I, § 2; MICH. CONST. art. I, § 1; TEX. CONST. art. I, § 2.

54. COLO. CONST. art. II, § 1; LA. CONST. art. I, § 1; MD. CONST. declaration of rights, art. 1; MISS. CONST. art. 3, § 5; MO. CONST. art. I, § 1; MONT. CONST. art. II, § 1; N.M. CONST. art. II, § 2; N.C. CONST. art. I, § 2.

55. ALA. CONST. art. VIII, § 177; ALASKA CONST. art. V, § 1; ARIZ. CONST. art. VII, § 2; ARK. CONST. art. 3, § 1; CAL. CONST. art. II, § 2; COLO. CONST. art. VII, § 1; CONN. CONST. art. VI, § 1; DEL. CONST. art. V, § 2; FLA. CONST. art. VI, § 2; GA. CONST. art. II, § 1; HAW. CONST. art. II; IDAHO CONST. art. VI, § 2; ILL. CONST. art. III, § 1; IND. CONST. art. 2, § 1; IOWA CONST. art. II, § 1; KAN. CONST. art. 5, § 1; KY. CONST. § 145; LA. CONST. art. I, § 10(A); ME. CONST. art. II, § 1; MD. CONST. art. I, § 1; MASS. CONST. declaration of rights, art. IX; MICH. CONST. art. II, § 1; MINN. CONST. art. VII, § 1; MISS. CONST. art. 12, § 241; MO. CONST. art. VIII, § 2; MONT. CONST. art. IV, § 2; NEB. CONST. art. I, § 22; NEV. CONST. art. 2, § 1; N.H. CONST. pt. I, art. 11; N.J. CONST. art. II, § 1; N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 1; N.C. CONST. art. VI, § 1; N.D. CONST. art. II, § 1; OHIO CONST. art. V, § 1; OKLA. CONST. art. 3, § 1; OR. CONST. art. II, § 1; PA. CONST. art. VII, § 1; R.I. CONST. art. II, § 1; S.C. CONST. art. I, § 5; S.D. CONST. art. VI, § 19; TENN. CONST. art. IV, § 1; TEX. CONST. art. VI, § 2; UTAH CONST. art. I, § 1; VT. CONST. ch. I, art. 8; VA. CONST. art. I, § 6; WASH. CONST. art. VI, § 1; W. VA. CONST. art. IV, § 1; WIS. CONST. art. III, § 1; WYO. CONST. art. 6, § 1. *See generally* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–05, 144–49 (2014).

od of time preceding such election as prescribed by law,”<sup>56</sup> but even this provision effectively qualifies voters who meet the eligibility requirements. The other forty-nine state constitutions include an explicit affirmative right. For example, Colorado provides, “Every citizen of the United States who has attained the age of eighteen years, has resided in this state for such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections.”<sup>57</sup> Other states use similar formulations, such as that citizens “shall have the right to vote,” “may vote,” or are “qualified elector[s].”<sup>58</sup>

In addition to conferring the franchise, a large number of states furnish further electoral protections. Twenty-six state constitutions declare that elections shall be “free,” “free and equal,” or “free and open.”<sup>59</sup> Twenty-eight foreclose particular restrictions on the franchise, such as interference by civil or military powers, or simply prohibit “disenfranchise[ment].”<sup>60</sup> And twen-

56. ARIZ. CONST. art. VII, § 2.

57. COLO. CONST. art. VII, § 1.

58. See ALA. CONST. art. VIII, § 177; ALASKA CONST. art. V, § 1; ARK. CONST. art. 3, § 1; CAL. CONST. art. II, § 2; CONN. CONST. art. VI, § 1; DEL. CONST. art. V, § 2; FLA. CONST. art. VI, § 2; GA. CONST. art. II, § 1; HAW. CONST. art. II, § 1; IDAHO CONST. art. VI, § 2; ILL. CONST. art. III, § 1; IND. CONST. art. 2, § 2; IOWA CONST. art. II, § 1; KAN. CONST. art. 5, § 1; KY. CONST. § 145; LA. CONST. art. I, § 10(A); ME. CONST. art. II, § 1; MD. CONST. art. I, § 1; MASS. CONST. declaration of rights, art. IX; MICH. CONST. art. II, § 1; MINN. CONST. art. VII, § 1; MISS. CONST. art. 12, § 241; MO. CONST. art. VIII, § 2; MONT. CONST. art. IV, § 2; NEB. CONST. art. VI, § 1; NEV. CONST. art. 2, § 1; N.H. CONST. pt. I, art. 11; N.J. CONST. art. II, § 1; N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 1; N.C. CONST. art. VI, § 2; N.D. CONST. art. II, § 1; OHIO CONST. art. V, § 1; OKLA. CONST. art. 3, § 1; OR. CONST. art. II, § 2; PA. CONST. art. VII, § 1; R.I. CONST. art. II, § 1; S.C. CONST. art. II, § 3; S.D. CONST. art. VII, § 2; TENN. CONST. art. IV, § 1; TEX. CONST. art. VI, § 2; UTAH CONST. art. IV, § 2; VT. CONST. ch. II, § 42; VA. CONST. art. II, § 1; WASH. CONST. art. VI, § 1; W. VA. CONST. art. IV, § 1; WIS. CONST. art. III, § 1; WYO. CONST. art. 6, § 2. These provisions are also tallied in Douglas, *supra* note 55, at 144–49.

59. ARIZ. CONST. art. II, § 21; CAL. CONST. art. II, § 3; COLO. CONST. art. II, § 5; DEL. CONST. art. I, § 3; ILL. CONST. art. III, § 3; IND. CONST. art. 2, § 1; KY. CONST. § 6; MD. CONST. declaration of rights, art. 1, § 7; MASS. CONST. declaration of rights, art. IX; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; NEB. CONST. art. I, § 22; N.H. CONST. pt. I, art. 11; N.M. CONST. art. II, § 8; N.C. CONST. art. I, § 10; OKLA. CONST. art. 3, § 5; OR. CONST. art. II, § 1; PA. CONST. art. I, § 5; S.C. CONST. art. I, § 5; S.D. CONST. art. VII, § 1; TENN. CONST. art. I, § 5; UTAH CONST. art. I, § 17; VT. CONST. ch. I, art. 8; VA. CONST. art. I, § 6; WASH. CONST. art. I, § 19; WYO. CONST. art. 1, § 27; *see, e.g.*, Wallbrecht v. Ingram, 175 S.W. 1022, 1026–27 (Ky. 1915); Neelley v. Farr, 158 P. 458, 467 (Colo. 1916).

60. ARIZ. CONST. art. II, § 21; *id.* art. VII, § 2; ARK. CONST. art. 3, § 2; CAL. CONST. art. I, § 22; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 8; IDAHO CONST. art. I, § 19; *id.* art. I, § 20; ILL. CONST. art. III, § 8; IND. CONST. art. 2, § 2; MICH. CONST. art. I, § 2; MINN. CONST. art. I, § 2; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; NEB. CONST. art. I, § 22; NEV. CONST. art. 2, § 1; N.H. CONST. pt. I, art. 11; N.J. CONST. art. I, § 5; N.M. CONST. art. II, § 8; N.Y. CONST. art. I, § 1; N.C. CONST. art. I, § 11; OKLA. CONST. art. 1, § 6; PA. CONST. art. I, § 5; S.C. CONST. art. II, § 2; S.D. CONST. art. VI, § 19; TENN. CONST. art. I, § 5; UTAH CONST. art. I, § 17; WASH. CONST. art. I, § 19; W. VA. CONST. art. III, § 11; WYO. CONST. art. 1, § 27.

ty-seven protect voters from arrest during their attendance at or travel to or from an election.<sup>61</sup>

(3) *Plural Elected Executive*. State constitutions favor elected offices filled by statewide popular vote.<sup>62</sup> In addition to the governor and lieutenant governor, states elect a number of other executive actors, including attorneys general, secretaries of state, treasurers, auditors, controllers, and superintendents.<sup>63</sup> Moreover, there is no Electoral College equivalent; whoever receives the highest number of votes statewide for these offices prevails.<sup>64</sup>

(4) *Elected Judges*. State constitutions also favor elections for the judiciary. The vast majority of states provide either for the election of judges in the

61. ALA. CONST. art. VIII, § 192; ARIZ. CONST. art. VII, § 4; ARK. CONST. art. 3, § 4; COLO. CONST. art. VII, § 5; CONN. CONST. art. VI, § 6; DEL. CONST. art. V, § 5; IND. CONST. art. 2, § 12; IOWA CONST. art. II, § 2; KAN. CONST. art. 5, § 7; KY. CONST. § 149; LA. CONST. art. XI, § 3; ME. CONST. art. II, § 2; MO. CONST. art. VIII, § 4; MISS. CONST. art. 4, § 102; MONT. CONST. art. IV, § 6; NEB. CONST. art. VI, § 5; OKLA. CONST. art. 3, § 5; OR. CONST. art. II, § 13; PA. CONST. art. VII, § 5; S.C. CONST. art. II, § 11; TENN. CONST. art. IV, § 3; TEX. CONST. art. VI, § 5; UTAH CONST. art. IV, § 3; VA. CONST. art. II, § 9; WASH. CONST. art. VI, § 5; W. VA. CONST. art. IV, § 3; WYO. CONST. art. 6, § 3.

62. Forty state constitutions provide expressly for the governor to be the candidate who receives the highest number of votes in a statewide contest. ALA. CONST. art. V, § 115; ALASKA CONST. art. III, § 3; ARIZ. CONST. art. V, § 1; ARK. CONST. art. 6, § 3; COLO. CONST. art. IV, § 3; CONN. CONST. art. IV, § 4; DEL. CONST. art. III, § 3; FLA. CONST. art. VI, § 1; HAW. CONST. art. V, § 1; IDAHO CONST. art. IV, § 2; ILL. CONST. art. V, § 5; IOWA CONST. art. IV, § 4; KY. CONST. § 70; ME. CONST. art. V, pt. 1, § 3; MD. CONST. art. II, § 3; MASS. CONST. amend. art. XIV; MO. CONST. art. IV, § 18; MONT. CONST. art. IV, § 5; NEB. CONST. art. IV, § 4; NEV. CONST. art. 5, § 4; N.H. CONST. pt. II, art. 42; N.J. CONST. art. V, § 1, para. 4; N.M. CONST. art. V, § 2; N.Y. CONST. art. IV, § 1; N.D. CONST. art. V, § 3; OHIO CONST. art. III, § 3; OKLA. CONST. art. 6, § 5; OR. CONST. art. II, § 16; PA. CONST. art. IV, § 2; R.I. CONST. art. IV, § 2; S.C. CONST. art. IV, § 5; S.D. CONST. art. IV, § 2; TENN. CONST. art. III, § 2; TEX. CONST. art. IV, § 3; UTAH CONST. art. VII, § 2; VA. CONST. art. V, § 2; WASH. CONST. art. III, § 4; W. VA. CONST. art. VII, § 3; WIS. CONST. art. V, § 3; WYO. CONST. art. 4, § 3. Three states use a different approach. GA. CODE ANN. § 21-2-501(a)(1) (West 2019); MISS. CONST. art. 5, § 140; VT. CONST. ch. II, § 47. All states tally votes for other elected executive-branch offices in the same manner as for their selection of governor. For a compilation of and commentary on these provisions, see D. Gregory Sanford & Paul Gillies, *And if There Be No Choice Made: A Meditation on Section 47 of the Vermont Constitution*, 27 VT. L. REV. 783 (2003).

63. E.g., ARIZ. CONST. art. V, § 1; IDAHO CONST. art. IV, § 1; OHIO CONST. art. III, § 1; see Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1552 (2019) (“Forty-three states popularly elect an attorney general; thirty-seven elect a secretary of state, thirty-four elect a treasurer, twenty-four elect an auditor, and twenty-two elect a superintendent of public instruction or members of a board of education.” (footnotes omitted)); Miriam Seifter, *Understanding State Agency Independence: Appendices*, SSRN 1–113 (Mar. 1, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3369026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3369026) [https://perma.cc/K5K4-LNTC].

64. Mississippi was long an exception: an 1890 provision designed to disenfranchise Black voters required candidates for statewide office to win both the popular vote and the highest number of House districts; if no candidate won both, the House would choose from the two highest vote-getters. In November 2020, however, Mississippi voters adopted Ballot Measure 2, which eliminates the electoral vote requirement and instead provides for a runoff process. The state legislature referred the ballot initiative to voters following a federal lawsuit. See *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss 2019).

first instance or for retention elections following appointment.<sup>65</sup> More than most other state constitutional provisions, judicial selection has a regional character: governors appoint judges in nine New England and upper Mid-Atlantic states, and legislatures appoint judges in Virginia and South Carolina.<sup>66</sup> In the other thirty-nine states, judges face elections.

(5) *Redistricting & Apportionment*. State constitutions provide for apportioning legislative districts by population for both houses of the legislature.<sup>67</sup> At the time the Fourteenth Amendment to the U.S. Constitution was ratified, nearly three-quarters of state constitutions provided for apportionment based on population.<sup>68</sup> Around the turn of the twentieth century, however, some states provided for one house to be apportioned by population and the other by geographical area,<sup>69</sup> and many more failed or refused to reapportion their legislatures despite significant population shifts from rural to urban areas.<sup>70</sup> Attempts to defend such disparities, by comparing them to the U.S. Senate among other things, failed in *Reynolds v. Sims*, which held that the Fourteenth Amendment requires districting based on population.<sup>71</sup> To-

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65. See generally JED HANDELSMAN SHUGERMAN, *THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012); *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=Supreme> [<https://perma.cc/M2NL-B7T7>].

66. See CONN. CONST. art. V, § 2; DEL. CONST. art. IV, § 3; ME. CONST. art. V, pt. 1, § 8; MASS. CONST. pt. 2, ch. II, § I, art. IX; N.H. CONST. pt. II, art. 46; N.Y. CONST. art. VI, § 2; N.J. CONST. art. VI, § 6; R.I. CONST. art. IX, § 5; VT. CONST. ch. II, § 32; VA. CONST. art. VI, § 7; S.C. CONST. art. V, § 3.

67. In the eighteenth century, Pennsylvania, Georgia, and Vermont tried unicameral legislatures. Today, only Nebraska has one. DINAN, *supra* note 18, at 138.

68. See DOUGLAS KEITH & ERIC PETRY, BRENNAN CTR. FOR JUST., *APPORTIONMENT OF STATE LEGISLATURES, 1776-1920*, at 3, 10-79, <https://www.brennancenter.org/sites/default/files/legal-work/Apportionment%20of%20State%20Legislatures%201776-1920.pdf> [<https://perma.cc/LUN3-MQKV>] (collecting provisions). Only two of the original thirteen state constitutions so provided, PA. CONST. of 1776, § 17; MASS. CONST. pt. 2, ch. I, § 3, art. II, but because populations were more evenly distributed, apportionment by area or other metric did not tend to yield substantial disparities. See ROBERT B. MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION* 25-26 (1965).

69. E.g., IOWA CONST. art. III, §§ 34-36 (repealed 1904); see ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION* 82-83 (1968) (describing the attraction of "little federal plans" as state populations shifted to urban areas).

70. See *Baker v. Carr*, 369 U.S. 186 (1962) (describing Tennessee's refusal to reapportion and resulting malapportionment); J. DOUGLAS SMITH, *ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES* 11-22 (2014) (explaining how racism, nativism, antiurban sentiment, and the desire to entrench incumbent power drove refusals to reapportion); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Reynolds Reconsidered*, 67 ALA. L. REV. 485, 488-92, 496-97 (2015) (discussing how failures to reapportion after the Great Migration led to "massive underrepresentation of urban centers").

71. 377 U.S. 533, 575 (1964). To be sure, *Reynolds* was highly controversial in state political circles. See, e.g., Note, *The Reaction to the Reapportionment Cases*, 79 HARV. L. REV. 1231, 1232-37 (1966) (describing proposed constitutional amendments and widespread lobbying to overturn or limit *Reynolds*); James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled*



day, state constitutions all contemplate apportionment of legislative districts by population.<sup>72</sup> In addition, a number of state constitutions take redistricting out of legislative hands by entrusting redistricting to nonpartisan or bipartisan commissions.<sup>73</sup>

(6) *Legislative Accountability.* State constitutions also contain accountability mechanisms intended to keep legislators responsive to the public and to facilitate public monitoring of government action. First, many states limit the length of legislative sessions and impose term limits to encourage rotation in office.<sup>74</sup> In the words of Colorado's constitution, term limits are designed "to broaden the opportunities for public service and to assure that the general assembly is representative of [state] citizens."<sup>75</sup> State constitutions

*Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 46 (2014) (lamenting that, after *Reynolds*, states "almost immediately reconverged on a solution that changed as little as possible of the discredited prior institutional structure"). Yet the commitment to equipopulous districts is an important feature of state constitutions, even if (and perhaps especially if) it has often been at odds with the beliefs of state political actors. *See infra* Part II; *cf.* SMITH, *supra* note 70, at 20 (noting that, "[b]y ensuring minority control of government in a purportedly democratic nation," state malapportionment "stood on a shaky foundation").

72. Most state constitutions provide expressly for equipopulous districts. *See* ALA. CONST. art. VIII, §§ 198–200; ALASKA CONST. art. VI, § 3; ARIZ. CONST. art. IV, pt. 2, § 1; ARK. CONST. art. 8, §§ 2–3; CAL. CONST. art. XXI, § 2; COLO. CONST. art. V, § 48.1; DEL. CONST. art. 2, § 2A; FLA. CONST. art. III, § 21; HAW. CONST. art. IV, §§ 4–6; ILL. CONST. art. IV, § 3; IND. CONST. art. 4, § 5; IOWA CONST. art. III, § 34; KAN. CONST. art. 10, § 1; KY. CONST. § 33; LA. CONST. art. III, § 6; ME. CONST. art. IV, pt. 1, § 2; *id.* pt. 2, § 2; MD. CONST. art. III, § 4; MASS. CONST. amend. arts. XXI, XXII, LXXI; MICH. CONST. art. IV, § 3; MINN. CONST. art. IV, § 2; MO. CONST. art. III, §§ 3, 7; MONT. CONST. art. V, § 14; NEB. CONST. art. III, § 5; NEV. CONST. art. 4, § 5; N.H. CONST. pt. II, arts. 9, 26; N.J. CONST. art. IV, § 2; N.Y. CONST. art. III, § 4; N.C. CONST. art. II, §§ 3, 5; N.D. CONST. art. IV, § 2; OHIO CONST. art. XI, §§ 3, 4; OR. CONST. art. IV, § 6; PA. CONST. art. II, § 16; R.I. CONST. art. VII, § 1; *id.* art. VIII, § 1; S.C. CONST. art. III, §§ 4, 6; S.D. CONST. art. III, § 5; TENN. CONST. art. II, § 4; TEX. CONST. art. III, §§ 25–28; VT. CONST. ch. II, §§ 13, 18; VA. CONST. art. II, § 6; WASH. CONST. art. II, § 43; W. VA. CONST. art. II, § 4; *id.* art. VI, §§ 4, 7; WIS. CONST. art. IV, § 3; WYO. CONST. art. 3, § 3. Some states provide only indirectly for equipopulous districts. Three state constitutions instead require districts to comply with the federal Constitution. CONN. CONST. art. III, § 5; IDAHO CONST. art. III, § 5; MISS. CONST. art. 13, § 254. And four simply provide for districts to be changed following the federal decennial census. GA. CONST. art. III, § 2; N.M. CONST. art. IV, § 3; OKLA. CONST. art. 5, § 11A; UTAH CONST. art. IX, § 1; *see also* Part II (discussing state-federal constitutional complementarity).

73. *See infra* notes 323–328 and accompanying text.

74. For constitutional limits on length of legislative sessions, *see, for example*, ARK. CONST. art. 5, § 17; NEB. CONST. art. III, § 10; and NEV. CONST. art. 4, § 2. For constitutional term-limit provisions, *see* ARIZ. CONST. art. IV, pt. 2, § 21; ARK. CONST. amend. 73; CAL. CONST. art. IV, § 2; COLO. CONST. art. V, § 3; FLA. CONST. art. VI, § 4; LA. CONST. art. III, § 4; MICH. CONST. art. 4, § 54; MO. CONST. art. III, § 8; MONT. CONST. art. IV, § 8; NEB. CONST. art. III, § 12; NEV. CONST. art. 4, §§ 3–4; OHIO CONST. art. II, § 2; OKLA. CONST. art. 5, § 17A; and S.D. CONST. art. III, § 6.

75. COLO. CONST. art. V, § 3.

also contain detailed legislative-procedure requirements.<sup>76</sup> They require bills to retain their original purpose and not be altered or amended to change this purpose, to be referred to committee, to be printed, to be limited to a single subject that is clearly expressed in the title, to be read and considered by the legislature on multiple days, and to be adopted only following the recording of yes and no votes.<sup>77</sup> State constitutions also generally require both houses of the legislature to keep and publish journals of their proceedings, and many require proceedings to be open to the public.<sup>78</sup> So too, many state constitutions require bills to receive a majority vote in each house, prohibiting a minority from enacting legislation.<sup>79</sup>

(7) *Public & General Purposes.* State constitutions also generally include substantive constraints that limit “special” legislation.<sup>80</sup> For example, Illinois’s typical prohibition declares, “The General Assembly shall pass no special or local law when a general law is or can be made applicable.”<sup>81</sup> Many constitutions also contain lists of prohibited subjects,<sup>82</sup> and some clarify that

76. See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201–07 (1983).

77. See, e.g., MICH. CONST. art. IV, § 24 (preserve original purpose); WYO. CONST. art. 3, § 23 (referred to committee); NEB. CONST. art. III, § 14 (printed for members); KAN. CONST. art. 2, § 16 (single subject); TENN. CONST. art. II, § 18 (considered on multiple days); ALASKA CONST. art. II, § 14 (recording of yes/no votes).

78. See, e.g., MICH. CONST. art. IV, § 18 (journal publication); NEB. CONST. art. III, § 11 (same); CAL. CONST., art. IV, § 7(c)(1) (proceedings open to public); GA. CONST. art. III, § 4, para. XI (same).

79. E.g., MONT. CONST. art. V, § 11 (“No bill shall become law except by a vote of the majority of all members present and voting.”); NEV. CONST. art. 4, § 18; UTAH CONST. art. VI, § 22.

80. See ALA. CONST. art. IV, §§ 104–07; ALASKA CONST. art. II, § 19; ARIZ. CONST. art. IV, pt. 2, § 19; ARK. CONST. art. 5, § 25; CAL. CONST. art. IV, § 16; COLO. CONST. art. V, § 25; CONN. CONST. art. X, § 1; DEL. CONST. art. II, § 19; FLA. CONST. art. III, §§ 10–11; GA. CONST. art. III, § 6, para. IV; HAW. CONST. art. I, § 21; IDAHO CONST. art. III, § 19; ILL. CONST. art. IV, § 13; IND. CONST. art. 4, § 22; IOWA CONST. art. III, § 30; KAN. CONST. art. 2, § 17; KY. CONST. §§ 59–60; LA. CONST. art. III, §§ 12(A), 13; MD. CONST. art. III, § 33; MICH. CONST. art. IV, § 29; MINN. CONST. art. XII, § 1; MISS. CONST. art. 4, § 87; MO. CONST. art. III, §§ 40–42; MONT. CONST. art. V, § 12; NEB. CONST. art. III, § 18; NEV. CONST. art. 4, § 20; N.J. CONST. art. IV, § 7, para. 9; N.M. CONST. art. IV, § 24; N.Y. CONST. art. III, § 17; N.C. CONST. art. II, § 24; N.D. CONST. art. IV, § 13; OHIO CONST. art. XIII, § 1; OKLA. CONST. art. 5, §§ 46, 59; OR. CONST. art. IV, § 23; PA. CONST. art. III, § 32; R.I. CONST. art. VI, § 11; S.C. CONST. art. III, § 34; S.D. CONST. art. III, § 23; TENN. CONST. art. XI, § 8; TEX. CONST. art. III, § 56; UTAH CONST. art. VI, § 6, para. V; VA. CONST. art. IV, § 14; WASH. CONST. art. II, § 28; W. VA. CONST. art. VI, § 39; WIS. CONST. art. IV, § 31; WYO. CONST. art. 3, § 27. For a similar compilation, see Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 721 n.6 (2012).

81. ILL. CONST. art. IV, § 13.

82. The most common examples are prohibitions or limitations on legislative authorization of lotteries or gambling; there are also other, more idiosyncratic examples. See, e.g., ALA. CONST. art. IV, § 65 (lotteries); CAL. CONST. art. IV, § 19 (lottery tickets and casinos); GA. CONST. art. III, § 6, para. V (regulation of municipal utilities); N.J. CONST. art. IV, § 7 (gambling); OKLA. CONST. art. 5, § 48 (creation of a state immigration bureau); OR. CONST. art. I,

the legislature must not suspend laws for the benefit of particular individuals or corporations.<sup>83</sup> In a similar vein, most state constitutions require that state money be used only for public purposes.<sup>84</sup>

(8) *Initiative*. State constitutions also provide a variety of ways for the people to engage directly in lawmaking. Most significant is the initiative. Currently, twenty-four states have an initiative process.<sup>85</sup> Eighteen have a constitutional initiative process,<sup>86</sup> and twenty-one have a statutory initiative process.<sup>87</sup> In states that recognize the initiative, constitutional provisions generally declare that “[t]he people may propose and enact laws by the initiative”<sup>88</sup> or that “the people reserve to themselves the power to propose legislative measures, laws, and amendments to the Constitution,”<sup>89</sup> and they contemplate approval by majority vote.<sup>90</sup>

§ 30 (“No law shall be passed prohibiting emigration from the State.”); R.I. CONST. art. VI, § 22 (gambling); TENN. CONST. art. XI, § 5 (lotteries); UTAH CONST. art. VI, § 27 (lotteries); VT. CONST. § 60 (legislative declarations of treason).

83. *E.g.*, ALA. CONST. art. IV, § 108; ARK. CONST. art. 5, § 25; MISS. CONST. art. 4, § 87; TENN. CONST. art. XI, § 8.

84. *See, e.g.*, N.Y. CONST. art. VII, § 8 (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking . . .”); *see also* Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 143 n.1 (1993) (finding that all states but Kansas, Maine, South Dakota, and Wisconsin have such provisions). Even the four states that lack an express textual provision observe a public-purpose doctrine. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 663–88 (8th ed. 2016).

85. ALASKA CONST. art. XI, § 1; ARIZ. CONST. art. IV, pt. 1, § 1; ARK. CONST. art. 5, § 1; CAL. CONST. art. II, § 8; COLO. CONST. art. V, § 1; FLA. CONST. art. XI, § 3; IDAHO CONST. art. III, § 1; ILL. CONST. art. XIV, § 3; ME. CONST. art. IV, pt. 3, § 18; MASS. CONST. amend. art. XLVIII; MICH. CONST. art. II, § 9; MISS. CONST. art. 15, § 273; MO. CONST. art. III, § 49; MONT. CONST. art. III, § 4; NEB. CONST. art. III, § 1; NEV. CONST. art. 19, § 2; N.D. CONST. art. III, § 1; OHIO CONST. art. II, § 1; OKLA. CONST. art. 5, § 1; OR. CONST. art. IV, § 1; S.D. CONST. art. III, § 1; UTAH CONST. art. VI, § 1; WASH. CONST. art. II, § 1; WYO. CONST. art. 3, § 52.

86. The states with statutory but not constitutional initiative processes are Alaska, Idaho, Maine, Utah, Washington, and Wyoming. *See supra* note 85.

87. The states with constitutional but not statutory initiative processes are Florida, Illinois, and Mississippi. *See supra* note 85.

88. ALASKA CONST. art. XI, § 1; *see also* ME. CONST. art. IV, pt. 3, § 18; MONT. CONST. art. III, § 4; UTAH CONST. art. VI, § 1; WYO. CONST. art. 3, § 52.

89. ARK. CONST. art. 5, § 1; *see also* MICH. CONST. art. II, § 9; MISS. CONST. art. 15, § 273; N.D. CONST. art. III, § 3; OKLA. CONST. art. 5, § 1; S.D. CONST. art. III, § 1; WASH. CONST. art. II, § 1.

90. *See, e.g.*, ALASKA CONST. art. XI, § 6; ARIZ. CONST. art. IV, pt. 1, § 1(5); ARK. CONST. art. 5, § 1; CAL. CONST. art. II, § 10(a); COLO. CONST. art. V, § 1(4)(a); ME. CONST. art. IV, pt. 3, § 19; MASS. CONST. amend. art. XLVIII, ch. 5, § 1; MO. CONST. art. III, § 51; MICH. CONST. art. II, § 9; NEB. CONST. art. III, § 4; NEV. CONST. art. 19, § 2(3); N.D. CONST. art. III, § 8; OHIO CONST. art. II, § 1b; OKLA. CONST. art. 5, § 3; OR. CONST. art. IV, § 1(4)(d); WASH. CONST. art. II, § 1(d); WYO. CONST. art. 3, § 52(f). Some provide for a majority vote by statute. IDAHO CODE § 34-1811 (2015); MONT. CODE ANN. § 7-5-132(6) (2019); S.D. CODIFIED LAWS § 2-1-12 (2012 & Supp. 2019); UTAH CODE § 20A-7-211(3) (2019). A handful of states impose

As those provisions suggest, most direct-democracy states describe the initiative as a popular withholding of power from the legislature.<sup>91</sup> These provisions further insulate direct democracy from representative government by providing that the gubernatorial veto does not extend to initiative measures approved by a majority of voters.<sup>92</sup>

(9) *Referendum*. Every state provides for the legislative referendum, which allows the legislature (or sometimes another government actor) to place a measure on the ballot for popular approval by a majority of voters.<sup>93</sup> In addition, nearly every state that recognizes the popular initiative also recognizes the popular referendum, which allows the people to reject laws or constitutional amendments passed by the state legislature.<sup>94</sup> Florida, Illinois, and Mississippi recognize the initiative but not the referendum, while Maryland and New Mexico recognize the referendum but not the initiative.<sup>95</sup>

As with the initiative, state constitutional provisions for referenda generally declare the people's right to "approve or reject acts of the legislature by the referendum," often exempting appropriations from this power, and they contemplate adoption by a majority vote.<sup>96</sup> The referendum is also common-

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a higher bar for constitutional initiatives. *See, e.g.*, COLO. CONST. art. XIX, § 2 (requiring "fifty-five percent of the votes cast thereon").

91. *See, e.g.*, ARIZ. CONST. art. IV, pt. 1, § 1 ("The legislative authority of the state shall be vested in the legislature . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . ."). For similar reservations of power to the people, *see* ARK. CONST. art. 5, § 1; COLO. CONST. art. V, § 1; IDAHO CONST. art. III, § 1; MASS. CONST. amend. art. XLVIII, ch. 1; ME. CONST. art. IV, pt. 1, § 1; MICH. CONST. art. II, § 9; MISS. CONST. art. 15, § 273; MONT. CONST. art. V, § 1; NEB. CONST. art. III, § 1; NEV. CONST. art. 19, § 2; N.D. CONST. art. III, § 1; OHIO CONST. art. II, § 1; OKLA. CONST. art. 5, § 1; OR. CONST. art. IV, § 1; and WASH. CONST. art. II, § 1.

92. *See, e.g.*, ALASKA CONST. art. XI, § 6; ARIZ. CONST. art. IV, pt. 1, § 1(6)(a); ARK. CONST. art. 5, § 1; COLO. CONST. art. V, § 1(4)(a); ME. CONST. art. IV, pt. 3, § 19; MASS. CONST. art. XLVIII, ch. 5, § 1; MICH. CONST. art. II, § 9; MONT. CONST. art. VI, § 10; MO. CONST. art. III, § 52(b); NEB. CONST. art. III, § 4; NEV. CONST. art. 19, § 2; N.D. CONST. art. III, § 8; OHIO CONST. art. II, § 1b; OKLA. CONST. art. 5, § 3; S.D. CONST. art. III, § 1; WASH. CONST. art. II, § 1(d); WYO. CONST. art. 3, § 52(f); *see also, e.g.*, *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1364 n.5 (Cal. 1991) ("[T]he Governor has no veto power over initiatives."); UTAH CODE ANN. § 20A-7-212 (3)(a) (2019) ("The governor may not veto a law adopted by the people.").

93. *See Table 1.2: States with Legislative Referendum (LR) for Statutes and Constitutional Amendments*, INITIATIVE & REFERENDUM INST., <http://www.iandrinstitute.org/docs/Legislative-Referendum-States.pdf> [<https://perma.cc/95C8-2EJP>] (identifying states with constitutional or legislative referenda).

94. *See* HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 78–79 (2014); sources cited *supra* note 85.

95. MD. CONST. art. XVI, § 1; N.M. CONST. art. IV, § 1.

96. ALASKA CONST. art. XI, § 1; ARIZ. CONST. art. IV, pt. 1, § 1(5); ARK. CONST. art. 5, § 1; CAL. CONST. art. II, § 10; COLO. CONST. art. V, § 1(3)–(4); ME. CONST. art. IV, pt. 3, § 17(1); MASS. CONST. amend. art. XLVIII, ch. 1, § 3; MD. CONST. art. XVI, § 2; MICH. CONST. art. II, § 9; MO. CONST. art. III, § 52(b); NEV. CONST. art. 19, § 1(3); N.M. CONST. art. IV, § 1; N.D. CONST. art. III, § 1; OHIO CONST. art. II, § 1c; OKLA. CONST. art. 5, § 3; OR. CONST. art.

ly framed as a withholding of power from the legislature<sup>97</sup> and is not subject to the gubernatorial veto.<sup>98</sup>

(10) *Recall*. Nineteen states allow the people to recall state officials before the end of their terms.<sup>99</sup> Some recall provisions extend to appointed as well as elected officials,<sup>100</sup> while some extend to only a subset of elected officials—for example, excluding judges.<sup>101</sup> Like the initiative and referenda, recall provisions generally contemplate a majority vote.<sup>102</sup>

(11) *Amendment*. State constitutions generally provide for multiple paths to constitutional amendment: conventions, legislative amendments, and, in nearly half of the states, constitutional initiatives. All states recognize the convention,<sup>103</sup> and fourteen states have a periodic convention call that directly submits the question of whether to hold a constitutional convention to voters every set number of years.<sup>104</sup> State legislatures may also propose

IV, § 1(4)(d); WASH. CONST. art. II, § 1(d); WYO. CONST. art. 3, § 52(f). For statutory provisions, see IDAHO CODE § 34-1811 (2015); MONT. CODE ANN. § 7-5-132(6) (2019); S.D. CODIFIED LAWS § 2-1-12 (2012 & Supp. 2019); UTAH CODE § 20A-7-310(3) (2019).

97. See, e.g., ARK. CONST. art. 5, § 1; IDAHO CONST. art. III, § 1; NEV. CONST. art. 19, § 2(1).

98. See, e.g., MONT. CONST. art. VI, § 10; OR. CONST. art. IV, § 1(3)(c); WASH. CONST. art. II, § 1(d).

99. Eighteen states provide for recalls in their constitutions. ALASKA CONST. art. XI, § 8; ARIZ. CONST. art. VIII, pt. 1, § 1; CAL. CONST. art. II, § 15; COLO. CONST. art. XXI, § 1; GA. CONST. art. II, § 2, para. IV; IDAHO CONST. art. VI, § 6; ILL. CONST. art. III, § 7; KAN. CONST. art. 4, § 3; LA. CONST. art. X, § 26; MICH. CONST. art. II, § 8; MINN. CONST. art. VIII, § 6; NEV. CONST. art. 2, § 9; N.J. CONST. art. I, § 2; N.D. CONST. art. III, § 10; OR. CONST. art. II, § 18; R.I. CONST. art. IV, § 1; WASH. CONST. art. I, § 33; WIS. CONST. art. XIII, § 12. Montana does so by statute. MONT. CODE ANN. § 2-16-635 (2019).

100. E.g., ARIZ. CONST. art. VIII, pt. 1, § 1.

101. E.g., ALASKA CONST. art. XI, § 8.

102. See, e.g., CAL. CONST. art. II, § 15; COLO. CONST. art. XXI, § 3; ILL. CONST. art. III, § 7.

103. See ALA. CONST. art. XVIII, § 286; ALASKA CONST. art. XIII, § 2; ARIZ. CONST. art. XXI, § 2; CAL. CONST. art. XVIII, § 2; COLO. CONST. art. XIX, § 1; CONN. CONST. art. XIII, § 2; DEL. CONST. art. XVI, § 2; FLA. CONST. art. XI, § 4; GA. CONST. art. X, § 1, para. IV; HAW. CONST. art. XVII, § 2; IDAHO CONST. art. XX, § 3; ILL. CONST. art. XIV, § 1; IOWA CONST. art. X, § 3; KAN. CONST. art. 14, § 2; KY. CONST. § 258; LA. CONST. art. XIII, § 2; MD. CONST. art. XIV, § 2; MICH. CONST. art. XII, § 3; MINN. CONST. art. IX, § 2; MO. CONST. art. XII, § 3(a); MONT. CONST. art. XIV, § 1; NEB. CONST. art. XVI, § 2; NEV. CONST. art. 16, § 2; N.H. CONST. pt. II, art. 100; N.M. CONST. art. XIX, § 2; N.Y. CONST. art. XIX, § 2; N.C. CONST. art. XIII, § 1; N.D. CONST. art. III, § 1; OHIO CONST. art. XVI, § 2; OKLA. CONST. art. 24, § 2; OR. CONST. XVII, § 1; R.I. CONST. art. XIV, § 2; S.C. CONST. art. XVI, § 3; S.D. CONST. art. XXIII, § 2; TENN. CONST. art. XI, § 3; UTAH CONST. art. XXIII, § 2; VA. CONST. art. XII, § 2; WASH. CONST. art. XXIII, § 2; W. VA. CONST. art. XIV, § 1; WIS. CONST. art. XII, § 2; WYO. CONST. art. 20, § 3. Although nine states (Arkansas, Indiana, Maine, Massachusetts, Mississippi, New Jersey, Pennsylvania, Texas, and Vermont) do not include express provisions regarding a convention, even these states accept that the legislature may call a convention subject to voter approval. See DINAN, *supra* note 44, at 21.

104. New Hampshire adopted the device in 1792 and was followed by New York (1846), Michigan (1850), Maryland (1851), Ohio (1851), Iowa (1857), Oklahoma (1907), Missouri (1920), Hawaii (1959), Alaska (1959), Connecticut (1965), Illinois (1971), Montana (1972), and

constitutional amendments in all states, and in forty-one states, a majority vote by the electorate in favor of a legislative amendment suffices for ratification.<sup>105</sup> Finally, as noted above, eighteen states recognize the constitutional initiative, which allows the people to propose and ratify amendments without the legislature.<sup>106</sup>

### C. *Democratic Commitments*

It is no accident that state constitutions share numerous provisions concerning popular self-government; they have been drafted and refined in service of rule by the people. The frequency of constitutional amendment and even outright replacement is itself testament to the democratic principle, and the particular changes the people have adopted—from facilitating constitutional amendment to embracing initiatives to imposing constraints on special legislation—reflect an ongoing project to improve state democracy. This section places discrete provisions in context by considering the broader structure and history of state constitutions.<sup>107</sup> We focus on the three features that together compose the democracy principle: popular sovereignty, majori-

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Rhode Island (1973). N.H. CONST. pt. II, art. 100; N.Y. CONST. art. XIX, § 2; MICH. CONST. art. XII, § 3; MD. CONST. art. XIV, § 2; OHIO CONST. art. XVI, § 3; IOWA CONST. art. X, § 3; OKLA. CONST. art. 24, § 2; MO. CONST. art. XII, § 3(a); HAW. CONST. art. XVII, § 2; ALASKA CONST. art. XIII, § 3; CONN. CONST. art. XIII, § 2; ILL. CONST. art. XIV, § 1; MONT. CONST. art. XIV, § 3; R.I. CONST. art. XIV, § 2. In addition, four states—Florida, Montana, North Dakota, and South Dakota—allow citizens to bypass the legislature by placing a convention question directly on the ballot. FLA. CONST. art. XI, § 4; MONT. CONST. art. XIV, § 2; N.D. CONST. art. III, § 1; S.D. CONST. art. XXIII, § 2; S.D. CONST. art. XXIII, § 1. See DINAN, *supra* note 44, at 21.

105. ALA. CONST. art. XVIII, § 284; ALASKA CONST. art. XIII, § 1; ARIZ. CONST. art. XXI, § 1; ARK. CONST. art. 19, § 22; CAL. CONST. art. XVIII, §§ 1, 4; CONN. CONST. art. XII; HAW. CONST. art. XVII, §§ 2–3; IDAHO CONST. art. XX, § 1; IND. CONST. art. 16, § 1; KAN. CONST. art. 14, § 1; KY. CONST. § 256; LA. CONST. art. XIII, § 1(C); ME. CONST. art. X, § 4; MD. CONST. art. XIV, § 1; MASS. CONST. amend. art. XLVIII, ch. 4, § 5; MICH. CONST. art. XII, § 1; MISS. CONST. art. 15, § 273; MO. CONST. art. XII, § 2(b); MONT. CONST. art. XIV, § 8; NEB. CONST. art. XVI, § 1; N.J. CONST. art. IX, para. 1, 6; N.M. CONST. art. XIX, § 1; N.Y. CONST. art. XIX, § 1; N.C. CONST. art. XIII, § 4; N.D. CONST. art. IV, § 16; OHIO CONST. art. XVI, § 1; OKLA. CONST. art. 24, § 1; OR. CONST. art. XVII, § 1; PA. CONST. art. XI, § 1; R.I. CONST. art. XIV, § 1; S.D. CONST. art. XXIII, §§ 1, 3; TEX. CONST. art. XVII, § 1; UTAH CONST. art. XXIII, § 1; VT. CONST. ch. II, § 72; VA. CONST. art. XII, § 1; WASH. CONST. art. XXIII, § 1; W. VA. CONST. art. XIV, § 2; WIS. CONST. art. XII, § 1; WYO. CONST. art. 20, § 1. Four states require a supermajority vote, five require a majority of votes cast on any question in the election, one (Illinois) allows either of these two methods, and one (Delaware) does not require voter ratification of legislature-generated amendments. COLO. CONST. art. XIX, § 2; FLA. CONST. art. XI, §§ 1, 5; MINN. CONST. art. IX, § 1; N.H. CONST. pt. II, art. 100; GA. CONST. art. X, § 1, para. II; IOWA CONST. art. X, § 1; NEV. CONST. art. 16, § 1; S.C. CONST. art. XVI, § 1; TENN. CONST. art. XI, § 3; ILL. CONST. art. XIV, § 2; DEL. CONST. art. XVI, § 1.

106. See *supra* notes 85–87 and accompanying text.

107. Our account is necessarily simplified; much more could be said about each of the developments we canvass below (as well as many we do not take up). Indeed, much more has been said. Book-length treatments of certain developments we discuss here include DINAN, *supra* note 18; FRITZ, *supra* note 18; and TARR, *supra* note 31.

ty rule, and political equality. Although these features are closely intertwined and ultimately inseparable, we parse them for analytic purposes.

First, popular sovereignty is a defining principle of state constitutions.<sup>108</sup> State constitutions begin with express commitments to popular self-rule, and over time they have incorporated more mechanisms for its expression, from constitutional conventions to constitutional initiatives to subconstitutional direct democracy. State constitutions also seek to reconcile popular sovereignty with representative democracy. In guaranteeing a right to vote, requiring popular election of numerous government actors, limiting terms of office, and parsing responsibilities among government actors, these constitutions place the people themselves above government. The recognition of popular sovereignty not as a memory of the distant past or an invented tradition but rather as a present structural commitment is critical to understanding state constitutions.<sup>109</sup>

Second, state constitutions embrace majority rule as the best approximation of popular will. From the earliest days, these constitutions have recognized “a majority of the community”<sup>110</sup> as the source of government power, and they continue to provide for the popular majority to ratify constitutional amendments, to adopt initiatives and referenda, and to choose elected officials. For constitutional change, direct democracy, and representative government alike, state constitutions cast the majority as the voice of the people and understand majority rule to be the basis of legitimate government.

Third, and closely related, state constitutions propose political equality as a necessary condition for majority rule. These constitutions reflect a belief that the primary threat to democracy is “minority faction—power wielded by the wealthy or well-connected few—rather than majority faction.”<sup>111</sup> To respond to this threat, state constitutional provisions governing participation in elections and direct democracy attempt to make government accessible to all members of the political community. Meanwhile, state constitutional provisions guaranteeing equality, prohibiting special legislation, and imposing public-purpose requirements seek to foreclose forms of special treatment by the government.

This is an incomplete picture: even as they have endorsed majority rule by equal members of the political community, state constitutions have often understood that community in narrow, exclusionary terms. The racism inscribed in state constitutions is a particularly abhorrent part of the historical tradition, which is also marred by xenophobia, misogyny, and other discrim-

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108. See generally LAURA J. SCALIA, *AMERICA'S JEFFERSONIAN EXPERIMENT* 156 (1999) (“State constitutions . . . have always tipped the scales in favor of popular sovereignty.”).

109. See generally *Vreeland v. Byrne*, 370 A.2d 825, 830 (N.J. 1977) (describing state constitutions as “the voice of the people”).

110. See, e.g., VA. CONST. of 1776, declaration of rights, art. 3.

111. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in *DEMOCRACY: HOW DIRECT?* 87, 89 (Elliott Abrams ed., 2002).

inatory understandings.<sup>112</sup> The expansion of the political community, figured among other things in near-universal adult suffrage, is thus critical to the democratic commitment we explore here. But if state endorsements of popular sovereignty, majority rule, and political equality long predated any meaningful realization of these principles, the early, partial embrace of democracy underlay a fuller realization and should continue to do so.

### 1. Popular Sovereignty

The clearest and most longstanding commitment of state constitutions is to popular sovereignty. In both express statements of the people's power and the establishment of channels for constitutional revision, state constitutions facilitate constitutional self-rule. Further, numerous state constitutions establish direct democracy as a path for popular self-rule in a subconstitutional register, and still more model representative democracy on direct democracy through mechanisms intended to keep government officials directly accountable to the people.

*Constitutional Change.* Although only two of the twenty-eight state constitutions adopted in the eighteenth century were formally sent to the people for ratification,<sup>113</sup> all of the original constitutions declared that the people were sovereign and the source of government power.<sup>114</sup> For example, Virginia's 1776 Constitution stated that "all power is vested in, and consequently derived from, the people" and that "whenever any government shall be found inadequate or contrary to [producing the greatest degree of happiness and safety], a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the publick weal."<sup>115</sup> Some states followed Virginia's language quite closely,<sup>116</sup> while others employed different formula-

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112. See *infra* notes 181–187 and accompanying text.

113. The two were the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784. See Donald S. Lutz, *The Purposes of American State Constitutions*, PUBLIUS, Winter 1982, at 27, 35 & n.9. Other state constitutions of this era were informally submitted for popular approval. See WALTER FAIRLEIGH DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 24 (1910).

114. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 477 (1994) ("[W]hen we closely examine the various bills of rights and declarations of rights issuing from the states between 1776 and 1790, we will see a dramatic pattern: Each state had explicitly endorsed at least one statement—and in many cases several—that established popular sovereignty as that state's legal cornerstone.").

115. VA. CONST. of 1776, declaration of rights, arts. 2, 3.

116. E.g., PA. CONST. of 1776, declaration of rights, arts. IV, V ("That all power being originally inherent in, and consequently derived from, the people . . . the community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal.").



tions.<sup>117</sup> But in one form or another, all thirteen states emphasized popular sovereignty as the foundation of government.<sup>118</sup>

As the example of Virginia suggests, popular sovereignty was closely linked to the people's right to change their constitutions. Even in states without explicit "alter or abolish" language, the people's right to change their fundamental law was widely assumed.<sup>119</sup> Since the eighteenth century, constitutional amendment has been among the most prominent instantiations of popular sovereignty. The vast majority of states have held multiple constitutional conventions, and state constitutions have collectively been amended more than 7,500 times, through both legislative amendments ratified by voters and amendments proposed directly by the people.<sup>120</sup>

The nineteenth century was a particularly fertile time for constitutional revision. Across the century, all but three extant states entirely replaced their constitutions, and new states entering the Union adopted constitutions that reconsidered and supplemented previous attempts to guarantee popular self-rule.<sup>121</sup> Constitutional conventions mirrored state populations more closely than legislatures; participants "were not professional politicians."<sup>122</sup> Moreover, state ratification procedures generally put the convention's proposal directly to a vote of the people rather than seek approval from intermediaries.<sup>123</sup> A number of states also expressly created an extra-legislative route to facilitate constitutional conventions: every set number of

117. E.g., MD. CONST. of 1776, declaration of rights, arts. I, IV ("That all government of right originates from the people . . . [That] whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government.").

118. CONN. CONST. of 1818, pmbl.; DEL. CONST. of 1776, declaration of rights, §§ 1, 4, 5; GA. CONST. of 1777, pmbl.; MASS. CONST. declaration of rights, arts. IV, V, VII; N.C. CONST. of 1776, declaration of rights, § 1; N.H. CONST. of 1784, bill of rights, arts. I, VII, VIII, X; N.J. CONST. of 1776, pmbl.; N.Y. CONST. of 1777, pmbl. & art. I; R.I. CONST. of 1842, pmbl.; S.C. CONST. of 1776, pmbl. Many states trimmed lengthy proclamations when they revised their constitutions and "no longer needed to justify the creation of governments." TARR, *supra* note 31, at 68–69.

119. See TARR, *supra* note 31, at 74; FRITZ, *supra* note 18, at 4; Amar, *supra* note 114, at 481.

120. DINAN, *supra* note 44, at 12–13, 19–20.

121. Delaware, Georgia, Kentucky, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia replaced their eighteenth-century constitutions, while Massachusetts, New Hampshire, and Vermont did not. See COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 2019, at 5 tbl.1.3 (2019), <http://knowledgecenter.csg.org/kc/system/files/1.3.2019.pdf> [<https://perma.cc/MN2U-S6ZW>]. For some of the attempts to better implement popular self-rule, see *infra* text accompanying notes 126 & 142–154.

122. Tarr, *supra* note 111, at 95; see Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969, 974 (1995) (book review).

123. Tarr, *supra* note 111, at 96.

years (often twenty), the question of whether to hold a constitutional convention would be directly submitted to the voters.<sup>124</sup>

At constitutional conventions, delegates were not skittish about amending state foundational documents. Conceiving of constitutions as ongoing projects, they sought to capitalize on the “progress” that had been made since original constitutions were drafted.<sup>125</sup> In the nineteenth century, states also increasingly began to provide for amendment outside conventions. All but one state to hold a convention between 1820 and 1842 introduced a provision for amendment if it did not already possess one.<sup>126</sup>

In later years, states adopted still more means by which the people could change their fundamental law. In particular, in the early twentieth century, they began to embrace the constitutional initiative, which allows the people to propose and ratify amendments without the legislature.<sup>127</sup> During the Progressive Era, thirteen states adopted the constitutional initiative, and five additional states did so in the wake of the Reapportionment Revolution, in part based on arguments that it would enable reform where legislators’ self-interest prevented them from governing for the public good.<sup>128</sup> Partially replacing the convention, the initiative came to serve as the twentieth century’s “preferred mechanism for ensuring that government reflect the popular will.”<sup>129</sup>

*Direct Democracy.* During the early twentieth century, direct democracy also blossomed beyond constitutional amendment. Writing in the late nineteenth century, Lord Bryce saw in Americans “an unmistakable wish in the minds of the people to act directly rather than through their representatives in legislation.”<sup>130</sup> The mechanisms by which they came to do so were the initiative and referendum, which 40 percent of the states had adopted by 1918.<sup>131</sup> At constitutional conventions across the country, delegates emphasized the unrepresentative character of their ostensibly representative governments and advocated direct democracy as an antidote. In Massachusetts, for instance, delegate George Anderson insisted it was inaccurate to say the choice was between “pure democracy—government directly by the people,—and representative government. The question is between representative gov-

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124. Today, fourteen states have a periodic convention call. See *supra* note 104 and accompanying text.

125. Fritz, *supra* note 37, at 974 (quoting delegates to nineteenth-century constitutional conventions).

126. FRITZ, *supra* note 18, at 242. Virginia was the lone exception. *Id.* at 243.

127. DINAN, *supra* note 18, at 59.

128. See DINAN, *supra* note 18, at 60, 62.

129. Tarr, *supra* note 111, at 97.

130. 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 42 (London, MacMillan & Co. 1888).

131. See DINAN, *supra* note 18, at 94 (citing RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 39 (2002)).

ernment and unrepresentative government.”<sup>132</sup> In Michigan, George Horton complained that “[t]he history of legislatures for the recent past decades is prolific with disregard for the prayers of the people.”<sup>133</sup> The initiative and referenda were proposed as correctives to misrepresentation, ways of bringing states’ “whole fabric of government into larger ful[l]ness in accord with that great foundation principle that all just governments among men derive their power from the consent of the governed. A carrying out of that principle to meet the changed conditions.”<sup>134</sup>

The embrace of direct democracy thus reflected an attempt to ensure self-government at a subconstitutional level. Popular initiatives became more widespread across the twentieth century, as additional states embraced direct democracy. Since 1904, when Oregon saw the first ballot initiative, more than two thousand initiatives have been considered, and nearly half have been approved.<sup>135</sup> Certain periods (such as the Progressive Era and 1990s and 2000s) have seen more initiatives than others, and certain states (especially in the West) have seen more initiatives than others, but initiatives have been a part of state governance across the country.<sup>136</sup>

*Representation.* The commitment to popular sovereignty has also informed the ways state constitutions create and constrain government offices. Over time, state constitutions have increased the number of elected offices and shifted power among government actors in an effort to ensure greater responsiveness. They have also introduced numerous accountability mechanisms, from legislative publication requirements to single-subject rules, to make government action more readily monitored by the public.

The first state constitutions envisioned the legislature as the closest approximation of the people. Reacting in part against monarchy, these constitutions provided for weak governors and strong legislatures,<sup>137</sup> seeking “to approximate direct democracy in their systems of representative government.”<sup>138</sup> They also adopted institutional mechanisms that would reinforce legislators’ connection to the people, such as small districts, rotation in office, and annual elections for the lower house.<sup>139</sup> Although colonial assem-

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132. 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918, at 273 (1918) (emphasis omitted).

133. PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MICHIGAN 560 (1907).

134. STATE OF NEW HAMPSHIRE: CONVENTION TO REVISE THE CONSTITUTION; DECEMBER, 1902, at 784 (1903) (Delegate George Clyde).

135. INITIATIVE & REFERENDUM INST., INITIATIVE USE (2019), [http://www.iandrinstitute.org/docs/IRI-Initiative-Use-\(2019-2\).pdf](http://www.iandrinstitute.org/docs/IRI-Initiative-Use-(2019-2).pdf) [<https://perma.cc/9L6B-TYF9>].

136. Nearly half the states have recognized at least one initiative. *Id.*

137. Gordon S. Wood, Foreword, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 914-16 (1993).

138. Tarr, *supra* note 111, at 91.

139. *Id.* at 92; see TARR, *supra* note 31, at 82-83. Originally, South Carolina did not have annual elections, but it adopted them in 1778. By 1789, seven states also had annual elections for their upper houses. *Id.* at 83.

blies had generally deliberated in private to ensure independence, a number of eighteenth-century state constitutions further required legislatures to publish their votes and proceedings.<sup>140</sup> And they also expressly or impliedly included a right of the people to instruct their representatives.<sup>141</sup>

By the early nineteenth century, concerns that legislatures were not faithful representatives of the people had grown acute, and state reformers adopted a new round of constitutional provisions that sought to check the legislature in the service of greater popular accountability.<sup>142</sup> Most states added constitutional provisions limiting state legislative processes “in response to perceived state legislative abuses [such as] last-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.”<sup>143</sup> The point of these procedural requirements was not to limit government power as such; instead, it was to ensure that government was working for the people, “limiting government’s discretion without limiting its scope.”<sup>144</sup>

States also enhanced the connections between the people and other government actors. During the eighteenth century when fears of monarchy were paramount, it was common for state constitutions to provide that governors be selected by legislatures.<sup>145</sup> But in the nineteenth century, every state entering the Union chose to popularly elect the governor, and all existing states but South Carolina revised their constitutions to provide for popular election.<sup>146</sup> The vast majority of state constitutions also began to provide for popular election of other executive officials, including secretaries of state, treasurers, attorneys general, and auditors.<sup>147</sup> Elected judiciaries became the norm as well: after Mississippi adopted an entirely elective judiciary in 1832, every state entering the United States in the second half of the nineteenth century popularly elected its judges, and in short order a majority of states so provided.<sup>148</sup> At the Wisconsin Constitutional Convention of 1846, the Judi-

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140. *Id.* at 79. The “radical” Pennsylvania Constitution contemplated that a new assembly would be elected before a law came into effect, so that the people could effectively vote on legislation. *See id.* at 83; STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 171 (1968) (describing this as “bicameralism from below”).

141. *E.g.*, MASS. CONST. declaration of rights, art. XIX; *see* TARR, *supra* note 31, at 84; *see also* EDMUND S. MORGAN, *INVENTING THE PEOPLE* 212–13 (1988) (discussing instruction of representatives in the colonies).

142. *See* Tarr, *supra* note 111, at 85–94.

143. WILLIAMS, *supra* note 9, at 258.

144. ZACKIN, *supra* note 21, at 33 (cleaned up) (discussing the detailed nature of state constitutional provisions).

145. TARR, *supra* note 31, at 83.

146. *Id.* at 121.

147. *Id.* at 121–22.

148. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 716–17 (1995); LARRY C. BERKSON, *UPDATED BY RACHEL*

ciary Committee reported that judges as well as legislatures and executives should be selected in accordance with “an axiom of government in this country, that the people are the source of all political power, and to them should their officers and rulers be responsible for the faithful discharge of their respective duties.”<sup>149</sup>

As Tarr has explained, “the state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will.”<sup>150</sup> The direct election of executive officials and judges was key: “Popular election not only ensured accountability but also allowed executive officials and judges to claim that they had just as strong a connection to the people, the source of all political authority, as did legislators.”<sup>151</sup> This claim was particularly important to the adoption of the gubernatorial veto, which most states embraced in the nineteenth century.<sup>152</sup> It also carried into the twentieth century. For example, Progressive-Era constitutional convention delegates argued that legislators were more likely than governors to be captured by special interests, and they increased the role of the governor in the legislative process through such mechanisms as the line-item veto.<sup>153</sup> Convention delegates likewise sought to make elected judiciaries more responsive to the people, for instance by adopting recall provisions.<sup>154</sup>

During subsequent waves of reform, popular initiatives imposed other restraints intended to ensure popular responsiveness, such as term limits that were widely adopted at the end of the twentieth century.<sup>155</sup> In recalibrating power among government actors and providing for direct popular over-

CAUFIELD & MALIA REDDICK, AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE UNITED STATES, [http://judicialselection.us/uploads/documents/Berkson\\_1196091951709.pdf](http://judicialselection.us/uploads/documents/Berkson_1196091951709.pdf) [<https://perma.cc/N4ZQ-A453>] (“By the time of the Civil War, 24 of 34 states had established an elected judiciary . . .”).

149. JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN: BEGUN AND HELD AT MADISON, ON THE FIFTH DAY OF OCTOBER, ONE THOUSAND EIGHT HUNDRED AND FORTY-SIX 106–08 (Madison, Beriah Brown 1847) (report of the judiciary committee); see Croley, *supra* note 148, at 722 (“The philosophical justifications for elective judiciaries seem to have been limited largely to invocations of democratic principles . . .”).

150. Tarr, *supra* note 111, at 94.

151. *Id.*

152. See DINAN, *supra* note 18, at 112–13.

153. See DINAN, *supra* note 18, at 122–23; John A. Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473 (1917); see, e.g., 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 568 (1912) [hereinafter OHIO 1912 DEBATES] (Prof. George W. Knight) (noting that the veto “has in the main been exercised in the interest of the people”).

154. See DINAN, *supra* note 18, at 135.

155. See *The Term-Limited States*, NAT’L CONF. ST. LEGISLATURES (Nov. 12, 2020), <https://www.ncsl.org/research/about-state-legislatures/chart-of-term-limits-states.aspx> [<https://perma.cc/95CG-W6MV>] (documenting adoption of term limits in fifteen states by initiative between 1990 and 2000). In the midst of this initiative effort, the Supreme Court invalidated state attempts to impose term limits on federal representatives in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

sight of government action, state constitutions have sought to make popular sovereignty a lived feature of representative as well as direct democracy.

## 2. Majority Rule

To implement the commitment to popular sovereignty, state constitutions generally understand a majority to speak for the people. They provide for constitutional amendment by majorities, they contemplate that initiatives and referenda will be adopted by popular majorities, and they provide for representative government to be constituted by those receiving the highest number of votes. Although there are important exceptions, state constitutions overwhelmingly favor the majority as the best approximation of the people themselves. Their frameworks for representative and direct democracy alike contemplate that the preference of the majority will prevail when there is political disagreement.

*Constitutions.* The earliest state constitutions closely connected popular sovereignty to majority rule. In declaring that all government power was derived from the people, Virginia's 1776 Constitution expressly noted that "a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the publick weal."<sup>156</sup> Although other state constitutions did not make the connection so explicitly, the necessary relationship between the two was widely understood: "Both as a general default rule in the absence of specific language to the contrary, and as a specific corollary of popular sovereignty, [majority rule] literally went without saying in a variety of declarations precisely because it was so obvious."<sup>157</sup>

Notwithstanding proclamations of a right to "alter or abolish" in the earliest state constitutions, the institutional mechanisms for exercising this right were unsettled in the late eighteenth and early nineteenth centuries.<sup>158</sup> Although state constitutions that addressed the question generally required legislatures to propose a constitutional convention,<sup>159</sup> the early nineteenth century was rife not only with conventions called by legislatures (sometimes succumbing reluctantly to popular pressure<sup>160</sup>) but also with extralegal conventions during which the people insisted on the popular majority's right to change the constitution without specific legislative permission. Most famously Thomas Dorr in Rhode Island, but also Americans across all then-extant states, insisted on "a right of a majority to change government in the

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156. VA. CONST. of 1776, declaration of rights, § 3.

157. Amar, *supra* note 114, at 482; see also *id.* ("In the 1780s the special status of majority rule was extraordinarily well understood.").

158. See Fritz, *supra* note 37, at 989.

159. See Tarr, *supra* note 111, at 95; see generally Fritz, *supra*, note 37, at 989–90.

160. This occurred in Virginia in 1829 and Mississippi in 1832. See A.E. Dick Howard, "For the Common Benefit": *Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 847 (1968); David G. Sansing, *Mississippi's Four Constitutions*, 56 MISS. L.J. 3, 7 (1986).

exercise of that political sovereignty which the majority of [the] community embodies.”<sup>161</sup> During this period, numerous states adopted new constitutions through majoritarian proceedings despite provisions in their constitutions specifying revision through other mechanisms.<sup>162</sup>

As states in the early nineteenth century began to provide for constitutional amendment outside conventions, moreover, the generally accepted principle was “that the people’s sovereignty—expressed by a majority—remained the ultimate constitutional authority.”<sup>163</sup> Over the course of the nineteenth century, procedural bars to the majority’s effectuation of its will began to disappear in favor of legislative majoritarianism: states gradually removed requirements including consecutive legislative session approval and supermajority voting.<sup>164</sup> They also increasingly accepted the ability of popular majorities to ratify constitutional amendments proposed by the legislature. During the nineteenth century, it was common for states to require approval of legislature-generated amendments by more than a majority (either a supermajority or a majority of all those participating in the election rather than voting on the particular question),<sup>165</sup> but the clear trend across the twentieth century was in favor of a majority vote. Today, only four states have supermajority requirements, and only five have majority-in-the-election requirements.<sup>166</sup> In forty-one states, a majority vote in favor of a legislative amendment is sufficient for ratification.<sup>167</sup>

*Government.* State constitutions also contemplate majoritarianism for subconstitutional lawmaking. In adopting the initiative and referendum in the twentieth century, states tended to provide that a majority vote would suffice to adopt proposals as law.<sup>168</sup> They also infused direct democracy with majority-rule principles in additional respects—for example, by stating that if two conflicting measures are approved by the people in the same election, the rule receiving more votes prevails.<sup>169</sup>

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161. FRITZ, *supra* note 18, at 262 (quoting Dorr’s supporters).

162. *See id.* at 30–31.

163. *Id.* at 242, 244.

164. *See* DINAN, *supra* note 18, at 45; *id.* (quoting a delegate to the Pennsylvania Convention of 1837–1838 saying “our government is based upon the fundamental principle that the majority shall govern” and that a supermajority requirement is “in direct opposition to that fundamental principle”).

165. *Id.* at 56–57.

166. DINAN, *supra* note 44, at 13–15. As discussed previously, Illinois permits the supermajority approach as one of two methods. *See supra* note 105.

167. *Id.* Delaware does not require voter ratification of legislature-generated amendments. *Id.*

168. *See* sources cited *supra* note 90.

169. *See, e.g.,* ARIZ. CONST. art. IV, pt. 1, § 1(12) (“If two or more conflicting measures or amendments to the constitution shall be approved by the people at the same election, the measure or amendment receiving the greatest number of affirmative votes shall prevail in all particulars as to which there is conflict.”).

State constitutions likewise widely provide for a popular majority to select state government. From the start, the goal of approximating direct democracy in their representative legislatures led eighteenth-century state constitutions to embrace majoritarianism. Most notably, the Pennsylvania Constitution apportioned the legislature based on the number of taxable inhabitants because this was deemed “the only principle which can . . . make the voice of a majority of the people the law of the land.”<sup>170</sup> Other constitutions similarly provided that state legislators should be elected by majorities.<sup>171</sup> Nineteenth-century reformers increasingly “argued that majority rule and voter equality were essential and fundamental rights of freemen,” and conventions altered schemes of representation and apportionment accordingly.<sup>172</sup> They further recognized that plurality-voting rules might best instantiate majority rule in the case of multiple candidates. As they made governors, other executive officials, and judges popularly elected, for instance, nineteenth-century constitutions generally provided that the person receiving the highest number of votes would prevail.<sup>173</sup> Today, all state legislators are selected from districts drawn based on population,<sup>174</sup> and for the broad range of statewide offices—not only state governors, but also judges and other executive branch officials, from attorneys general to secretaries of state—the nearly universal rule is selection of the person receiving the highest number of votes.<sup>175</sup>

Within governing bodies themselves, moreover, state constitutions provide for majority rule. In outlining legislative procedure, for instance, many state constitutions state that bills must receive a majority vote in each house to become law, prohibiting a minority from enacting legislation.<sup>176</sup> State constitutions not only seek to create representative governments directly tethered to popular majorities but also to ensure that the majority prevails within such institutions.

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170. PA. CONST. of 1776, § 17.

171. See, e.g., MASS. CONST. pt. 2, ch. I, § 2, arts. III, IV.

172. SCALIA, *supra* note 108, at 63; see, e.g., *id.* at 67 (quoting a delegate to the Virginia convention arguing that the “essential character of a free Government” was majority rule). See generally DINAN, *supra* note 44, at 65 (describing more equitable apportionment plans adopted in nineteenth-century conventions). But see *infra* notes 182–187 and accompanying text (discussing restrictive understandings of the political community).

173. See, e.g., MASS. CONST. amend. art. XIV (“[T]he person having the highest number of votes shall be deemed and declared to be elected.”); see Sanford & Gillies, *supra* note 62, at 787–88.

174. See *supra* notes 67–72 and accompanying text (noting state constitutional revision based on the Supreme Court’s Fourteenth Amendment doctrine).

175. See *supra* notes 62–64 and accompanying text.

176. See *supra* note 79 and accompanying text.



### 3. Political Equality

Together with their commitments to popular sovereignty and majority rule, state constitutions also embrace a commitment to political equality, a commitment that entails both equal access to political institutions by members of the political community and equal treatment of members of the political community by those institutions in turn. Responding to a fear that the privileged few may capture government at the expense of the many—and that “[m]inority faction, not majority faction, pose[s] the greatest danger”<sup>177</sup>—provisions governing participation in elections and direct democracy attempt to make government accessible to all members of the political community. At the same time, provisions guaranteeing equality, prohibiting special legislation, and imposing public-purpose requirements attempt to foreclose special treatment for the privileged few.

*Inputs.* From the beginning, state constitutions declared a commitment to political equality among the limited group of people understood to be members of the political community. Eighteenth-century declarations of rights spoke of equal participation in shaping representative government. For example, the Virginia Constitution of 1776 called for “equal” elections with participation by “all men, having sufficient evidence of permanent common interest with, and attachment to, the community.”<sup>178</sup> The Massachusetts Constitution of 1780 similarly provided that the representation of the people in the legislature was to be “founded upon the principle of equality”<sup>179</sup> and further stated, “All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments.”<sup>180</sup>

As some of these early provisions themselves indicated, the political community was understood quite narrowly. Over time, the story has undeniably been one of progressive inclusion—but this progress has been marred by periods of sharp retrenchment. For example, during the Jacksonian era, an emphasis on popular rule and the “common man” led to the end of property and religious qualifications for white men but also wider disenfranchisement of people of color.<sup>181</sup> At the Pennsylvania Constitutional Convention of 1837–1838, which was called to extend suffrage, Black Pennsylvanians were stripped of their right to vote through an amendment limit-

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177. TARR, *supra* note 31, at 78.

178. VA. CONST. of 1776, declaration of rights, § 6; *see also, e.g.*, DEL. CONST. of 1776, declaration of rights, art. 6 (“That the right in the people to participate in the legislature is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage.”).

179. MASS. CONST pt. 2, ch. I, § 3, arts. I, II.

180. MASS. CONST. declaration of rights, art. IX.

181. *See, e.g.*, TARR, *supra* note 31, at 105–06.

ing the franchise to “white freem[e]n.”<sup>182</sup> Decades later, the period following the Civil War marked an expansion of suffrage, but the advances of Reconstruction quickly yielded to the racial terror of Redemption. Southern states adopted literacy tests, poll taxes, and other exclusionary mechanisms—coupled with grandfather clauses for white men—to deny Black Americans the vote.<sup>183</sup> In its 1890 constitution, for example, Mississippi imposed a poll tax and required electors to “be able to read any section of the constitution of this State” or “be able to understand the same when read to him, or give a reasonable interpretation thereof.”<sup>184</sup> Former Confederate states followed the “Mississippi plan” and codified disenfranchisement in their constitutions.<sup>185</sup> In other regions of the country, immigrants and ethnic minorities were excluded from constitutional understandings of the political community.<sup>186</sup>

Only after the invalidation of the poll tax in 1964 and passage of the Civil Rights Act of 1964 and Voting Rights Act of 1965 did political equality become even an ostensibly full state constitutional commitment—and one that still has yet to be realized in practice.<sup>187</sup> But if the principle of political equality has been radically incomplete throughout American history, its articulation from the start as an aspiration of state constitutions has underwrit-

182. PA. CONST. of 1838, art. III, § 1; see ROBERT PURVIS, *APPEAL OF FORTY THOUSAND CITIZENS, THREATENED WITH DISFRANCHISEMENT, TO THE PEOPLE OF PENNSYLVANIA* (Philadelphia, Merrihew & Gunn 1838).

183. See generally EDWARD L. GIBSON, *BOUNDARY CONTROL* 35–71 (2012); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 83–89 (rev. ed. 2009); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* (1974); ROBERT MICKEY, *PATHS OUT OF DIXIE* 33–63 (2015); MICHAEL PERMAN, *STRUGGLE FOR MASTERY* (2001).

184. MISS. CONST. art. 12, §§ 243–244 (repealed 1975); see *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (rejecting a federal constitutional challenge to these provisions because “[t]hey do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them”).

185. See, e.g., ALA. CONST. art. VIII, §§ 178–195 (repealed 1996); GA. CONST. of 1877, art. II (1908); LA. CONST. of 1898, art. 197, §§ 3–4; N.C. CONST. art. VI, § 4; S.C. CONST. of 1895, art. II, § 4; VA. CONST. of 1902, art. II, § 20.

186. See, e.g., CAL. CONST. art. II, § 1 (repealed 1972) (disenfranchising Chinese residents from 1879 to 1943, when they became eligible for naturalization); IDAHO CONST. art. VI, § 3 (amended 1962) (disenfranchising Chinese and Mormon residents); KEYSSAR, *supra* note 183, at 94–138.

187. Despite the constitutional commitment to full enfranchisement, state measures suppressing the vote of citizens of color remain pervasive. For example, numerous states have adopted strict photo ID requirements, they have made voter registration more difficult, and they have cut back on polling locations and hours. See BRENNAN CTR. FOR JUST., *NEW VOTING RESTRICTIONS IN AMERICA* (2019), <https://www.brennancenter.org/sites/default/files/2019-11/New%20Voting%20Restrictions.pdf> [<https://perma.cc/9KWH-V7LY>]; *Voter Identification Requirements: Voter ID Laws*, NAT’L CONF. ST. LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/8X45-WGLC>]. Moreover, forty-eight states disenfranchise citizens convicted of felony offenses, and twenty-eight of these states continue to do so following prison, parole, and probation—a practice that has wildly disproportionate effects on citizens of color. Jean Chung, *Felon Disenfranchisement: A Primer*, SENT’G PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/TE38-NZ8W>].

ten more inclusive understandings and continues to provide a measure by which to judge state government.

Today, the state constitutional commitment to political equality in constituting government is reflected especially in provisions that expressly confer the right to vote and that guarantee “free and equal elections.” It is also found in the requirement imposed on the states by the Fourteenth Amendment that legislative districts must be apportioned based on population and more particular state guarantees of “equal representation in the government.”<sup>188</sup>

*Outputs.* The idea that members of the political community have an equal say in governance has been closely linked to the idea that government must work for the people as a whole. For example, the same eighteenth-century declarations of rights that insisted all government power flows from the people further “invariably identified promoting the common good as the principal aspiration of American republics.”<sup>189</sup> Maryland’s 1776 Constitution stated that government was created “solely for the good of the whole,” for instance, while South Carolina’s 1776 Constitution stated that governments were created for “the good of the people,” and Georgia’s 1777 Constitution provided that it was “the people” for “whose benefit all government is intended.”<sup>190</sup> As a corollary to the idea that the common good was the end of government, many state declarations of rights also condemned special treatment of individuals and classes. For example, Massachusetts’s Constitution of 1780 provided that “[g]overnment 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,”<sup>191</sup> while Virginia’s 1776 Constitution indicated that “no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.”<sup>192</sup>

The state constitutional commitment to promoting the public good became more pronounced in the nineteenth century, as state constitutional revisions responded to special legislative treatment for the favored few.<sup>193</sup> In

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188. See *supra* notes 67–73 and accompanying text; see, e.g., W. VA. CONST., art. II, § 4 (“Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved.”).

189. FRITZ, *supra* note 18, at 18.

190. GA. CONST. of 1777, pmbl.; MD. CONST. of 1776, declaration of rights, art. I; S.C. CONST. of 1776, pmbl.

191. MASS. CONST. declaration of rights, art. VII; see also, e.g., PA. CONST. of 1776, declaration of rights, art. 5.

192. VA. CONST. of 1776, declaration of rights, § 4.

193. Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., Pa. State Univ. 2002) (1835); 2 JOHN STUART MILL, *M. de Tocqueville on Democracy in America*, reprinted in *DISSERTATIONS AND DISCUSSIONS* 1, 7–8 (London, John W. Parker & Son 1859) (“By Democracy M. de Tocqueville understands equality of conditions; the absence of all aristocracy, whether constituted by political privileges, or by superiority in individual importance

the 1830s, state legislatures rushed into internal improvements and other costly ventures, financing railroads, canals, and banks and granting significant benefits to these interests, while driving the states themselves into economic crises.<sup>194</sup> At the same time, state legislatures were spending considerable time and energy—often the vast majority of their time—on special legislation for particular individuals' benefit.<sup>195</sup> In response, state constitutional conventions restricted legislatures from acting in favor of special interests and against the public weal. For example, they adopted mandatory referenda that enabled the people as a whole to "sit upon as a jury" the legislature's decision to enter into public improvements, to raise taxes, to charter banks, and the like.<sup>196</sup> They also adopted the procedural restrictions described above, such as single-subject and original-purpose rules.<sup>197</sup>

In the 1840s and 1850s, numerous states also adopted equality guarantees.<sup>198</sup> Echoing founding-era provisions, Ohio's 1851 Constitution stated that "Government is instituted for [the people's] equal protection and benefit,"<sup>199</sup> while Oregon's 1859 Constitution more distinctly stated that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."<sup>200</sup> Although state equality provisions have sometimes been understood as comparable to the federal Equal Protection Clause, their distinct pedigree speaks to a distinct purpose. As the Oregon Supreme Court has explained, while the Reconstruction Congress "was concerned with discrimination against disfavored groups or individuals, specifically, former slaves," the drafters of Oregon's 1857 provision were concerned "with favoritism and the granting of special privileges for a select few."<sup>201</sup>

Alongside equality provisions and procedural requirements, states also adopted constitutional prohibitions on legislative enactment of special and

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and social power. It is towards Democracy in this sense, towards equality between man and man, that he conceives society to be irresistibly tending.").

194. See Long, *supra* note 80, at 727.

195. See, e.g., WILLIAMS, *supra* note 9, at 278 (noting that 90 percent of the laws passed during Indiana's 1849–1850 legislative session were special in nature).

196. 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 269 (Davenport, Luse, Lane & Co. 1857) (Delegate Amos Harris); see DINAN, *supra* note 18, at 68–76.

197. See *supra* notes 143–144 and accompanying text.

198. See Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

199. OHIO CONST. art. I, § 2.

200. OR. CONST. art. I, § 20.

201. *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 975 (Or. 1982) (en banc); OR. CONST. art. I, § 20; see WILLIAMS, *supra* note 9, at 213 ("A provision like Oregon's . . . does not seek equal protection of the laws at all. Instead, it prohibits legislative discrimination in favor of a minority.").

local laws that applied only to a limited set of persons or localities.<sup>202</sup> The Pennsylvania Constitution of 1873 contained forty subject-matter restrictions on the legislature; the Missouri Constitution of 1875 contained fifty-six; and the California Constitution of 1879 contained thirty-three.<sup>203</sup> “Moreover, once a limitation was enshrined in a few constitutions, the interstate borrowing of provisions virtually guaranteed its appearance in others as well, as constitution-makers sought to avoid granting ‘too lax a discretion to transient representatives of the people.’”<sup>204</sup> The vast majority of state constitutions still contain prohibitions on special legislation.<sup>205</sup> They also include public-purpose requirements that seek to limit state spending, taxing, and borrowing so as “to prevent the use of government power to effect private transfers of economic interests.”<sup>206</sup>

Finally, the embrace of direct democracy across the twentieth century reflected concerns about “interest-dominated legislatures”<sup>207</sup> and a desire to make laws reflect the common good. Progressive proponents of direct democracy echoed arguments of nineteenth-century reformers: special interests were preventing public-regarding legislation, so the people needed to be able to govern directly.<sup>208</sup> More recent direct-democracy efforts have targeted forms of legislative self-dealing, by seeking, for instance, to impose limits on lobbying and campaign finance.<sup>209</sup> Together, these various provisions reflect a constitutional vision that state government must be both “by” the people and “for” the people.<sup>210</sup>

## II. AMERICAN CONSTITUTIONS

The distinctiveness of the state constitutional commitment to democracy emerges more clearly when considered alongside the federal Constitution. While state constitutions embrace an active popular sovereign, the federal

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202. See, e.g., *Perkins v. City of Philadelphia*, 27 A. 356, 360 (Pa. 1893) (“It is certainly not forgotten that the well-nigh unanimous demand which brought the convention of 1873 into existence was prompted by the evils springing from local and special legislation.”).

203. TARR, *supra* note 31, at 120.

204. *Id.* (quoting JAMES SCHOUER, *CONSTITUTIONAL STUDIES, STATE AND FEDERAL* 210 n.2 (photo. reprt. 1971) (New York, Dodd, Mead & Co. 1897)).

205. See *supra* note 80; see also Long, *supra* note 80, at 721 (noting that courts stopped enforcing these provisions by the mid-twentieth century).

206. *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1484 (1982); see *supra* note 84. But see Richard Briffault, Foreword, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003) (“Judicial interpretations have effectively nullified the public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors.”).

207. DINAN, *supra* note 18, at 59–60.

208. See *id.* at 84–85.

209. See DINAN, *supra* note 44, at 250–55.

210. TARR, *supra* note 31, at 100.

Constitution has placed the popular sovereign in a “coma.”<sup>211</sup> While state constitutions facilitate majority rule, the federal Constitution thwarts any straightforward exercise of majority governance. And while state constitutions endorse political equality, the federal Constitution largely rejects it, not least because of the federal structure itself.

Each of these oppositions is, as we will discuss, more complicated, but nuance should not distract from the basic point. Whether one describes the federal Constitution as simply “undemocratic,” as have a number of distinguished commentators,<sup>212</sup> or instead offers interpretations that seek to “reconcile [federal] constitutionalism with democracy,”<sup>213</sup> the federal document bears a very different relationship to democracy than do state constitutions. It is wary of unmediated popular sovereignty, majority rule, and political equality.

Beyond underscoring distinctive aspects of the democracy principle, exploring federal and state constitutions together helps make sense of a broader American constitutionalism. Neither the federal Constitution nor state constitutions stand alone. Since the eighteenth century, they have been drafted and amended in response to one another—sometimes to incorporate the other’s content and sometimes to reject the other’s particular approach. If they are distinct, so too are state and federal constitutions complementary in critical respects. While the ways in which the federal Constitution may temper excesses and abuses of state majoritarianism have been much studied, the ways in which state constitutions may ameliorate national democratic shortcomings, including problems of minority rule, have not received similar attention.

#### A. *Alternatives*

It is unsurprising that state and federal constitutions would bear different relationships to democracy. Drafters of the 1789 U.S. Constitution were “alarmed by majoritarian tyranny within the states” and responded to the “excesses” of American democracy they perceived to be reflected in the first wave of state constitutions.<sup>214</sup> For their part, drafters of state constitutional provisions in the nineteenth century rejected numerous aspects of the eighteenth-century U.S. Constitution, including Article V’s inhibition of

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211. David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 687 (2018) (reviewing RICHARD TUCK, *THE SLEEPING SOVEREIGN* (2016)).

212. See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2d ed. 2003); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* (2006); Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987).

213. Jackson, *supra* note 41, at 1261–62; see, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE* (1991); ELY, *supra* note 5; Amar, *supra* note 114; Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

214. Gordon S. Wood, *Democracy and the Constitution*, in *HOW DEMOCRATIC IS THE CONSTITUTION?* 1, 9 (Robert A. Goldwin & William A. Schambra eds., 1980).

popular amendment and its rejection of simple majoritarian government.<sup>215</sup> Eschewing Founder-worship, a delegate to the Nevada convention of 1864 noted that the federal Constitution had been adopted when “the Government was yet but an experiment,”<sup>216</sup> while a delegate to the California convention of 1878–1879 more bluntly dismissed the relevance of any constitution formed in such “primitive times.”<sup>217</sup> These and other state conventions not only exemplified a different approach to democracy involving continuous revision but also yielded distinct constitutional provisions and understandings. Designed from the outset in partial opposition to one another, and amended and interpreted through distinct traditions over time, state and federal constitutions embody different relationships to rule by the people.

### 1. Popular Sovereignty and the Problem of Present Consent

Although both state and federal constitutions express a belief in popular sovereignty, their understandings and commitments differ markedly. As David Grewal and Jedediah Purdy have argued, “the conception of popular sovereignty underlying a democratic constitution necessarily combines” ideas of popular authorship and present consent.<sup>218</sup> First, the people must “be said in a genuine, non-obscurantist way to be the original source of authority for their own fundamental law.”<sup>219</sup> Second, “what gives fundamental law its authority is the consent of the people now living under it, who constitute the present sovereign, rather than the fact that it was originally adopted through an earlier sovereign act.”<sup>220</sup>

At the state level, practices of constitutional revision unite popular authorship with continuous present consent: the people who are currently living under the state constitution remain responsible for that constitution and have a genuine and oft-exercised ability to change it if they no longer endorse its provisions. These constitutions have collectively been replaced and amended thousands of times, through both legislative amendments ratified by voters and amendments proposed directly by the people.<sup>221</sup> The popular

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215. See generally FRITZ, *supra* note 18 (describing nineteenth-century state amendments).

216. NEVADA 1864 DEBATES, *supra* note 32, at 563–64.

217. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 203 (Sacramento, J.D. Young 1880) (Delegate Clitus Barbour).

218. Grewal & Purdy, *supra* note 211, at 681–82.

219. *Id.*

220. *Id.* at 682.

221. See DINAN, *supra* note 44, at 23; *supra* Part I.

sovereign has remained, by design and practice alike, at least intermittently awake.<sup>222</sup>

In contrast, although the federal Constitution likewise begins with a proclamation of popular sovereignty, it “calls ‘We the People’ into being only to constrain sharply the same people’s capacity for ongoing constitutional self-rule.”<sup>223</sup> Article V provides the only explicit path to amendment: proposal of an amendment by two-thirds of both houses of Congress or proposal of a convention by two-thirds of the state legislatures, and ratification by three-fourths of the states through their legislatures or conventions.<sup>224</sup> Amending the federal Constitution is accordingly exceedingly difficult; only seventeen amendments have been adopted since the 1791 Bill of Rights, and only one of those (the repeal of Prohibition) by anything other than congressional proposal and state legislative ratification.<sup>225</sup> None of the twenty-seven amendments that have been adopted over 230 years has been proposed by a convention.<sup>226</sup>

The difficulty of amendment has not convinced Americans—or, more specifically, judges, lawyers, and scholars—that popular sovereignty does not exist as a matter of federal constitutional law. But the various responses that valorize “We the People” necessarily adopt a different understanding of and approach to popular sovereignty than do state constitutions.

Presenting perhaps the starkest contrast, one response focuses solely on popular authorship: the federal Constitution was adopted by the people, so its provisions instantiate popular sovereignty, however long they have been in effect and however little we know about whether the now-living people approve.<sup>227</sup> Although this approach, most prominently associated with originalism, may suggest that the absence of constitutional amendment indicates present consent, Article V constraints reveal the stark limits of such a claim. At a minimum, the absence of amendment cannot indicate consent by anything close to a popular majority.<sup>228</sup> The originalist conception of popular sovereignty necessarily privileges the past over the present. Insofar as it equates dead-hand control with popular sovereignty, it poses the clearest contrast to state constitutions, which privilege ongoing, present consent.

A different approach to popular sovereignty and the federal Constitution focuses on the present community instead of accepting dead-hand con-

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222. See generally SCALIA, *supra* note 108 (exploring popular sovereignty in the state constitutional tradition); RICHARD TUCK, *THE SLEEPING SOVEREIGN* (2016) (tracing the historical distinction between sovereignty and government).

223. Grewal & Purdy, *supra* note 211, at 681.

224. U.S. CONST. art. V.

225. Prohibition was repealed by state conventions. Thomas F. Schaller, *Democracy at Rest: Strategic Ratification of the Twenty-First Amendment*, PUBLIUS, Spring 1998, at 81, 81; see also U.S. CONST. amend. XXI.

226. *Constitutional Amendment Process*, NAT’L ARCHIVES, <https://www.archives.gov/federal-register/constitution> [<https://perma.cc/TL9H-2RTP>].

227. Grewal & Purdy, *supra* note 211, at 681–82.

228. See *infra* Section II.A.2 (discussing majority rule).



trol.<sup>229</sup> Yet whereas the living sovereign may speak at the state level by amending the constitution itself, Article V all but precludes that at the federal level. Because there is no other recognized mechanism of constitutional amendment, struggles over how the living sovereign speaks and who may decipher its speech are unavoidable. Akhil Amar, for instance, has argued that “We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.”<sup>230</sup> The implausibility of such a process highlights just how removed the federal constitutional tradition is from state practices of popular sovereign control.

Other accounts look to interpretation rather than amendment as such. For example, the sort of popular constitutionalism embraced by Larry Kramer, democratic constitutionalism embraced by Robert Post and Reva Siegel, and living originalism embraced by Jack Balkin posit channels, including social and political movements, through which the people express understandings of an inherited foundational document that make it “our own.”<sup>231</sup> As an initial matter, this approach is limited as compared to constitutional amendment; only a subset of provisions are understood to admit of meaningful interpretation, and specific text forecloses some conceptions of fundamental law that might better accord with popular sentiment.<sup>232</sup> Some amount of dead-hand control is inescapable. Even where there is more interpretive room, moreover, there is no agreed-upon way in which “We the People” speak and are heard. Absent amendment, it is left to government actors to decide what the people have willed.<sup>233</sup>

In contrast, the constitutionally specified state processes of popular approval and revision enable the people to speak for themselves, and they have done so time and again. To be sure, there may be any number of practical impediments (not to mention any number of normative objections) to their revisions, but the constitutional distinction remains critical: state constitutions allow the people to speak for themselves, and yoke popular authorship to present consent, in ways the federal Constitution does not.

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229. Grewal & Purdy, *supra* note 211, at 682.

230. Amar, *supra* note 114, at 457. *But see* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (disputing Amar’s account).

231. JACK M. BALKIN, *LIVING ORIGINALISM* 62–63, 71 (2011); *see* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 7–8 (2004); Post & Siegel, *supra* note 213, at 374.

232. *See, e.g.,* SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 246–54 (new ed. 2011) (describing the “Constitution of Settlement”).

233. *See* Grewal & Purdy, *supra* note 211, at 691 (“[C]ompeting official interpreters . . . make clashing appeals to a ‘people’ that cannot speak for itself.”).

## 2. Majority Rule and the Question of Mediation

The federal Constitution's relative privileging of the past over the present is closely related to the distinct ways in which state and federal constitutions conceive of majority rule. In brief, state constitutions endorse simple, unmediated expressions of majority will, while the federal Constitution rejects any such approach.

State constitutions embrace the authority of current popular majorities with respect to both sovereign acts and governmental ones. State constitutional ratification and amendment tends to occur through relatively simple majoritarian decisionmaking insofar as a popular majority speaks for the people. With respect to subconstitutional lawmaking as well, state constitutions privilege decisions of popular majorities. These majorities may themselves adopt laws, through processes of direct democracy, and they are responsible for constituting government, through statewide popular voting for governors, other executive officials, and judges; state constitutions have no equivalent of the Senate or the Electoral College, and all but one have rejected life tenure for judges.<sup>234</sup> Even where state constitutions favor representative over direct democracy, then, they remain skeptical of mediated government and locate the majority of the political community as the principal and normatively superior decisionmaker.

The federal Constitution disavows both simple majority rule and unmediated governance. Most starkly, there is nothing akin to a national initiative or referendum process. As Michael Klarman has noted, "despite the Framers' regular professions of devotion to popular sovereignty, their deep distrust of the people was evident . . . in nearly every substantive choice made in the Constitution that bore on the new federal government's susceptibility to popular influence."<sup>235</sup> Publius famously celebrated the "total exclusion of the people in their collective capacity" as the most distinctive feature of extant American governments, and one that would be inscribed in the federal document.<sup>236</sup> The people would act exclusively, and not only partially, through representatives. There has been no introduction of direct democracy for federal lawmaking in the centuries since. When national reform swept the country during the Progressive Era, for instance, it was only written into state constitutions. President Teddy Roosevelt, among others, announced himself "emphatically a believer in constitutionalism" while "protest[ing] against any theory that would make of the constitution a means of thwarting instead of securing the absolute right of the people to rule themselves and to provide for their own social and industrial well-being."<sup>237</sup> Yet his advocacy for more flexible amendment procedures and popular rule focused on state

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234. Rhode Island grants life tenure. R.I. CONST. art. X, § 5.

235. MICHAEL J. KLARMAN, *THE FRAMERS' COUP* 608 (2016).

236. THE FEDERALIST NO. 63, at 355 (James Madison) (Clinton Rossiter ed., 1999) (emphasis omitted).

237. OHIO 1912 DEBATES, *supra* note 153, at 378–79.

constitutions, not the federal one; his comments were made to the Ohio Constitutional Convention of 1912.<sup>238</sup>

With respect to representative government, too, the federal Constitution favors heavily mediated approaches to lawmaking, in part to limit expressions of majority will in the manner state constitutions embrace. Notwithstanding proclaimed commitments at the constitutional convention, the Framers' "stress on majoritarianism . . . sat awkwardly with the actual shape of the Constitution, as it had emerged from the compromises of Philadelphia."<sup>239</sup> A number of "strong anti-majoritarian features" have been hardwired into the federal Constitution from the start.<sup>240</sup> These provisions—most notably the structure of the Senate, the Electoral College, and the guarantee of life tenure for Article III judges—"construct a barrier to majority rule at the national level."<sup>241</sup> And even as these provisions have become still-more "anti-majoritarian" in their effects over time given changes in population, they have not been changed, at least in part because of Article V's own requirement of double supermajorities to alter the Constitution. "The dreadful fact," Sandy Levinson concludes, "is that none of the great institutions of American politics can plausibly claim to speak for the majority of Americans."<sup>242</sup>

Others dispute Levinson's contention that "majority rule is significantly stymied by the operation of the Constitution itself."<sup>243</sup> For example, some suggest that individually antimajoritarian institutions may offset one another to foster a reasonably majoritarian system overall.<sup>244</sup> Some focus on additional entry points, such as ways in which social movements representing popular majorities shape government decisionmaking.<sup>245</sup> Some define majority rule in terms of views reached after deliberation by informed representatives and argue that the federal Constitution fosters such a deliberative majority.<sup>246</sup> And a large number take issue with temporally bounded or uni-

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238. *Id.* at 379.

239. TUCK, *supra* note 222, at 231; *see id.* at 229–31 (quoting statements from the constitutional convention and noting that "it was the state constitutions rather than the federal one that most closely corresponded to the political convictions of the Americans"). *See generally* KLARMAN, *supra* note 235, at 606–09 (emphasizing the federal document's "[h]ostility [t]oward [d]emocracy"). For the classic, much-disputed statement, *see* CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 188 (1913) (arguing that the Founders designed the Constitution to protect their own property interests).

240. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 75 (1989).

241. DAHL, *supra* note 212, at 47, 48, 55, 76–77.

242. LEVINSON, *supra* note 212, at 49.

243. *Id.* at 77.

244. *See, e.g.,* Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 34 (2009).

245. *See, e.g.,* BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

246. *See, e.g.,* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in *HOW DEMOCRATIC IS THE CONSTITUTION?*, *supra* note 214, at 102, 106.

tary conceptions of the popular majority; from social choice theory to constructivist theories of representation and more, these scholars reject the idea that we might derive a meaningful form of majority rule by simple aggregation.<sup>247</sup>

For our purposes, the important point is not whether one joins company with those who expressly label the federal Constitution “antimajoritarian.” It is the comparative observation: whereas state constitutions privilege present, unmediated popular majorities, the federal Constitution does not; it rejects at least this form of majority rule.

### 3. Political Equality and the Limits of Federalism

Inherently bound up with their distinct approaches to mediated governance and majority rule are state and federal constitutions’ different responses to political equality, the idea that members of the political community share equally in the power to influence government. Whereas state constitutions embrace this democratic commitment, the federal Constitution at least partially rejects it because of federalism itself.

State constitutions have long worried about distortions of political equality. To facilitate the equal influence of all members of the political community on government, for example, state constitutional drafters have repeatedly expanded the role and direct influence of the electorate—through multiple forms of direct democracy, the statewide election of a broader array of officials, popular election of both houses of state legislatures, and the ease of amending state constitutions. State constitutions also exhibit concern with political equality as an output: seeking to ensure that government works for all members of the political community, state constitutional provisions guarantee equality, prohibit special legislation, impose procedural constraints, and require public purposes.<sup>248</sup> These various provisions evince skepticism of mediated decisionmaking as potentially inequalitarian as well as potentially antipopular and antimajoritarian.

Although the federal Constitution also evidences certain commitments to political equality—most notably in the Fourteenth Amendment—it is not a similarly pervasive principle. In particular, it is challenged by the constitutional commitment to federalism. Privileging states over people, both the Senate and Electoral College defy political equality, and the Senate’s structure is more hardwired into the Constitution than other provisions.<sup>249</sup> Even after the Seventeenth Amendment made Senators popularly elected, citizens of the least populous states have more than fifty times the voting power in

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247. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (3d ed. 2012); NADIA URBINATI, *REPRESENTATIVE DEMOCRACY* (2006).

248. See *supra* Section I.C.3.

249. U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

the Senate than citizens of large states.<sup>250</sup> So too, the design of the Electoral College means that presidents can be—and have been—elected after losing the popular vote, compromising political equality and majority rule alike.<sup>251</sup>

These federal constitutional features impede political equality in a manner that has no counterpart at the state level—although, notably, it was not autonomous state efforts but rather the U.S. Supreme Court’s holding that the Equal Protection Clause requires seats in both houses of a state legislature to be apportioned on the basis of population that led to state constitutional amendments in the 1960s and 1970s.<sup>252</sup> The Supreme Court understood popular political equality to be a requirement of state democracy, even if not its national counterpart.<sup>253</sup> *Reynolds v. Sims* and its progeny underscore an important point that we turn to now: state and federal constitutions are not only distinct but also interdependent.

### B. Complements

Beyond staking out alternative approaches, state and federal constitutions may be understood as complementary in key respects. To begin, they are intertwined documents. As Donald Lutz has argued, the federal Constitution is “an incomplete text”<sup>254</sup>. “The states are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution,” and many of these instances borrow state constitutional determinations.<sup>255</sup> For example, although the federal Constitution was “born in celebration of ‘republican government,’” it “did not grant anyone the right to vote.”<sup>256</sup> Instead, it incorporates the voter qualifications established by states;<sup>257</sup> relies on state legislatures to “direct” the manner of selecting presidential elec-

250. Wyoming (population 578,759) and California (population 39,512,223) present the most extreme example. 2019 *National and State Population Estimates*, U.S. CENSUS BUREAU (Dec. 30, 2019), <https://www.census.gov/newsroom/press-kits/2019/national-state-estimates.html> [<https://perma.cc/6CGG-NBZY>].

251. See, e.g., FED. ELECTION COMM’N, *FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES* (2017), <https://www.fec.gov/resources/cms-content/documents/federalections2016.pdf> [<https://perma.cc/V6F5-ZWP3>] (counting 65,853,514 votes for Hillary Clinton and 62,984,828 votes for Donald Trump).

252. See *Reynolds v. Sims*, 377 U.S. 533, 564–66 (1964); James A. Henretta, Foreword, *Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 839 (1991) (noting that thirteen states revised their constitutions between 1963 and 1976). *But see supra* notes 68–72 (noting that state constitutions called for equipopulous districts prior to *Reynolds*, even if these requirements were not widely observed).

253. *Reynolds*, 377 U.S. at 564–65 (“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . .” (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964))).

254. Lutz, *supra* note 18, at 32.

255. *Id.* at 24–25.

256. KEYSSAR, *supra* note 183, at 4.

257. U.S. CONST. art. I, § 2.

tors;<sup>258</sup> and leaves the administration of congressional elections to the states, subject to congressional alteration.<sup>259</sup> At the same time, state constitutions sometimes directly incorporate provisions of the federal Constitution,<sup>260</sup> and they operate in the shadow of federal supremacy.<sup>261</sup>

This mutual dependence reflects deliberate choices of state and federal constitutional drafters, who have sought both to compensate for perceived deficiencies of the other document and to emulate or incorporate by reference congenial provisions. As we have noted, for example, the 1789 federal constitutional design not only incorporated state law but also reacted against perceived excesses of democracy and majoritarianism at the state level.<sup>262</sup> On the flip side, developments in state constitutional rights have been prompted by perceived federal requirements, federal vacuums, or both. State educational rights are illustrative: many Southern states included educational rights to address congressional pressure prior to their readmission to the Union;<sup>263</sup> a century later, education-equality advocates reacted to federal constitutional defeat by turning to state constitutions and state courts.<sup>264</sup> As this further underscores, the complementarity of state and federal constitutions reflects not only choices of drafters but also decisions by underlying social and political movements. Given their greater permeability, state constitutions have long been a site of national organizing, with amendments and interpretations generated by coordinated nationwide efforts.<sup>265</sup>

Viewing state and federal constitutions as parts of a whole thus provides a more complete view of American constitutionalism.<sup>266</sup> Although this argument applies to a number of domains, we focus here on one of the most pressing for American democracy: How might state and federal complementarity speak to fears of minority rule, on the one hand, and tyranny of the majority, on the other? As Neil Komesar has written, “[t]wo visions of political malfunction—one stressing fear of the many and the other stressing fear of the few—coexist in our traditional views of government. At various times and by various parties, one or the other of these conceptions has been envi-

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258. *Id.* art. II, § 1, cl. 2.

259. *Id.* art. I, § 4, cl. 1.

260. See *supra* notes 67–73 and accompanying text (canvassing apportionment provisions).

261. U.S. CONST. art. VI.

262. See *supra* note 214 and accompanying text.

263. Black, *supra* note 45, at 765–67.

264. See ZACKIN, *supra* note 21, at 74–75, 98.

265. See *id.* at 21. National politicians also frequently advocated state constitutional changes. See, e.g., *supra* note 237 and accompanying text (quoting Roosevelt’s speech to Ohio’s 1912 Convention); DINAN, *supra* note 18, at 16 (noting state convention speeches by Dwight Eisenhower and Earl Warren).

266. As numerous scholars of state constitutions have long argued. See, e.g., DINAN, *supra* note 18; FRITZ, *supra* note 18; TARR, *supra* note 31; ZACKIN, *supra* note 21.

sioned as the sole or paramount evil.”<sup>267</sup> The Federalists worried that a “small republic” would enable majority factions to rule “without regard for the rights of minorities,” while the Anti-Federalists feared the constitution would establish a small ruling class that would “reflect[] only the interests of the few.”<sup>268</sup> Years of debates between Thomas Jefferson and John Adams made clear that “Adams believed in restraining the will of the majority, Jefferson in submitting to it.”<sup>269</sup> In the context of judicial review, decades of scholarship have feared and attempted to rebut a “counter-majoritarian difficulty” raised by unelected judges reviewing the decisions of elected officials.<sup>270</sup> But those who have studied the state judiciary identify an opposing fear—that of the “majoritarian difficulty,” or judging by elected officials who imperil unpopular minorities.<sup>271</sup>

Both the federal and state constitutions independently seek to balance protections for majorities and minorities, most notably by conjoining popular elections with minority-protecting rights. But this hardly resolves the question of majority tyranny and minority rule. Few accept rights provisions alone as sufficient to protect minorities, yet limiting majority rule in the first instance risks “[m]inoritarian bias”—“an inordinate power of the few at the expense of the many”<sup>272</sup>—which may not protect vulnerable minorities so much as further empower the “wealthy or well-connected few” and exacerbate inequality.<sup>273</sup>

While the coexistence of state and federal constitutions does not resolve the inevitable tension between majoritarianism and minoritarianism, it does enable additional mediating work. Insofar as state constitutions are more solicitous of the majority, while the federal Constitution is more skeptical of majoritarianism, state and federal constitutions help to address distinct shortcomings of the other.

Indeed, half of this argument is widely assumed: the tyranny of the majority at the state level may be checked by the federal Constitution. Since Reconstruction, the federal Constitution has been seen as an answer to the most pernicious forms of state majoritarianism, racial apartheid and discrimination. Not only federal constitutional rights, such as those contained in the Fourteenth and Fifteenth Amendments, but also federally imposed requirements about the structure and operation of state government may

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267. Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 668 (1988); see also DAHL, *supra* note 25, at 4 (“[P]reoccupation with the rights and wrongs of majority rule has run like a red thread through American political thought since 1789.”).

268. Jean Yarbrough, *Representation and Republicanism: Two Views*, PUBLIUS, Spring 1979, at 77, 85, 88.

269. JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 155 (2018).

270. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

271. See, e.g., Croley, *supra* note 148, at 694.

272. Komesar, *supra* note 267, at 671.

273. Tarr, *supra* note 111, at 89.

combat the expression of majority rule as white supremacy. The Voting Rights Act, and other legislation adopted to enforce federal constitutional guarantees, imposes limits on majority rule at the state level to protect racial and ethnic minorities.<sup>274</sup>

But if it is widely accepted that the federal Constitution speaks to problems of state majority tyranny, it has not been similarly appreciated that state constitutions speak to problems of federal minority rule. Reclaiming the state constitutional commitment to democracy may ameliorate democratic shortcomings at the federal level as well as in the states, as state constitutions constrain federal minoritarianism both from within and without.

First, state constitutions may temper the antimajoritarian composition of the federal government. States are the building blocks of the federal government. From the federal Constitution's express incorporation of state electoral rules to the selection of the president, senators, and representatives by state populations to districting for the House by state legislatures, states critically compose the federal government. The federal design necessarily impedes national majoritarianism, but additional departures from popular majority rule in the states may exacerbate the federal government's unrepresentative character. To be sure, departures from majority rule in the states need not have this effect; theoretically, system effects could mean even outright minority rule in the fifty states ultimately yields something more akin to national majority rule in the aggregate.<sup>275</sup> But political pathologies, residential patterns, and more make this unlikely; at least as a practical matter, departures from majority rule at the state level compound problems of minority rule at the federal level.<sup>276</sup> State actors who evade the state constitutional guarantees of majority rule and political equality through partisan gerrymandering and voter suppression, for example, worsen federal minoritarianism. Conversely, reining in these antidemocratic practices and recovering the state constitutional commitment to popular majorities would constrain federal minoritarianism.

Second, in addition to composing federal institutions, states also directly engage in national policymaking. Because of the federal Constitution's anti-

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274. E.g., Voting Rights Act of 1965, 52 U.S.C. §§ 10301–10702 (formerly cited as 42 U.S.C. §§ 1973 to 1973bb-1). *But see* *Shelby County v. Holder*, 570 U.S. 529 (2013) (significantly curtailing the VRA).

275. See Vermeule, *supra* note 244.

276. See, e.g., NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA* (2d ed. 2016). One place we might expect to see offsetting effects is partisan gerrymandering. See, e.g., Aaron Goldzimer & Nicholas Stephanopoulos, *Democrats Can't Be Afraid to Gerrymander Now*, SLATE (July 3, 2019, 4:05 PM), <https://slate.com/news-and-politics/2019/07/democrats-gerrymandering-sctotus-rucho.html> [<https://perma.cc/DK73-REH7>] (arguing that blue states might “offset red state gerrymanders elsewhere” and craft their “congressional districts with the aim of *national* partisan fairness”). To date, however, blue states have been “unilaterally disarming,” *id.*, while red states engage in increasingly extreme gerrymandering—a disparity consistent with the parties’ asymmetric practices more generally. See Joseph Fishkin & David E. Pozen, *Essay, Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).



majoritarian character, national decisionmaking often fails to reflect the national popular will, but national majority preferences will tend to be shared by majorities in at least a number of states.<sup>277</sup> Given the substantial overlap of state and federal policy domains since at least the New Deal, states provide fifty disaggregated sites for national governance.<sup>278</sup> Insofar as state constitutions empower popular majorities to govern, then, they may directly facilitate majoritarian decisionmaking that counterbalances the federal government's more minoritarian approach. Sometimes, decisionmaking at the state level will reflect the preferences of a state majority that is not a national majority,<sup>279</sup> but in many cases, states may also offer voice to national majorities. State constitutions, in turn, empower those majorities to act in ways that challenge or substitute for national decisions.

Often, this pushback tracks what one of us has termed "partisan federalism": red and blue states resisting blue and red national governments, respectively.<sup>280</sup> But the majority-minority clashes facilitated by state constitutions go beyond partisan politics. In particular, opportunities for direct democracy in the states—in the form of state constitutional amendments as well as subconstitutional initiatives and referenda—allow popular majorities to work around political parties. Citizens of red states can adopt policies disfavored by the Republican Party, citizens of blue states can adopt policies disfavored by the Democratic Party, and, most true to the initiative's Progressive roots, citizens of red and blue states alike can adopt policies disfavored by elites in both parties.<sup>281</sup> For example, Medicaid expansion pursuant to Obamacare has been a staunchly partisan issue for elected officials, but citizens of red states have proposed and adopted initiatives to expand Medicaid.<sup>282</sup> These votes are best understood as efforts by national (and state) ma-

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277. See Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265, 317–22 (2019); Vicki C. Jackson, *The Democratic Deficit of United States Federalism? Red State, Blue State, Purple?*, 46 FED. L. REV. 645, 652 (2018).

278. See generally Bulman-Pozen, *supra* note 277, at 319–20; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1897–98 (2014).

279. Indeed, some conceptualize federalism in just this way. Heather Gerken observes that "[m]ost theories of federalism explicitly or implicitly depend on minority rule," in which "national minorities . . . constitute local majorities." Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 12 & n.10 (2010). "For instance, states are unlikely to constitute laboratories of democracy or facilitate Tieboutian sorting if the same types of people are making decisions at the state and national levels." *Id.* at 12 n.10. As Gerken's framing suggests, however, if the national government is governing for a national minority, states might provide the necessary difference by governing for a national majority that is not represented as such in Washington.

280. Bulman-Pozen, *supra* note 35, at 1078–81, 1096–108.

281. See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1951–56 (2014).

282. See *Status of State Medicaid Expansion Decisions: Interactive Map*, KFF (Feb. 4, 2021), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [https://perma.cc/F8C7-HZAB] (noting that Idaho, Utah, Nebraska, and Oklahoma voters have approved Medicaid expansion ballot initiatives).

majorities to expand a program at the same time that national (and state) minorities seek to curtail it. Because there is no national referendum process, state constitutional amendments and initiatives provide the only approximation of national direct democracy.

There is at least a superficial irony here: federalism lies at the root of the most antidemocratic features of the U.S. Constitution, from unequal representation in the Senate and Electoral College to nearly insurmountable amendment procedures. But in their independence from, rather than their partial constitution of, the federal government, states play a different role. If the way states figure in the federal Constitution is in opposition to majority rule and popular equality, the way states function as distinct American governments may further popular majority will—at least if the democracy principle is properly understood and implemented.

### III. PRACTICAL CONSEQUENCES

Reclaiming the state constitutional commitment to democracy offers resources for evaluating, and potentially invalidating, antidemocratic actions. This Part describes how the democracy principle can inform numerous disputes by making sense of abundant textual, purposive, and structural clues. Democracy at the state level is a constitutional concept,<sup>283</sup> not just a political one, and must be given meaning in constitutional interpretation. This does not mean that the principle will be dispositive in every dispute that implicates state democracy or that the answers it generates will always be clear. That would be too much to ask of any such principle. But we believe the democracy principle adds considerable value—by showing that conflicts over state democracy are constitutional conflicts, by synthesizing the many resources state constitutions provide to protect democratic rule, and by operationalizing a commitment that has long been a central feature of state founding documents. It is far more faithful to state constitutions to try to protect democracy than to ignore it.

Indeed, a few state courts have recently recognized as much in the context of partisan gerrymandering.<sup>284</sup> The democracy principle helps to make sense of and reinforce this emerging body of case law. It also provides a foundation for states that have yet to recognize partisan gerrymandering as a constitutional concern to do so.

In other instances, the democracy principle provides a more compelling justification for decisions reached on different grounds. After voters popularly elected a new governor of North Carolina, for example, the legislature met in a special session to strip gubernatorial power over the state elections

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283. See *supra* Section I.A (comparing the democracy principle to other constitutional concepts). Parsing more finely, we might say that we are identifying democracy as a constitutional “concept” in the states and then offering a particular “conception” of it. See JOHN RAWLS, *A THEORY OF JUSTICE* 8–9 (rev. ed. 1999) (identifying concept-conception distinction).

284. See *infra* Section III.A.

board.<sup>285</sup> Although the state supreme court invalidated the change on separation-of-powers grounds, it made no reference to the legislature's power grab.<sup>286</sup> Speaking directly to this problem, the democracy principle provides a sounder basis for striking down such lame-duck laws.<sup>287</sup>

In still other instances, the democracy principle yields altogether different conclusions from those courts have reached. For example, a number of direct-democracy states allow legislatures to repeal statutory initiatives immediately upon passage.<sup>288</sup> The robust state commitment to popular sovereignty calls for a different approach to legislative nullification of the people's policies.

In the pages that follow, we analyze these and related controversies and describe how the democracy principle limits partisan self-dealing, minority rule, and attempts to override direct democracy. As our discussion underscores, the democracy principle can only be fully understood and applied with reference to specific state constitutions; it is a variegated principle because the precise text, history, and structure that compose it vary from state to state. In this sense, our references to the "democracy principle" are a shorthand for a number of state-specific commitments. But we also mean to invoke a shared principle that transcends its instantiation in any given state. The commitment to popular self-rule pervades all fifty state constitutions and has emerged through interstate borrowing in drafting and interpretation, as well as through dialogue with the federal Constitution. It is thus appropriate for constitutional interpreters to consider a shared state commitment to democracy as they make sense of and implement provisions contained in particular documents.<sup>289</sup>

Who are these constitutional interpreters we invoke? An obvious starting point is state courts. Judicial review is a longstanding feature of state constitutional systems,<sup>290</sup> and state courts are often called upon to settle constitutional disputes and rein in state officials. Although there are examples of state courts stepping back from constitutional enforcement in recent decades,<sup>291</sup> historically state courts took their constitutional obligations seri-

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285. Rebecca Hersher, *North Carolina Governor Signs Law Limiting Power of His Successor*, NPR (Dec. 16, 2016, 4:47 PM), <https://www.npr.org/sections/thetwo-way/2016/12/16/505872501/north-carolina-governor-signs-law-limiting-power-of-his-successor> [https://perma.cc/3ZPF-MPBC].

286. *Cooper v. Berger*, 809 S.E.2d 98, 112–14 (N.C. 2018).

287. See *infra* Section III.B.

288. See *infra* Section III.C.

289. See *supra* Section I.A; cf. GARDNER, *supra* note 35 (endorsing a functional approach to state constitutions and proposing that courts should interpret state constitutions to protect liberty in a federal system).

290. See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207 (1983).

291. See, e.g., Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

ously.<sup>292</sup> State courts are particularly well-suited to implement the democracy principle, given their own democratic qualifications—their election, in most states, and their susceptibility to override through constitutional amendment if they err.<sup>293</sup>

But state courts are not the only, or even the most important, avenue for reclaiming state democracy. To the contrary, the state constitutional tradition is one that empowers the people of the states directly.<sup>294</sup> In some cases, judges will misapply or overlook state constitutional constraints on anti-democratic behavior. A number of the political pathologies that underlie our discussion also affect state courts, and judicial decisions are not immune from such pathologies. More public and scholarly attention to state courts can help on this front, but only to some degree.<sup>295</sup> In other cases, state courts may correctly conclude that a particular government action is not unconstitutional even given the democracy principle.

In either of those situations, the democracy principle may be invoked by nonjudicial actors. It offers opposing government officials, organizers, and members of the broader public a language and role morality to push back against antidemocratic behavior. In some instances, reclaiming state democracy will provide the vocabulary for amending state constitutions to reject actions that depart from the state tradition yet do not violate the constitution as written.<sup>296</sup>

Addressing judicial and nonjudicial actors alike, the remainder of this Part considers a number of contemporary controversies and sketches legal and political adjustments that reclaiming state democracy entails. While fully applying the democracy principle to any given dispute necessarily involves more considerations than we can air here, this discussion provides a starting point. State constitutions offer extensive, underappreciated resources for combating antidemocratic behavior, and we hope the following discussion motivates more case-specific consideration.

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292. W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 156–57 (1919). Although such constitutional enforcement has often involved constraining state legislatures, it would be a mistake to conflate these constraints with limits on government as such. ZACKIN, *supra* note 21, at 34 (noting that state constitutional constraints include both prohibitions and “mandates for legislative action”).

293. See, e.g., Helen Hershkoff, *State Courts and the “Passive Virtues”*: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1886–91 (2001).

294. See, e.g., ZACKIN, *supra* note 21; Reed, *supra* note 20, at 887.

295. Miriam Seifter, *Unwritten State Constitutions? In Search of Constitutional Participants* (Sept. 1, 2019) (unpublished manuscript) (on file with author).

296. This is the most likely avenue for addressing state constitutional provisions that require supermajority approval before a change can occur, such as California’s Proposition 13. See, e.g., Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. L. SCH. ROUNDTABLE 133 (1999); Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243.

A. *Partisan Gerrymandering*

Consider first an application of the democracy principle that has already begun to receive traction. State courts in Pennsylvania<sup>297</sup> and North Carolina<sup>298</sup> have recently held extreme partisan gerrymanders unconstitutional under their respective state constitutions. The democracy principle provides both a fruitful way to understand and additional support for these decisions. As the Supreme Court's decision in *Rucho v. Common Cause* directs additional attention to state courts,<sup>299</sup> moreover, the principle should underpin similar decisions in other states. Even if state constitutional provisions specifically addressing districting (such as compactness requirements) are "not adequate to the task of restricting partisan gerrymandering,"<sup>300</sup> other state constitutional resources, including provisions conferring voting rights and forbidding government favoritism, offer powerful tools.<sup>301</sup>

The Pennsylvania Supreme Court considered a gerrymander by the Republican state legislature designed to give a decisive advantage to Republicans. In the three elections held under the plan, Republicans won thirteen congressional seats and Democrats won five, even though the Republican vote share ranged between 49.2 percent and 55.5 percent; in 2012, Republicans won a supermajority of seats despite Democrats receiving a higher percentage of the state vote.<sup>302</sup> The Pennsylvania Supreme Court concluded that the gerrymander violated the state's "Free and Equal Elections" clause, which "provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so."<sup>303</sup> Drawing on text, history, and case law, the court interpreted the clause as an effort "to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylva-

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297. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801–02 (Pa. 2018).

298. *Common Cause v. Lewis*, 18-CVS-014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

299. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (holding that partisan gerrymandering is not justiciable under the federal Constitution).

300. James A. Gardner, Foreword, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 889–90 (2006) (emphasis omitted).

301. See *id.* at 968 (raising this possibility); James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 ELECTION L.J. 643, 648 (2004) (arguing that the state constitutional right to vote and requirement of "free," "open," or "equal" elections might underlie challenges to partisan gerrymandering); Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019) ("[S]tate courts have a long and rich history of protecting representational rights by striking down districting schemes for violating their respective constitutions.").

302. *League of Women Voters*, 178 A.3d at 764.

303. *Id.* at 814; see also PA. CONST. art. I, § 5 ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

nia: namely, the dilution of the right of the people . . . to select representatives . . . based on” factors like political or religious beliefs or their region of the state.<sup>304</sup>

This decision both illustrates and is bolstered by the democracy principle. For example, the court stated that it was important to adopt a “broad and robust” reading of the free and equal elections clause because unequal voting power is “the antithesis of a healthy representative democracy.”<sup>305</sup> It further noted that Article I, in which the clause is located, “spells out the social contract between government and the people” and indicates that legislative power is “not absolute.”<sup>306</sup> Reading the free and equal elections clause in context, the court recognized that “for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives.”<sup>307</sup> These and related passages of the opinion operationalize the state constitutional commitment to popular sovereignty and political equality. As the court recognized, partisan gerrymandering of the sort at issue entails legislative self-dealing that at once undermines the ability of the people to share equally in the power to influence government and confers special treatment on members of one political party.<sup>308</sup>

Recent litigation concerning North Carolina’s 2017 gerrymander, which was designed “to advantage Republicans and reduce the effectiveness of Democratic votes”<sup>309</sup> in composing the state legislature, also implicates the democracy principle. The state court analyzed the text, history, and purposes of North Carolina’s free elections clause and concluded that “extreme partisan gerrymandering of legislative districts run[s] afoul of the mandate of the Free Elections Clause by depriving citizens of elections that are conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.”<sup>310</sup> The court expressed particular concern with ensuring the ability of the people to equally influence government and foreclosing self-serving government action:

[I]t is clear to the Court that extreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over

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304. *League of Women Voters*, 178 A.3d at 808–09; see also *id.* at 818 (holding that the gerrymander “subordinate[d] the traditional redistricting criteria in the service of partisan advantage”).

305. *Id.* at 814.

306. *Id.* at 803.

307. *Id.* at 814 (emphasis omitted).

308. In some cases, such partisan gerrymandering also directly contravenes majority rule—for instance, when it enables a minority of the electorate to elect a majority of the state legislature or congressional delegation, as in the 2012 Pennsylvania elections.

309. *Common Cause v. Lewis*, 18-CVS-014001, 2019 WL 4569584, at \*10 (N.C. Super. Ct. Sept. 3, 2019).

310. *Id.* at \*110; see also N.C. CONST. art. I, § 10 (“All elections shall be free.”).

the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.<sup>311</sup>

The court thus interpreted the North Carolina Constitution holistically, construing the free elections clause (as well as the equal protection and free expression clauses<sup>312</sup>) in light of state commitments to popular sovereignty and political equality.

The court's conclusions are grounded in the best reading of state constitutional law, one that synthesizes text, history, purposes, and structure. Moreover, the seeds of a democracy principle also appear in earlier North Carolina precedents. For example, the *Common Cause* court cited an 1897 case expressing something like what Rick Hasen has termed “the Democracy Canon”<sup>313</sup>; the 1897 court emphasized that “this is a government of the people, in which the will of the people—the majority—legally expressed, must govern.”<sup>314</sup> In turn, the court stated that the provision at issue, “and all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will.”<sup>315</sup> Extending these principles from vote counting to districting, *Common Cause* limits incumbent officials' ability to contort the electoral preferences of the people.

Although both the Pennsylvania and North Carolina decisions drew on provisions and histories specific to those states, similar provisions and driving purposes appear in other state constitutions as well. In addition to proclaiming popular sovereignty, for example, all state constitutions expressly confer the right to vote, most require “free and equal” elections or a variation thereon, and some more specifically indicate that voters have an equal right to elect government.<sup>316</sup> State constitutions also seek to foreclose government favoritism. They are explicit about both ensuring opportunities for equal participation and foreclosing special treatment; provisions governing equality, bans on special laws, and general-purpose requirements aspire to prevent

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311. *Lewis*, 2019 WL 4569584, at \*110.

312. *Id.* at \*116–17 (concluding that North Carolina's equal protection clause, N.C. CONST. art. I, § 19, protects a “fundamental right” to “substantially equal voting power” (emphasis omitted) (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 394 (N.C. 2002))); *id.* at \*118–24 (considering N.C. CONST. art. I, §§ 12, 14).

313. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

314. *State ex rel. Quinn v. Lattimore*, 26 S.E. 638, 638 (N.C. 1897); *see also* N.C. CONST. art. I, § 2 (“All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”).

315. *Lattimore*, 26 S.E. at 638.

316. *See supra* Part I. Massachusetts, New Hampshire, and South Carolina provide that all qualified voters have an equal right to vote or to elect officers, while West Virginia provides that every citizen is entitled to equal representation in government. MASS. CONST. declaration of rights, art. IX; N.H. CONST. pt. I, art. 11; S.C. CONST. art. I, § 5; W. VA. CONST. art. II, §§ 2–4.

“the granting of special privileges for a select few.”<sup>317</sup> As the commitment to political equality has developed in the state constitutional tradition, it has been particularly concerned with special treatment of the “wealthy or well-connected few,”<sup>318</sup> but it extends to other forms of special treatment, including narrowly personal and more broadly partisan self-dealing by government officials.

State constitutions thus furnish extensive resources for combatting factional activity that contravenes popular sovereignty and political equality and impedes voters’ ability to choose their governments. To be sure, the precise test for when a partisan gerrymander is unconstitutional may fairly be disputed, as extensive debates about gerrymandering underscore. But the basic principle is clear, and recent gerrymanders do not call for difficult conceptual line drawing.<sup>319</sup> The democracy principle thus provides additional support for recent gerrymandering precedents and suggests additional paths of inquiry for state courts that have not yet considered the question.

It also suggests that the Supreme Court’s invocation of state constitutions in *Rucho* should not be read as mere hand-waving. As it refused to invalidate partisan gerrymanders under the federal Constitution, the Court noted that “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”<sup>320</sup> This is true not simply as a matter of justiciability; state constitutions also provide substantive protections against antidemocratic conduct that the federal Constitution does not. And insofar as state constitutions combat partisan self-dealing and invalidate extreme partisan gerrymanders, they serve national as well as state democracy. Most directly, they yield more representative congressional delegations. Because the federal Constitution is “incomplete” and relies on states to draw federal districts, state decisions about gerrymandering immediately reshape the federal government.<sup>321</sup> More indirectly, by foreclosing extreme partisan gerrymanders of state legislatures, state constitutions may make these legislatures better vehicles for advancing national popular majority interests.<sup>322</sup> Such effects underscore that the democracy principle is a critical part of American constitutionalism, not simply state constitutionalism.

A further point bears mention: realizing the potential of state constitutions to thwart extreme partisan gerrymandering is an important project for state courts,<sup>323</sup> but it does not fall to courts alone. Other state actors participate (or can participate) in redistricting in various ways: legislators, of

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317. *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 975 (Or. 1982); *see supra* Part I.

318. Tarr, *supra* note 111, at 89.

319. *Cf. Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting) (endorsing “judicial intervention in the worst-of-the-worst cases of democratic subversion”).

320. *Id.* at 2507 (majority opinion).

321. *See* Lutz, *supra* note 18, at 25; *see supra* note 274.

322. *See supra* text accompanying notes 273–278.

323. *Cf. Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting).



course, but also nonpartisan legislative staff, members of redistricting commissions and their staff, governors and their counsel, attorneys general who clarify the rules of the process, and members of the public who comment on proposals.<sup>324</sup> The democracy principle forms a basis on which all of these actors should oppose extreme partisan gerrymandering.

To be sure, some actors will be unmoved by the principle. We do not suggest that legislators proposing an extreme gerrymander will suddenly see the constitutional light and stand down, or that an opposing-party governor needs the state constitution to draft the veto she would write anyway. Yet the democracy principle may do meaningful work in other nonjudicial settings.

Consider first how administrative constitutionalism may be a realistic avenue for the democracy principle.<sup>325</sup> Roughly twenty states use some form of commission in redistricting, either to draw lines initially or as a backup mechanism.<sup>326</sup> Each of these administrative bodies has a duty to follow the state constitution, and the democracy principle helps to clarify how they must do so.<sup>327</sup> There is reason to believe that many commissions will take constitutional argument seriously. Although redistricting inevitably involves

324. For overviews of the entities in charge of redistricting in each state, see *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), <https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting> [<https://perma.cc/P4UZ-G53F>]; *State-by-State Redistricting Reform: The Local Routes*, PRINCETON GERRYMANDERING PROJECT, <http://gerrymander.princeton.edu> [<https://perma.cc/STG8-WNUZ>]; and ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu> [<https://perma.cc/7J3U-H7KV>].

325. For background on administrative constitutionalism, see Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1705 (2019) (“Defined most broadly, it refers to agencies’ role in constructing constitutional norms such as adequate due process, the bounds of free speech, or the scope of executive power, whether or not agencies consider themselves to be doing so. More narrowly, it includes only instances in which agencies self-consciously consider the meaning of the Constitution in designing policies and issuing decisions.”). Although we deem redistricting commissions to be agencies for purposes of considering administrative constitutionalism, it is immaterial to our claim which “branch” these commissions—often comprising appointees from various branches—belong to.

326. These include commissions dedicated to drawing state legislative districts, congressional districts, or both. For key provisions, see ALASKA CONST. art. VI, § 8; ARIZ. CONST. art. IV, pt. 2, § 1(3); ARK. CONST. art. 8, § 1; CAL. CONST. art. XXI, § 2; COLO. CONST. art. V, §§ 44–44.6, 46–48.4; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; ILL. CONST. art. IV, § 3; IND. CODE § 3-3-2-2 (2019); MICH. CONST. art. IV, § 6; MISS. CONST. art. 13, § 254; MO. CONST. art. III, §§ 3, 7; MONT. CONST. art. V, § 14; N.J. CONST. art. II, § 2; *id.* art. IV, § 3; OHIO CONST. art. XI, § 1; *id.* art. XIX, § 1; OKLA. CONST. art. 5, § 11a; PA. CONST. art. II, § 17; TEX. CONST. art. III, § 28; and WASH. CONST. art. II, § 43.

327. Redistricting commissions in a number of states also have more specific constitutional instructions. For example, many state constitutions require compactness of districts, and five state constitutions require commissions to avoid undue preference for parties or individuals or to strive for competitive districts. See Justin Levitt, *Where the Lines Are Drawn – State Legislative Districts*, ALL ABOUT REDISTRICTING, <http://redistricting.ills.edu/wheretablestate.php> [<https://perma.cc/2ZMF-VU4X>] (listing rules in each state).

political considerations,<sup>328</sup> even “politician commissions” often grant a tie-breaking vote to an ostensibly nonpartisan member (chosen jointly by the other members, for example, or by the state supreme court).<sup>329</sup> Moreover, other state commissions, like California’s, involve members who are not professional politicians.<sup>330</sup> Commissions’ professional staff members or consultants, including attorneys, are appropriate advocates for the democracy principle.<sup>331</sup>

Executive constitutionalism, too, may allow the democracy principle to gain traction outside of courts. Attorneys general in all states have the power to issue opinions clarifying state law.<sup>332</sup> While these opinions do not themselves carry the force of law, they are regularly treated as authoritative by state officials and state courts, and they are often the final word in practice.<sup>333</sup> As Justin Levitt and Jim Tierney have noted, attorneys general have a variety of roles to play in redistricting.<sup>334</sup> They may opine on the overall le-

328. See Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 COLO. L. REV. 1029, 1030 (2001) (quipping, based on personal service in both entities, that congressional redistricting by the state legislature was 100 percent political, while legislative redistricting by the state commission was 98 percent political). See generally Justin Levitt, Essay, *Weighing the Potential of Citizen Redistricting*, 44 LOY. L.A. L. REV. 513, 531 (2011).

329. See Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637, 648, 652 (2013) (“The presence of ‘independent’ members of a bipartisan or tripartite commission, especially if one of them is the chair, may facilitate interparty bargaining.”).

330. See generally *Background on Commission*, WEDRAWTHELINES.CA.GOV, <https://wedrawthelines.ca.gov/commission/> [<https://perma.cc/6QS6-DG26>] (describing California’s application and selection systems and its practice of rotating commission leadership). For other state provisions restricting participation by politicians, see ALASKA CONST. art. VI, § 8(a); ARIZ. CONST. art. IV, pt. 2, § 1(3); COLO. CONST. art. V, § 44.1(2)(c) (congressional redistricting commission); COLO. CONST. art. V, § 47(2)(c) (legislative redistricting commission); IDAHO CONST. art. III, § 2(2); IOWA CODE § 42.5 (2021); MICH. CONST. art. IV, § 6(1)(b); MONT. CONST. art. V, § 14(2); N.Y. CONST. art. III, § 5-b(b); UTAH CODE ANN. § 20A-19-201(6)(b) (2018) (repealed 2020); and WASH. CONST. art. II, § 43.

331. Multiple commission processes begin with maps drawn by nonpartisan staff. See, e.g., COLO. CONST. art. V, §§ 44.4, 48.2; MO. CONST. art. III, §§ 3, 7. Still more have explicit authority to hire staff members to assist with the commission’s work. See, e.g., ALASKA CONST. art. VI, § 9; ARIZ. CONST. art. IV, pt. 2, § 1(19); CAL. GOV’T CODE § 8253 (2012 & Supp. 2020); COLO. CONST. art. V, § 44.2; COLO. CONST. art. V, § 48; MICH. CONST. art. IV, § 6(4); N.Y. CONST. art. III, § 5-b(h); PA. CONST. art. II, § 17(g); VT. STAT. ANN. tit. 17, ch. 31A, § 1904(e) (2018).

332. See NAT’L ASS’N OF ATT’YS GEN., STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 80–90 (Emily Myers ed., 4th ed. 2018); Ian Eppler, *The Opinion Power of the State Attorney General and the Attorney General as a Public Law Actor*, 29 B.U. PUB. INT. L.J. 111, 115 (2019) (discussing differences in the form and scope of the opinion power across states).

333. Eppler, *supra* note 332, at 115–17; see James E. Tierney & Justin Levitt, *The Role of Attorneys General in Federal and State Redistricting in 2020*, STATEAG.ORG, <https://www.stateag.org/redistricting> [<https://perma.cc/R6SE-UBYN>] (calling attorney general opinions a “powerful default”).

334. See Levitt & Tierney, *supra* note 333.

gality of a redistricting plan, as well as on the procedural and substantive rules for the districting process.<sup>335</sup> Exercising that “substantial interpretive authority,” attorneys general could invoke the democracy principle to explain why extreme partisan gerrymandering is constitutionally infirm.<sup>336</sup>

Moreover, governors and attorneys general alike can leverage their bully pulpit and convening powers. Governors can create special commissions or other bodies to propose fair maps,<sup>337</sup> providing a ready alternative to gerrymandered maps and forcing legislatures to defend their divergent choices. Attorneys general, too, can be a “public counterweight to partisan or other excesses of the primary districting body,” including by making public remarks or setting up commissions of their own.<sup>338</sup> In turn, these actions can help spur public discourse and grassroots organizing, increasing the political costs of adopting or tolerating extreme partisan gerrymanders.

### B. *Lame-Duck Entrenchment and Power Stripping*

The democracy principle also helps to address state efforts to stymie popular majorities both at particular moments in time and across time. Official entrenchment is an age-old concern.<sup>339</sup> At the federal level, the conventional view is that the Constitution prohibits at least some strong forms of entrenchment.<sup>340</sup> Yet scholars have struggled to explain the foundation for this view. It might be a structural principle,<sup>341</sup> a feature of original meaning,<sup>342</sup> or a “temporal mandate” derived from the structure of elections.<sup>343</sup> Or it might be that the Constitution does not supply the anti-entrenchment principle but democratic theory does.<sup>344</sup> Meanwhile, skeptics of the anti-

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335. *Id.*

336. *Id.* at 3.

337. See Laurel White, *Gov. Tony Evers Orders Creation of Nonpartisan Redistricting Commission*, WIS. PUB. RADIO (Jan. 27, 2020, 9:10 AM), <https://www.wpr.org/gov-tony-evers-orders-creation-nonpartisan-redistricting-commission> [<https://perma.cc/QKY5-76P5>].

338. Tierney & Levitt, *supra* note 333.

339. There are many different definitions of entrenchment. Our use of the term here does not include functional forms of entrenchment. See, e.g., Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015). Our narrower focus is on officials maintaining themselves in power or limiting the power of future majorities in formal ways.

340. See, e.g., *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (citing Blackstone for “the centuries-old concept that one legislature may not bind the legislative authority of its successors”).

341. Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972).

342. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693 (2010).

343. Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. BAR FOUND. RSCH. J. 379.

344. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 499 (1997).

entrenchment principle argue that some forms of entrenchment are “both constitutionally permissible and, in appropriate circumstances, normatively attractive.”<sup>345</sup>

State constitutions provide stronger resources for contesting entrenchment because they privilege popular majority rule in ways the federal Constitution does not, from electoral frameworks that determine how state officials will be selected to governance frameworks that determine how government action may be pursued.<sup>346</sup>

Here, we explore how the democracy principle addresses one particularly salient example of entrenchment: the use of lame-duck sessions to remove the powers of incoming popularly elected officials. Courts have yet to describe these lame-duck laws as antidemocratic efforts at minority entrenchment, but that is just what they are. The democracy principle helps to explain why such maneuvers controvert popular majority rule in a constitutionally cognizable way.

Consider two recent lame-duck power grabs. First, in North Carolina, after voters elected Democrat Roy Cooper as governor in the 2016 election, the Republican-controlled legislature met in a surprise special session and enacted sweeping changes to executive power in the state.<sup>347</sup> The lame-duck enactments drastically shrunk the number of gubernatorial appointees, restructured the state’s industrial commission to preserve a Republican majority, and reorganized the state’s elections board.<sup>348</sup> With respect to the elections board, the new laws transformed it from a body controlled by the governor’s party to a board evenly divided between appointees from both parties and further mandated the retention of the GOP-selected executive director.<sup>349</sup> As critics explained, these changes would have “give[n] Republican appointees the power to veto any matter under consideration, including changes to the rules or procedures adopted by the previous Republican-controlled Board.”<sup>350</sup>

The North Carolina Supreme Court ultimately rejected these changes, but it did not mention the obvious entrenchment at issue or the antidemo-

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345. Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002).

346. See *supra* Parts I & II.

347. Trip Gabriel, *North Carolina G.O.P. Moves to Curb Power of New Democratic Governor*, N.Y. TIMES (Dec. 14, 2016), <https://www.nytimes.com/2016/12/14/us/politics/north-carolina-governor-roy-cooper-republicans.html> [<https://perma.cc/458G-J6NG>].

348. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1225–26 (2019).

349. Rather than appoint three members of a five-member board, the governor would now make four appointments of an eight-member board, the legislature would make the other four, and Republicans would chair the board in even-numbered (i.e., election) years. *Id.* at 1225; S.B. 4, 2016 Gen. Assemb., 4th Extra Sess. § 138B-2 (N.C. 2016).

350. Amici Curiae the Brennan Ctr. for Just. at N.Y.U. Sch. of L. & Democracy N.C.’s Amicus Brief in Support of Plaintiff-Appellant at 5, *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018) (No. 52PA17-2), 2017 WL 3456374, at \*5 [hereinafter Brennan Center Brief].

cratic nature of the lame-duck legislation. Rather, it held that the new arrangement violated the separation of powers and the state constitution's take care clause by depriving the governor of adequate control over a state agency.<sup>351</sup> The court reasoned that the state legislature had overstepped because the governor was required to select half of the commission from a list of people likely hostile to his agenda, and because the governor had limited supervisory and removal authority over commission members.<sup>352</sup> Such an arrangement, the court reasoned, "leaves the Governor with little control over the views and priorities of the [majority of] officers' and prevents the Governor from having 'the final say on how to execute the laws.'"<sup>353</sup>

This holding is questionable. Although the court emphasized it was applying a context-dependent standard, not a "categorical rule,"<sup>354</sup> and although it purported not to foreclose all independent agencies,<sup>355</sup> its ruling suddenly cast doubt on the constitutionality of both agency independence and requirements of bipartisanship in agency composition, two longstanding features of the state's government. Independent agencies commonly entail all three of the factors the court found problematic: limits on chief-executive selection (as when the governor must select from a list or balance party composition), limits on chief-executive supervision, and limits on chief-executive removal.<sup>356</sup> As the dissent pointed out, the Federal Election Commission would be unconstitutional under the majority's analysis.<sup>357</sup> It seems particularly odd to adopt such a unitarian theory in the states, where a plural executive structure is the rule.<sup>358</sup>

The democracy principle provides a sounder basis for striking down the North Carolina lame-duck laws.<sup>359</sup> Instead of relying on gubernatorial power as such, the court could have held that an outgoing government cannot substantially alter the powers of newly elected officials. The North Carolina legislature ironically defended its actions as ensuring "majority rule,"<sup>360</sup> yet the

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351. *Cooper*, 809 S.E.2d at 114.

352. *Id.* (basing the violation on the fact that the Governor "is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members").

353. *Id.* (alteration in original) (quoting *State ex rel. McCrory v. Berger*, 781 S.E.2d 248, 257 (N.C. 2016)).

354. *Id.* at 111.

355. *Id.* at 113.

356. Seifter, *supra* note 63, at 1561–62.

357. *Cooper*, 809 S.E.2d at 119 (Martin, C.J., dissenting).

358. See *supra* Part I; see also Seifter, *supra* note 63, at 1551–52.

359. See generally Brennan Center Brief, *supra* note 350 (advancing a congenial argument).

360. Craig Jarvis, *North Carolina Governor Signs Bill Limiting His Successor's Power*, GOVERNING (Dec. 19, 2016), <http://www.governing.com/topics/politics/tns-mccrory-cooper-bill.html> [<https://perma.cc/5DXY-FDMD>].

lame-duck legislation had just the opposite effect: stripping power from an official who had just been selected by statewide popular vote.<sup>361</sup>

The North Carolina Constitution's popular sovereignty and elections provisions,<sup>362</sup> construed in light of the state commitment to democracy, are best understood to foreclose lame-duck officials from altering institutions to deprive incoming officials of their powers. An outgoing legislature stripping power from officials the people just elected is not faithful to the constitutional declaration that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."<sup>363</sup> Nor is such a power grab reconcilable with a holistic reading of North Carolina's elections clauses. Those clauses declare not only that elections must be "free,"<sup>364</sup> and that such elections for governor are to occur every four years, but also that a purpose of frequent elections is "[f]or redress of grievances."<sup>365</sup> Stripping officials of the powers they were just elected to hold defeats elections as an avenue for majority redress. The legislature should be free to take up institutional changes, but only after the new government assumes office and only through the usual procedures, including a gubernatorial veto.

The democracy principle would also have bite with respect to recent events in Wisconsin. There, among other executive-power-stripping measures, the legislature used its 2018 lame-duck session to transfer authority from the just-elected attorney general to a single legislative committee with a Republican supermajority.<sup>366</sup> Under the new law, the attorney general cannot make various litigation decisions (including whether to settle a case) without committee approval.<sup>367</sup> A state trial court initially enjoined the law, holding that it violated the separation of powers by shifting executive functions to the legislature.<sup>368</sup> But the state supreme court ultimately upheld it, holding that the statute was not facially unconstitutional.<sup>369</sup> In our view, the circuit court's opinion was sound, even under the state's flexible separation-of-powers doctrine—the legislative branch is usurping an executive function. Still, placing the state constitutional commitment to democracy front and center would have strengthened the case against the legislation.

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361. The lame-duck legislation was still more concerning because the legislature itself was heavily gerrymandered and unrepresentative. *See supra* Section III.A.

362. *See* N.C. CONST. art. I, §§ 2, 9–10; *id.* art. VI.

363. *Id.* art. I, § 2.

364. *Id.* § 10.

365. *Id.* § 9 ("For redress of grievances and for amending and strengthening the laws, elections shall be often held.").

366. S.B. 884, 2017–2018 Leg., Reg. Sess. (Wis. 2018).

367. *Id.* § 30.

368. *Serv. Emps. Int'l Union, Local 1 v. Vos*, No. 19CV302, 2019 WL 1396826 (Wis. Cir. Ct. Mar. 26, 2019).

369. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 946 N.W.2d 35, 56 (Wis. 2020).

The Wisconsin statute offends the democracy principle in two ways. First, as in the North Carolina case, it substantially alters the attorney general's power through lame-duck lawmaking. Second, it limits his power in an ongoing fashion by allowing an unrepresentative committee to impose overrides that only the full legislature should be allowed to impose through bicameralism and presentment. Instead of treating the newly elected attorney general's decisions as the final word absent valid legislation, the lame-duck legislature gave the people precisely what they did not ask for: Republican control over the state's litigation.

But Wisconsin's constitution, like North Carolina's, proclaims popular sovereignty, specifying that state officials "deriv[e] their just powers from the consent of the governed."<sup>370</sup> Wisconsin is also among the states with a "fundamental principles" clause declaring that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."<sup>371</sup> In addition, Wisconsin's elections-related clauses—identifying every adult citizen as an elector,<sup>372</sup> specifying elections for governor every four years,<sup>373</sup> and allocating gubernatorial victory to the highest vote getter<sup>374</sup>—sit uneasily with lame-duck power grabs, especially when these clauses are interpreted against the backdrop of the history and democratic traditions described above.

A structural argument points in the same direction: it is hard to consider the institutions and relationships created by the Wisconsin Constitution and believe that the state legislature—itself a target of sustained suspicion by constitutional drafters—has authority to functionally undo the choices of electors, whose authority is privileged throughout the document. Applying the democracy principle would foreclose outgoing officials' ability to countermand voters' choices and would vindicate the ability of a popular majority to select its government.

Although the textual provisions and histories described above are specific to North Carolina and Wisconsin, respectively, other state constitutions contain similar clauses and embrace similar traditions.<sup>375</sup> It is quite likely that these states similarly foreclose outgoing officials from altering the roles and powers of newly elected officials in ways that infringe the authority of a majority of voters to select their government. Some states go further: a few

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370. WIS. CONST. art. I, § 1.

371. *Id.* § 22. One state judge, rejecting the idea that the clause is a mere "rhetorical flourish," argued that "it disclosed . . . the deep-seated belief which the Constitution makers held in the necessity for a Constitution." A.H. Reid, *Legislative Suggestion, A Frequent Recurrence of Fundamental Principles*, 1 MARQ. L. REV. 186, 186, 190 (1917).

372. WIS. CONST. art. III, § 1.

373. *Id.* art. V, § 3.

374. *Id.*

375. See *supra* Part I.

constitutions foreclose lame-duck sessions,<sup>376</sup> and several states have recently proposed amendments to eliminate these sessions (though passage by incumbents seems unlikely).<sup>377</sup> In the majority of states where lame-duck sessions occur, state courts and other constitutional interpreters might derive from their constitutions a broad rule against institutional change during lame-duck sessions or a more tailored standard foreclosing only those institutional changes made during a lame-duck session that entrench minority power against popular will as expressed in state elections.

To be sure, constitutional interpreters might also offer arguments to defend the constitutionality of lame-duck power grabs. For example, one might cite historical practice, pointing out that power grabs by state officials are not unprecedented. This is certainly true, and yet postelection sessions are not a longstanding feature of state legislative traditions because state legislators historically were only part-time. Typically, governors had to call special sessions to accommodate out-of-session needs, and legislatures had to adhere to the issues noticed for the special session.<sup>378</sup>

Or one might invoke a trans-state variant of *expressio unius est exclusio alterius*, arguing that the foreclosing of lame-duck sessions in some constitutions means that the absence of such provisions in other constitutions speaks to the absence of any restrictions on such sessions. As an initial matter, we are skeptical about the force of this approach: reading state constitutions together makes good sense, but the simple absence of any particular provision in one constitution cannot be dispositive. In any event, this particular sort of *expressio unius* argument would be a willful overreading: the foreclosing of lame-duck sessions in some constitutions and not others may well support a presumption that such sessions are permissible in the silent constitutions, but it does not support a presumption that lame-duck legislatures may act in any manner they please.

Ultimately, simply engaging with the force of the democracy principle would be a step forward. Even if one concluded that a particular counterargument trumped (or altered) the principle as applied to certain facts, recognizing the competing constitutional claims would more accurately capture the stakes of the controversy.<sup>379</sup> While any specific rule would have to follow

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376. ALA. CONST. art. IV, § 46 (“The terms of office of the senators and representatives shall commence on the day after the general election at which they are elected . . .”); IND. CONST. art. 4, § 3 (similar); NEV. CONST. art. 4, §§ 3–4 (similar). Florida forecloses lame ducks by statute. FLA. STAT. tit. IX, § 100.041 (2020) (“The term of office of each member of the Legislature shall begin upon election.”).

377. See, e.g., H.R.J. Res. C, 2019–2020 Leg., Reg. Sess. (Mich. 2019); Tim Anderson, Capital Closeup: Proposal in Illinois, Michigan Aim to Kill the ‘Lame Duck’ Session, COUNCIL ST. GOV’TS (May 2015), <https://www.csgmidwest.org/policyresearch/0515-lame-duck.aspx> [<https://perma.cc/3DLC-DG3V>].

378. See PEVERILL SQUIRE, THE EVOLUTION OF AMERICAN LEGISLATURES 272 (2012).

379. Cf. *supra* text accompanying note 26 (analogizing the democracy principle to constitutional concepts such as federalism, which are widely contested but recognized as constitutional concepts).



from a particular state's constitutional text, history, and structure, there is good reason to believe state constitutions generally protect the ability of a majority of voters to select their government in ways that render lame-duck entrenchment constitutionally problematic.

As with gerrymandering, it should not fall to state courts alone to marshal the democracy principle. Attorneys general, again, are well-positioned to opine on the unconstitutionality of such laws.<sup>380</sup> And if courts do not strike down lame-duck power grabs as unconstitutional, executive officials with discretion to implement the resulting laws may construe them to preserve executive power in light of the democracy principle. Many recently enacted lame-duck laws confer discretion, even as they also limit executive power. For example, a lame-duck law in Michigan prevents the state's regulatory agencies from enacting stricter rules than the federal government has already imposed absent a "clear and convincing need" for the stricter rules.<sup>381</sup> Executive officials might understand "clear and convincing" more liberally given the democracy principle. Likewise, a Wisconsin provision authorizes a legislative committee to suspend administrative rules "multiple times," without specifying how many such suspensions would be permissible.<sup>382</sup> Officials implementing this provision might understand the number of suspensions to be limited. Because state officials will inevitably have to exercise their judgment as they determine the scope these and other provisions, the democracy principle should inform their decisions to read new limits narrowly and preserve executive power.

There is also reason to believe that this application of the democracy principle has implications for American democracy as a whole. As we have argued in previous work, much national policymaking today emerges through the joint action of state and federal executives, in part because of features of the federal Constitution that impede policymaking in Washing-

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380. See *supra* notes 332–333 and accompanying text (discussing the role and force of attorney general opinions).

381. MICH. COMP. LAWS ANN. § 24.232 (West 2019) ("Except for an emergency rule . . . , if the federal government has mandated that this state promulgate rules, an agency shall not adopt or promulgate a rule more stringent than the applicable federally mandated standard unless the director of the agency determines that there is a clear and convincing need to exceed the applicable federal standard.").

382. WISC. STAT. ANN. § 227.26(im) (West 2018) ("[T]he committee may act to suspend a rule as provided under this subsection multiple times."). The Wisconsin Supreme Court narrowly upheld this provision against a facial challenge, reasoning that "an endless suspension of rules could not stand," but that the provision could have some constitutional applications. *Serv. Emps. Int'l Union, Local 1 v. Vos*, 946 N.W.2d 35, 59 (Wis. 2020). Another Wisconsin provision that would have been a candidate for narrow executive interpretation attempted to bar agencies from issuing guidance documents containing requirements that are not "explicitly required or explicitly permitted" by an existing statute or rule. WISC. STAT. ANN. § 227.112(6) (West 2018) (requiring an agency head to certify that any new guidance "contains no standard, requirement, or threshold that is not explicitly required or explicitly permitted by a statute or a rule that has been lawfully promulgated"). But the Wisconsin Supreme Court eventually struck that provision down as an unconstitutional legislative incursion into executive power. *Serv. Emps. Int'l Union, Local 1*, 946 N.W.2d at 69.

ton, D.C.<sup>383</sup> And such “executive federalism” may in fact be more representative of the national popular will than decisions by the federal government<sup>384</sup>—but only when state executives speak on behalf of their states.<sup>385</sup> When lame-duck state legislatures strip power from popularly elected executives, the states no longer provide a forum for such representative national policymaking. Some recent power stripping has been quite explicit about the consequences for national policy. For instance, the Wisconsin lame-duck legislature limited the incoming governor’s power to negotiate over intergovernmental policies such as Medicaid, and it prevented the incoming attorney general from fulfilling his campaign pledge to withdraw from a lawsuit seeking to invalidate the Affordable Care Act.<sup>386</sup> Even when state legislation is not similarly explicit, disempowering popularly elected executives necessarily affects intergovernmental relations. To the extent executive federalism has emerged as a contemporary workaround for minoritarian, gridlocked federal government, state power grabs undermine national as well as state governance. And invalidating such power grabs in accordance with the democracy principle would therefore affect American democracy beyond particular state borders.

### C. Thwarting Popular Initiatives

The democracy principle can also shed new light on the relationship between representative and direct democracy. In recent years, the longstanding tension between direct democracy and legislative lawmaking has grown more acute.<sup>387</sup> The basic reasons for this tension are well-documented: the very impetus for direct democracy—the intransigence or corruption of elected officials—creates incentives for those officials to undermine direct democracy.<sup>388</sup> Especially as partisan polarization has increased, commentators

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383. See generally Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483 (2017).

384. See Bulman-Pozen, *supra* note 383, at 1009–15.

385. Cf. Seifter, *supra* note 383, at 519–30 (describing factors that can render governors less accountable than presidents); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 775–76 (2017) (arguing that citizens have more informed views about governors than other state officials).

386. S.B. 884, 2017–2018 Leg., Reg. Sess. (Wis. 2017); Riley Vetterkind, *Tony Evers Reverses Course on Withdrawing from Affordable Care Act Lawsuit*, WIS. ST. J. (Jan. 24, 2019), [https://madison.com/wsj/news/local/govt-and-politics/tony-evers-reverses-course-on-withdrawing-from-affordable-care-act-lawsuit/article\\_2a0ceb59-9988-5a52-9242-50976729cc1d.html](https://madison.com/wsj/news/local/govt-and-politics/tony-evers-reverses-course-on-withdrawing-from-affordable-care-act-lawsuit/article_2a0ceb59-9988-5a52-9242-50976729cc1d.html) [<https://perma.cc/H8PS-2EXE>].

387. See, e.g., Elaine S. Povich, *Lawmakers Strike Back Against Voter-Approved Ballot Measures*, PEW (July 28, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/07/28/lawmakers-strike-back-against-voter-approved-ballot-measures> [<https://perma.cc/NU6M-ZJ3Z>].

388. See generally ELISABETH R. GERBER, ARTHUR LUPA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE* (2001).

have observed an uptick both in the resort to direct democracy and in state officials' efforts to limit the opportunities for and effects of popular initiatives.<sup>389</sup>

In these fights, the people have state constitutions on their side. From their inception through numerous revisions, state constitutions evince a robust commitment to popular self-rule.<sup>390</sup> In direct democracy states, this commitment limits the extent to which government actors may countermand decisions made by the people themselves. Indeed, state courts have already recognized as much with respect to legislatively imposed initiative *procedures*. Here, courts have invalidated burdensome requirements, holding that only necessary restrictions may be imposed by legislatures on the initiative and referendum process. With respect to such cases, the democracy principle unifies existing precedents across various states and bolsters results sometimes articulated in narrower textual or doctrinal terms. In cases involving legislative *repeals* of initiatives, however, state courts have largely gone astray. In those cases, the democracy principle should lead to results more protective of the people's will.

Consider first procedural burdens on direct democracy.<sup>391</sup> Virtually every initiative state has some version of what we will refer to as a *direct-democracy canon*.<sup>392</sup> This canon generally provides that "the power of initiative should be liberally construed to promote the democratic process."<sup>393</sup> For example, referencing the state constitutional provision for popular initiatives (article IV, section 18), the Supreme Court of Maine has described its approach this way:

The broad purpose of the direct initiative is the encouragement of participatory democracy. By section 18 "the people, as sovereign, have retaken unto themselves legislative power," and that constitutional provision must be

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389. See, e.g., Povich, *supra* note 387.

390. See *supra* Part I.

391. We focus here on the initiative and referendum, bracketing other forms of direct democracy. See Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1347–48 (1985) (reviewing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984)) (noting that "virtually every state provides for some measure of direct citizen involvement in lawmaking," such as approving constitutional amendments and debt issuance).

392. This is different from, but complementary to, the state court approaches described in Hasen, *supra* note 313. Hasen's article refers to a canon of interpretation under which statutory limits on suffrage are construed in the voter's favor, and he identifies three fact patterns in which state courts have applied the canon: "vote counting cases," "voter eligibility/registration cases," and "candidate/party competitiveness cases." *Id.* at 71–72.

393. 1 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 4:9 (7th ed. 2010 & Supp. 2019); see, e.g., *Newsome v. Riley*, 245 N.W.2d 374, 376 (Mich. 1976) ("Constitutional and statutory initiative and referendum provisions should be liberally construed to effectuate their purposes, to facilitate rather than hamper the exercise by the people of these reserved rights . . .").

liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate.<sup>394</sup>

Most commonly, state courts apply the direct-democracy canon when legislatures attempt to impose procedural limitations on the initiative process, such as burdensome signature requirements or filing deadlines. For example, Michigan applies the canon as a form of strict scrutiny, explaining that "the legislature may only create those restrictions [on the initiative process] which are necessary," and that "[a]ny statute which is both unnecessary for the effective administration of the initiative process and restrictive of the initiative right is unreasonable and thus unconstitutional."<sup>395</sup>

A recent Michigan appellate decision is illustrative. During Michigan's lame-duck legislative session in 2018, the legislature imposed several new requirements on ballot initiatives.<sup>396</sup> One provided that no more than 15 percent of the required signatures supporting a ballot initiative could be from any one congressional district.<sup>397</sup> The Michigan Constitution requires a threshold number of signatures before an initiative can appear on the ballot, but, as the court pointed out, the constitution does not impose geographic restrictions on those signatures.<sup>398</sup> And the new limitation, the court concluded, "would undoubtedly drive petition circulators from the state's population hubs and would impede circulators' abilities to satisfy the Constitution's signature requirements."<sup>399</sup> The court discussed the direct-democracy canon, emphasizing "the long-held notion that, when interpreting a constitutional initiative or referendum provision, courts are to adopt a liberal construction of the same in order 'to facilitate, rather than hamper the exercise of the people of these reserved rights.'"<sup>400</sup> The court concluded that the 15-percent requirement imposed an undue and unconstitutional burden on the constitutional rights of the people.<sup>401</sup>

Other applications of the direct-democracy canon are substantive. For example, states including South Dakota and California apply the principle

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394. *Allen v. Quinn*, 459 A.2d 1098, 1102–03 (Me. 1983) (quoting Opinion of the Justices, 275 A.2d 800, 803 (Me. 1971)).

395. *Wolverine Golf Club v. Hare*, 180 N.W.2d 820, 831 (Mich. Ct. App. 1970), *aff'd*, 185 N.W.2d 392 (Mich. 1971); *see also, e.g., Sudduth v. Chapman*, 558 P.2d 806, 808–09 (Wash. 1977) (en banc) ("Those provisions of the constitution which reserve the right of initiative and referendum are to be liberally construed to the end that this right may be facilitated, and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right."); *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (noting that the right of initiative is fundamental and "should be liberally construed").

396. H.B. 6596, 99th Leg., Reg. Sess. (Mich. 2018) (enacted).

397. *Id.*

398. *League of Women Voters v. Benson*, No. 19-000084-MM, 2019 WL 6036702, at \*6 (Mich. Ct. Cl. Sept. 27, 2019).

399. *Id.*

400. *Id.* at \*7 (quoting *Newsome v. Riley*, 245 N.W.2d 374, 376 (Mich. Ct. App. 1976)).

401. *Id.* at \*6–7.

when seeking to avoid invalidating initiatives.<sup>402</sup> Still other applications of the canon occur at the boundary of substance and procedure. For example, a number of states interpret their constitutions to prohibit legislatures from preemptively amending pending initiatives.<sup>403</sup>

This longstanding, if largely neglected, aspect of state jurisprudence is fully consistent with the democracy principle, but there is another recurring set of questions on which state courts have been much less respectful of popular majority rule. Many states—indeed, many of the same states that espouse a direct-democracy canon—allow state legislatures to repeal statutory initiatives immediately upon their passage. In eleven of twenty-one statutory initiative states, the constitution does not expressly address legislative repeals,<sup>404</sup> and the prevailing view is that legislatures are free to override initiatives.<sup>405</sup>

The democracy principle suggests that the prevailing approach is misplaced. State courts' principal justification for this approach is that state legislatures possess any power not denied to them.<sup>406</sup> But state constitutions *do* limit legislative power in pertinent ways. Reflecting the structural commitment to popular sovereignty and political equality, the initiative and referendum were adopted for the very purpose of constraining legislative power and

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402. See, e.g., *SD Voice v. Noem*, 380 F. Supp. 3d 939, 944 (D.S.D. 2019) (“Any judge must view with great deference any legislative enactment, especially when enacted by a majority of the voters . . .”); Note, *Judicial Approaches to Direct Democracy*, 118 HARV. L. REV. 2748, 2755–56 (2005).

403. See, e.g., *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 34 (Mo. 2015) (“Such unilateral, preemptive action by the legislature serves as an end run around the constitutionally protected right of the people of Missouri to enact legislation by ballot initiative.”); Letter from Andrew Ketterer, Me. Att’y Gen., to Vinton E. Cassidy, Me. State Sen. (Feb. 26, 1997) (on file with the *Michigan Law Review*) (interpreting the state constitution to bar the legislature from amending a law while a contrary initiative is awaiting a vote); *Eyman v. Wyman*, 424 P.3d 1183 (Wash. 2018) (reaching a similar decision regarding the indirect initiative). The Michigan Supreme Court recently declined to decide the related question of whether the state legislature could enact an initiative, thereby removing it from voters, and amend it in the same session. See *In re House of Reps. Request for Advisory Op. Regarding Const. of 2018 PA 368 & 369*, 936 N.W.2d 241 (Mich. 2019) (mem.). The relevant provision states that initiative proposals are submitted to voters unless they are “either enacted or rejected by the legislature without change or amendment within 40 session days.” MICH. CONST. art. 2, § 9.

404. The states are Colorado, Idaho, Maine, Massachusetts, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, and Utah. See *supra* notes 85–87 and accompanying text. The remaining ten states restrict legislative overrides temporally, through supermajority requirements, or, in the case of California, by permitting initiatives to be overridden only through popular votes. See, e.g., CAL. CONST. art. II, § 10(c); NOYES, *supra* note 94.

405. See J.E. Macy, Annotation, *Power of Legislative Body to Amend, Repeal, or Abrogate Initiative or Referendum Measure, or to Enact Measure Defeated on Referendum*, 33 A.L.R.2d 1118 § 2 (2020) (collecting cases and stating that absent “special constitutional restraint” either the legislature or the electorate “may amend or repeal an enactment by the other”).

406. See, e.g., *State ex rel. Richards v. Whisman*, 154 N.W. 707, 709 (S.D. 1915) (“No rule of law is better settled throughout the United States than that a state Legislature has absolute power to enact, that is, pass, amend, or repeal, any law whatsoever it pleases, unless it is prohibited from so doing by either the state or federal Constitutions . . .”).

enabling the people to supersede government officials.<sup>407</sup> An approach more faithful to state constitutions' democratic commitments would be what we call an antinullification approach. Under this approach, (a) the state constitution and state statutes should be construed not to facilitate legislative overrides, and (b) legislation that repeals an initiative should be subject to heightened scrutiny that requires a good reason, other than simple disagreement with the people's will, for the repeal.

First, while the antinullification principle does not preclude all legislation that would override an initiative (just as most states that expressly limit legislative overrides do not ban them), it counsels against legislative and judicial constructions that make overrides easier. A prime example is the audacious practice of legislative emergency declarations. In all eleven states that lack express limits on legislative initiative overrides, the people may overcome a legislative override through a veto referendum—but in nine of those states, the referendum is available only if the legislation does not pertain to a legislatively declared “emergency.”<sup>408</sup> Seizing on that loophole, legislatures have invoked emergencies to insulate their overrides of controversial initiatives.<sup>409</sup> State courts have divided over whether such emergency declarations are judicially reviewable at all, and, if so, over what standard to apply.<sup>410</sup>

The democracy principle suggests that state courts should review these declarations, wary of legislative nullification of the popular will. There are many ways to formulate the standard, which may appropriately be a deferential one, but the ultimate question is whether there was indeed a plausible emergency afoot—or whether the supposed emergency was an initiative that the legislature disliked. This standard would apply in a number of conflicts around the country.<sup>411</sup> For example, in 2016, South Dakota voters adopted an initiative that established new campaign finance, ethics, and lobbying rules.<sup>412</sup> These have been common subjects for direct democracy given that,

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407. See *supra* Part I; see also, e.g., STEVEN L. PIOTT, *GIVING VOTERS A VOICE* (2003).

408. E.g., COLO. CONST. art. V, § 1(3) (allowing veto referendum but specifying emergency exception). In Idaho, even emergency provisions are subject to referendum, *Johnson v. Dieffendorf*, 57 P.2d 1068 (Idaho 1936), while Montana has no emergency provision.

409. For an early statement, see Comment, *Nullification of the Referendum by Legislative Declaration of Emergency*, 31 YALE L.J. 655 (1922). For a more recent account, see, for example, Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZ. L. REV. 219 (2008–2009).

410. Compare *Cavanaugh v. State*, 644 P.2d 1, 4 (Colo. 1982) (not reviewable), *Prescott v. Sec'y of Commonwealth*, 12 N.E.2d 462, 467 (Mass. 1938) (same), *State ex rel. Durbin v. Smith*, 133 N.E. 457, 461 (Ohio 1921) (same), and *Greenberg v. Lee*, 248 P.2d 324, 328 (Or. 1952) (same), with *Morris v. Goss*, 83 A.2d 556, 561 (Me. 1951) (reviewable), and *State ex rel. Charleston v. Holman*, 355 S.W.2d 946, 950–51 (Mo. 1962) (same).

411. See generally Alan Greenblatt, *Lawmakers Eye Changes to Ballot Measures—Passed and Future*, GOVERNING (Jan. 16, 2019), <https://www.governing.com/topics/politics/gov-lawmakers-block-ballot-measures.html> [<https://perma.cc/8R78-2PHH>].

412. See S.D. SEC'Y OF STATE, 2016 STATEWIDE BALLOT MEASURES 23–25, <https://sdsos.gov/elections-voting/assets/2016FullTextoftheBallotQuestionProposals.pdf> [<https://perma.cc>

to put it mildly, “legislators’ interests in maintaining their offices are not always consonant with the public interest in these areas.”<sup>413</sup> Invoking its emergency powers, the South Dakota legislature then overrode this popularly enacted measure.<sup>414</sup> Because of the emergency declaration, the state legislature did not have to justify its override, and the nullifying legislation was not susceptible to a popular referendum. Under our analysis, the state legislature would have had to explain how ethics and campaign-finance restrictions gave rise to an emergency, and a court could have invalidated the legislature’s repeal for a failure to provide a convincing explanation.

Reforming the emergency exception would constrain legislative attempts to make overrides easier. What about attempted overrides themselves? The democracy principle supports heightened scrutiny for such attempts.

As with any principle that imposes increased scrutiny, there will be harder and easier cases. For a relatively easy case, consider instances in which governors have refused to implement validly adopted initiatives based on policy disagreement. In Maine, for example, former Governor Paul LePage refused to implement Medicaid expansion after voters approved it.<sup>415</sup> A court in Maine rejected his refusal, holding that “[a]lthough the Governor may believe implementation to be unwise and disagree with the Act as a matter of policy, he may not ignore the will of the people and refuse to take any action toward accomplishing the policy objectives of the Act.”<sup>416</sup> In reaching this decision, the court cited the state’s take care clause.<sup>417</sup> Although that analysis is sensible—the initiative is a law, and the governor refused to execute it—obligations of faithful execution are famously malleable and have been used to expand as well as contract chief-executive power.<sup>418</sup>

The democracy principle bolsters decisions rejecting gubernatorial nullification, providing a firmer basis for concluding that governors lack discretion to override decisions of the people. Like other direct-democracy constitutions, Maine’s constitution expressly denies the governor power to

/FXY6-FHKB]; *South Dakota Measure 22—Revise Campaign Finance and Lobbying Laws—Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:26 AM), <https://www.nytimes.com/elections/2016/results/south-dakota-ballot-measure-22-campaign-finance-overhaul> [https://perma.cc/F8XT-MVJ8].

413. DINAN, *supra* note 44, at 250.

414. H.B. 1069, 2017 Leg., Reg. Sess. (S.D. 2017) (enacted); see Monica Davey & Nicholas Confessore, *South Dakota Legislators Seek Hasty Repeal of Ethics Law Voters Passed*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/us/south-dakota-repeal-ethics-law-vote.html> [https://perma.cc/DYM2-Y9D8].

415. See Abby Goodnough, *A Vote Expanded Medicaid in Maine. The Governor Is Ignoring It.*, N.Y. TIMES (July 24, 2018), <https://www.nytimes.com/2018/07/24/health/maine-medicare-expansion-lepage.html> [https://perma.cc/BBA7-RV3V].

416. *Me. Equal Just. Partners v. Comm’r, Me. Dep’t of Health & Hum. Servs.*, No. BCD-AP-18-02, 2018 WL 6264120, at \*8 (Me. Super. Ct. Nov. 21, 2018).

417. *Id.* at \*5; ME. CONST. art. V, pt. 1, § 12.

418. See Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835 (2016); Seifter, *supra* note 63 (surveying state case law).

veto popular initiatives, distinguishing the gubernatorial role in representative and direct lawmaking.<sup>419</sup> That text speaks to the underlying commitment to popular sovereignty: the people prevail over their representative institutions, and initiatives offer a way around legislatures and governors alike. Yet the text alone reaches only the veto, not a functionally equivalent failure to implement.

A holistic interpretation of the Maine Constitution extends the prohibition. Gubernatorial failure to implement an initiative violates the structural commitment that explains and unifies a number of more specific textual clauses, including the foundational declaration that “[a]ll power is inherent in the people”<sup>420</sup> and provisions for popular initiatives and referenda.<sup>421</sup> A contrary argument—that Maine’s foreclosure of gubernatorial vetoes but silence on failure to implement blesses the latter—misconceives the project of state constitutional interpretation. A particular instantiation of a broad commitment should not defeat all other applications; instead, silences or ambiguities should be interpreted in a way that comports with the document as a whole.

Recognizing the democracy principle’s application to such cases—rather than understanding them only in terms of the separation of powers—would not only support existing decisions but also provide a framework in which to reason about harder cases. The Medicaid expansion context alone presents a number of more complicated disputes. For example, in 2018, Utah voters adopted a popular initiative to expand Medicaid after the state legislature had declined to do so.<sup>422</sup> The initiative contemplated a full Affordable Care Act expansion that would cover adults up to 138 percent of the federal poverty level and provided for a state sales-tax increase to fund the state’s share of expansion costs.<sup>423</sup> The Utah legislature then passed a law that “significantly changed and limited the coverage expansion that the voters adopted,” most notably by requiring the state to seek a federal waiver to offer coverage to only 100 percent of the federal poverty level.<sup>424</sup> The federal government’s rejection of that waiver application has eclipsed questions about the state legislative override, but those questions remain important.

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419. ME. CONST. art. IV, pt. 3, § 19 (“The veto power of the Governor shall not extend to any measure approved by vote of the people.”).

420. *Id.* art. I, § 2.

421. *Id.* art. IV, §§ 17–18.

422. See UTAH LIEUTENANT GOVERNOR, PROPOSITION NUMBER 3 (2018), <https://elections.utah.gov/Media/Default/2018%20Election/Issues%20on%20the%20Ballot/Proposition%203%20-%20Ballot%20Title%20and%20Impartial%20Analysis.pdf> [https://perma.cc/223S-UKSR].

423. *Id.*

424. MaryBeth Musumeci, Madeline Guth, Robin Rudowitz & Cornelia Hall, *From Ballot Initiative to Waivers: What Is the Status of Medicaid Expansion in Utah?*, KAISER FAM. FOUND. (Nov. 15, 2019), <https://www.kff.org/%20medicaid/issue-brief/from-ballot-initiative-to-waivers-what-is-the-status-of-medicaid-expansion-in-utah/> [https://perma.cc/GPE9-Y2HE]; see S.B. 96, 2019 Leg., Gen. Sess. (Utah 2019) (enacted).



Legislatures may have good reason to clarify or even correct the policies set forth in initiatives. As Beth Garrett observed, state and local government operates through “hybrid democracy,” in which “policy is determined . . . by a combination of direct and representative institutions” interacting with one another.<sup>425</sup> Moreover, other factors, such as the passage of time and intervening circumstances, may also transform apparent nullification into amendment or even implementation.<sup>426</sup> We therefore do not contend that initiatives must always prevail over contrary legislation. But nullification is a constitutional concern, and courts should interrogate whether initiative-altering legislation is serving valid purposes or instead simply thwarting the will of the people.

Here again, nonjudicial actors also have a role to play. Executive officials including attorneys general and secretaries of state often conduct an initial review of proposed initiatives,<sup>427</sup> and they should review with the democracy principle in mind. Officials involved in the legislative process, including nonpartisan legislative staff or research bureaus, may identify the principle as a guidepost for legislative decisionmaking. On the back end, those who implement nullifying laws that do go into effect may exercise their legal discretion to construe those laws narrowly, in ways that limit erosion of the underlying initiatives.

Protecting popular initiatives and referenda again illustrates how the democracy principle may affect national as well as state-level democracy. Simply put, there is no national direct democracy. But state initiatives and referenda offer ways for the national public to work around representative institutions and engage directly on policy questions.<sup>428</sup> It is not a coincidence that many recent statutory and constitutional initiatives have concerned questions of nationwide import and interest, from Medicaid expansion to criminal justice reform to marijuana legalization. The people of the several states—and thus of the United States—have sought to circumvent elected officials through the only available channel for direct popular engagement. To the extent the constitutional democracy principle safeguards popular majority rule in the states, then, so too may it help counterbalance national minority rule.

The justifications state courts have offered for concluding that state legislatures may freely override initiatives are not compelling. First, they have placed much weight on the notion of plenary state legislative power. But as Robert Williams has observed, “[a] complete picture of legislative power under a state constitution must include the later waves of reaction to state legis-

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425. Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1096–98 (2005).

426. Even states that expressly limit legislative overrides do not entirely insulate initiatives. See, e.g., ALASKA CONST. art. XI, § 6 (providing that an initiative law “may not be repealed by the legislature within two years of its effective date”).

427. See NAT’L CONF. OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY 23 (2002).

428. See *supra* note 279 and accompanying text.

lative abuses, reflected in the procedural and substantive limitations on the legislature adopted over the years.”<sup>429</sup> The real question is always whether the legislature has the power, an inquiry that includes asking whether a state constitution has limited power that may have started out as plenary.<sup>430</sup> In keeping with the longstanding and ongoing state constitutional commitment to popular self-rule, provisions for direct democracy have imposed just such limits.<sup>431</sup>

Second, some state courts reason from the legal status of a passed initiative. They conclude that because a popular initiative has the same effect as a legislative enactment, it must likewise be unconditionally subject to legislative repeal.<sup>432</sup> But the distinct means by which initiatives and legislative enactments are adopted underscore that equivalent legal status does not eliminate procedural distinctions. Much as state constitutions embrace different routes to passing initiatives and legislation in the first instance, so too may they contemplate different routes to revising or repealing these laws.

There are, to be sure, arguments against an antinullification principle. For example, courts might survey the numerous state constitutions that expressly impose limits on legislative overrides and conclude, in another trans-state variant of *expressio unius*, that the absence of such provisions in other state constitutions constitutes a deliberate omission. As we have noted above, while evidence from other state constitutions may rightly inform interpretation, the absence of a provision in one constitution cannot alone be dispositive.<sup>433</sup> Whatever their common features, state constitutions are separate documents, and they always contain distinct provisions.

A stronger, related argument is that historical practice or gloss settles the issue: courts have blessed legislative overrides for many decades, and the people have not amended state constitutions to foreclose nullification, even as other states expressly do so. Although this argument is more persuasive than the invocations of plenary legislative power courts have offered, it does not account for impediments to such constitutional amendment (indeed, the question rather quickly assumes meta dimensions given state legislative efforts to restrict constitutional initiatives), nor does it grapple with the actual stakes of the question. However longstanding, legislative nullification of popular initiatives is inconsistent with the state constitutional commitment to popular self-rule. It deserves close scrutiny and as-yet unsupplied justification. When legislatures attempt to invalidate voters’ choices, the democra-

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429. Robert F. Williams, Comment, *On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57, 62–63 (1995) (footnotes omitted).

430. See Dodd, *supra* note 292, at 160 (describing “the doctrine of implied limitations” as “the most important single manifestation of judicial action” in state constitutional law).

431. See *supra* Part I; see also, e.g., AMY BRIDGES, *DEMOCRATIC BEGINNINGS* 133–34 (2015).

432. See, e.g., *Luker v. Curtis*, 136 P.2d 978, 979 (Idaho 1943) (noting the “equal footing” of “initiative legislation” and “legislative acts”).

433. See *supra* text accompanying notes 378–379.

cy principle should factor explicitly into the constitutional analysis. Courts and the public alike should recognize that the people have state constitutional resources—not just rhetorical or electoral ones—with which to challenge their representatives.

#### CONCLUSION

Scholars of state constitutional law have long argued that a full picture of American constitutionalism must include the states. Nowhere is this more important than with respect to democracy. In this Article, we have described how the state constitutional tradition embraces a robust democracy principle. Properly understood, this principle empowers popular majorities and establishes safeguards against minority rule. The democracy principle is rooted in the text, history, and structure of state founding documents and is remarkably consistent across states—even as it is markedly distinct from federal constitutional commitments. Our account explores how fifty-one founding documents might better navigate the twin perils of majoritarianism and minoritarianism in the United States.

In addition to painting a more complete picture of American constitutionalism, recovering the democracy principle promises immediate practical consequences. State constitutions foreclose a number of antidemocratic behaviors, from extreme partisan gerrymandering to lame-duck power grabs to nullification of popular initiatives. They also offer resources for approaching controversies we have not explored this Article. To respond to numerous threats to democratic governance, including impediments to ballot access and the integrity of election administration, government officials, organizers, and the public alike should look beyond the federal Constitution to state constitutions. Even though it cannot end there, reclaiming democracy is a project that must begin in the states.