WHY STUDY STATE CONSTITUTIONAL LAW?

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In light of the Supreme Court retrenching on certain rights in recent years, more Americans are paying attention to state constitutions. This moment therefore offers an opportunity to explain why scholars, lawyers, and ordinary citizens should take state constitutions as seriously as they do the U.S. Constitution, and consider studying them an intellectually rewarding and important endeavor. In this essay, I attempt to do that. Earlier in our history, state constitutions helped define what it meant to be American. Through the process of drafting and interpreting constitutions, prior generations decided what popular sovereignty meant, who qualified as part of "the people," and what "liberty" meant. The U.S. Constitution has proven resistant to change because of its difficult amendment process. But state constitutions are in the process of changing as we speak. Engaging with them gives us an opportunity to decide questions like what popular sovereignty and liberty mean in the twenty-first century. That is to say, studying state constitutions allows us to contribute to the ongoing discussion about what America means in the twenty-first century in a way no other area of law does. In this essay, I also argue that there are three practical benefits to approaching state constitutions from this perspective: (1) increasing respect for state constitutions; (2) ensuring constitutional stability and avoiding constitutional crisis; and (3) preserving American democracy.

Introduction 1925
I. Current Accounts of Why You Should Study State Constitutions 1927
II. What State Constitutions Have Meant and Can Mean 1931
A. *Making America* 1931
1. *What are "Liberty" and "Equality"?* 1932
2. *Popular Sovereignty* 1935
B. *Addressing the Declaration of Independence's Contradictions Today* 1942
III. Practical Benefits of Studying State Constitutional Law 1945
A. *Increasing Respect for State Constitutions* 1945
B. *Preserving Constitutional Stability* 1946
C. *Saving American Democracy* 1952

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IV. A Curriculum and Scholarly Agenda for State Constitutions 1955
Conclusion 1957

Introduction

For a long time, state constitutions have alternatively been seen as the ugly stepsisters or the awkward younger brothers of the U.S. Constitution. The history of slavery and Jim Crow taught many Americans to see state constitutions and state courts as central villains in the story of racial progress.[1] Amendments banning same-sex marriage reinforced the instinct to see state constitutions and courts as engines of oppression of marginalized groups earlier this century.[2] Those working to expand rights naturally focused their efforts on the U.S. Constitution. Furthermore, popular veneration of the founding fathers—present even early on in our history— created a climate in which even a state court could call the U.S. Constitution "[p]erhaps the most perfect of all written constitutions . . . ."[3] Americans by and large shared that assessment.[4] Finally, the U.S. Constitution provides the most efficient route to win a rights dispute. Once nine U.S. Supreme Court Justices side with you on how to, say, define "liberty," the federal government and all fifty states are bound by that determination. By contrast, if you convince your state supreme court to interpret "liberty" in a new way or to get residents to adopt a new amendment codifying your view, you only win in one state. Who wouldn't rather see their understanding of "liberty" prevail in the entire country instead of in just one state?

The relative unimportance of state constitutions has raised many questions, chief among them for our purposes: Why would any scholars devote their careers to studying state constitutions? Why would any student bother enrolling in a state constitutional law class? Why study state constitutions when, to put it bluntly, the U.S. Constitution is more important?

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[1] *See* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law viii (2018).

[2] *See, e.g.*, Wis. Const. art. XIII, § 13; Fla. Const. art. I, § 27; N.C. Const. art. XIV, § 6.

[3] State v. Post, 20 N.J.L. 368, 378 (Sup. Ct. 1845).

[4] *See* Michael F. Conlin, The Constitutional Origins of the American Civil War 39 (2019) ("If antebellum Americans held the Constitution sacred as the 'great' charter of American liberty, then they apotheosized the fifty-five delegates who actually wrote the document."); *see also* Kelsey Dallas, *Many Americans Say God Inspired the Constitution. . . Except That Part About Guns*, Deseret News (Apr. 22, 2022), https://www.deseret.com/faith/2022/4/22/23036178/many-americans-say-god-inspired-the-constitution-except-that-part-about-guns-pew-research-marist [https://perma.cc/9G9E-BKNJ].

The premise of those questions is on shaky ground. In the past few years, the Supreme Court has retreated from an expansive view of the U.S. Constitution. Two examples illustrate the point. First, the Supreme Court overturned *Roe v. Wade* and declared there was no constitutional right to an abortion.[5] As a result, many states banned abortion.[6] Those challenging abortion restrictions knew that the federal courthouse would no longer be sympathetic to their concerns. The only remaining path back to abortion access ran through state court. State courts have unsurprisingly handled an influx of cases that would probably have been filed in federal court before.[7] Some have upheld bans[8] while others have struck them down on state constitutional grounds.[9] Still others have done both.[10] Americans have also been busy drafting amendments to preserve abortion access.[11]

Second, the Supreme Court has refused to entertain partisan gerrymandering claims.[12] In *Rucho v. Common Cause*, North Carolina Democrats and Maryland Republicans challenged congressional redistricting plans that the Court conceded were "highly partisan, by any measure."[13] Nonetheless, it concluded that partisan gerrymandering

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5 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). Of course, the Supreme Court is not finished with abortion. In the next several years, it may have to consider other issues such as whether Congress has constitutional authority to ban abortion, under what circumstances states banning abortion can exercise personal jurisdiction over out-of-state defendants who help women get abortions, and whether there is a constitutional right to terminate a pregnancy when that pregnancy threatens the mother's life, among others. At the very least, we can say that there is now no general right to abortion under the U.S. Constitution.

6 Carter Sherman & Andrew Witherspoon, *Tracking Abortion Laws Across the United States*, THE GUARDIAN (May 1, 2024), https://www.theguardian.com/us-news/ng-interactive/2023/nov/10/state-abortion-laws-us [https://perma.cc/B7SD-HU6J] (canvassing state abortion laws).

7 *See State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Jan. 11, 2024), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/S7QH-9ZLB].

8 *See* Planned Parenthood Great N.W. v. State, 522 P.3d 1132 (Idaho 2023) (upholding the constitutionality of various bans on abortion).

9 *See* Preterm-Cleveland v. Yost, No. A2203203, 2022 WL 16137799 (Ohio C.P. Oct. 12, 2022) (enjoining Ohio from enforcing the Heartbeat Act).

10 *Compare* Planned Parenthood v. State, 882 S.E.2d 770 (S.C. 2023) (finding South Carolina's Fetal Heartbeat and Protection from Abortion Act violated South Carolina's Constitution), *with* Planned Parenthood S. Atl. v. State, 892 S.E.2d 121 (S.C. 2023) (finding that a revised version of South Carolina's Fetal Heartbeat and Protection from Abortion Act comported with South Carolina's Constitution).

11 *See, e.g.*, CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; OHIO CONST. art. I, § 22.

12 One scholar defines gerrymandering as "[t]he practice of drawing voting district lines for partisan political advantage." Girardeau A. Spann, *Gerrymandering Justiciability*, 108 GEO. L.J. 981, 984 (2020).

13 588 U.S. 684, 691 (2019).

claims were nonjusticiable political questions.[14] Gerrymandering threatens the very concept of popular sovereignty. How can we say a legislature represents the will of the people when it actually does not? The Supreme Court has decided not to consider this question, but state courts have stepped into the breach. Again, some have found redistricting plans unconstitutional,[15] some have rejected constitutional challenges to them,[16] and some have done both.[17]

In sum, state constitutions are now the most prominent they have been since at least the Progressive Era and arguably since Reconstruction. While more Americans than ever focus on state constitutions, legal scholars and law students should reconsider their reflexive fixation on the U.S. Constitution in part, so they can offer meaningful guidance to their fellow citizens on the subject. But there is another more fundamental reason. In this essay, I argue that engaging with state constitutional law—both the making and interpreting of it—gives scholars and students an opportunity to refine our identity as Americans in the twenty-first century in a way that no other area of law does. In Part II, I explain why this justification for studying state constitutional law differs from other prominent accounts of why we should take state constitutions seriously (which are presented in Part I). In Part III, I present how studying state constitutions with the purpose of better understanding what it means to be an American in mind can increase respect for state constitutions, help us avoid constitutional crisis, and strengthen democracy. Finally, in Part IV, I explain what is entailed by a law school curriculum or scholarly agenda that takes such a justification seriously.

I
Current Accounts of Why You Should Study State Constitutions

There are several rationales for studying state constitutions. Justice Brennan suggests the first—that state constitutions fill in the gaps left by narrow interpretations of the U.S. Constitution. Writing in the Harvard Law Review after the Supreme Court retreated from the Warren Court's

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14 *Id.* at 706.

15 *See* Harkenrider v. Hochul, 38 N.Y.3d 494, 521 (2022) (finding that New York's legislature engaged in unconstitutional partisan gerrymandering).

16 *See* Rivera v. Schwab, 512 P.3d 168, 187 (Kan. 2022) (finding that considering partisan advantage in gerrymandering did not violate Kansas's constitution).

17 *Compare* Harper v. Hall, 868 S.E.2d 499 (N.C. 2022) (finding legislative maps drawn to advantage the Republican Party were unconstitutional), *with* Harper v. Hall, 886 S.E.2d 393, 399 (N.C. 2023) (treating partisan gerrymandering claims as "political questions" which are nonjusticiable).

expansive reading of the U.S. Constitution, Justice Brennan celebrated state courts resting decisions protective of individual liberty on their state constitutions.[18] Instead of automatically following Supreme Court decisions in interpreting their constitutions, Justice Brennan argued that state courts should "scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees."[19]

Justice Brennan did the cause of state constitutional law a tremendous service. Lawyers accustomed to focusing all of their attention on the U.S. Constitution heard an influential Supreme Court Justice tell them that they should also think about state constitutions. And yet the unavoidable context of his article limited the appeal of his case for studying state constitutions. Towards the end of his article, he stated "the very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them."[20] That left a perception that a "liberal" Justice upset by "conservative" outcomes in cases was hoping to continue his struggle in state courts.[21] As Judge Jeffrey Sutton, a judge on the U.S. Court of Appeals for the Sixth Circuit who has written extensively about state constitutions, has observed:

> [I]t's easy to imagine a conservative state court judge's unfavorable reaction to his article. Having watched the U.S. Supreme Court identify many new liberal rights during the 1960s, having watched Justice Brennan lead the effort, and having perhaps become skeptical of some of those decisions, such a judge might understandably hesitate at the suggestion that the state courts should do still more.[22]

More fundamentally, Justice Brennan's case for taking state constitutions seriously may have implied that they were a second choice of sorts for those making constitutional claims. Under this view, litigants should ordinarily raise federal claims. And then state constitutions would be a fallback option if federal claims failed. This all begged an

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18 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498–500 (1977).

19 *Id.* at 501.

20 *Id.* at 503.

21 *See* Sutton, *supra* note 1, at 176.

22 *Id.*

important question: Why should someone happy with how the Supreme Court is ruling on U.S. Constitutional issues waste time with state constitutions?

Judge Sutton advances other rationales. First, he suggests that state constitutions present lawyers with additional opportunities to win cases. To illustrate how foolish it is to ignore state constitutions, Sutton analogizes to college basketball. Your team is down by one point with time running out when a player is fouled.[23] The player has two free throws and can win the game by sinking both.[24] Surely it would be madness for a coach to instruct his player to take only one shot. Yet that is what happens when, as so often occurs, lawyers in state court raise a federal constitutional claim but not a state constitutional claim alongside it. One powerful reason for a student to study state constitutional law would be to prepare to better serve clients in the future. Insofar as this is true, law professors should develop the expertise to offer state constitutional law classes to make students more practice ready.

Surely, the ability to better serve clients ought to be a persuasive reason to study state constitutions. But what about students who do not intend to pursue criminal or civil litigation, or those who envision careers doing so primarily in federal court? And there is another fundamental problem with viewing state constitutional law as another means to a client's desired end. Sanford Levinson has lamented that:

> [L]awyers taught only the arts of constitutional interpretation, and not the implications of constitutional design, may not have much to contribute to either solving or avoiding genuine [constitutional crises]. Even if most crises are resolved without bloodshed, the Civil War teaches us that the most dangerous crises, and the ones most likely to be avoided by careful planning, are of [the kind], for which most lawyers educated in American law schools come completely unprepared. Whether or not this marks a "crisis" in legal education, it is certainly a powerful argument for making constitutional design a central aspect of any serious course of study in constitutional law.[25]

Issues of constitutional design are just as important as issues of constitutional interpretation, and perhaps even more so. We are having an important debate about how to operationalize popular sovereignty in state constitutions without the sophistication and nuance to properly

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[23] Jeffrey S. Sutton, *Why Teach—and Why Study—State Constitutional Law*, 34 Okla. City U.L. Rev. 165, 165 (2009).

[24] *Id.*

[25] Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. Pa. L. Rev. 707, 753 (2009).

resolve it.[26] With so many abortion referenda on the ballot recently, even members of the popular press have made claims about what thresholds should be needed to change constitutions, and whether voters should be able to propose amendments on the ballots themselves without working through the legislature.[27] But if the primary reason to study state constitutional law is to achieve better client outcomes, a student will have little incentive to delve into constitutional design issues. For that matter, a professor hoping to help a student become more successful at winning cases will have less incentive to rigorously explore constitutional design issues.

Judge Sutton's second rationale is that more robustly engaging with state constitutions can help improve federal constitutional law.[28] State courts could take the lead in interpreting rights guarantees found in their state constitutions. Then, the Supreme Court "can use the States' experiences in developing its own federal constitutional rules."[29] In other words, states would be laboratories of democracy that allow the country to learn from the best approaches to rights disputes. This is surely true and a worthwhile goal of studying state constitutions.

Finally, Judge Sutton offers the indisputable insight that focusing on state constitutions promotes liberty. A state constitution and the U.S. Constitution could combine to offer more protection for liberty than either could individually.[30] That is because a citizen challenging a government policy that violates their liberty would have two chances to win instead of just one. On net, this could mean more chances to hold government accountable.

All in all, both Justice Brennan and Judge Sutton offer invaluable insights about why it would behoove us to pay more attention to state constitutions. Whether to fill the gaps left by narrow interpretations of the U.S. Constitution, to better provide legal representation, to experiment with novel constitutional reform, or to provide an additional bulwark for liberty, it is apparent that state constitutions are deserving of our attention. What I aim to do in the rest of this essay is to build on their work to offer another vision of what state constitutional law can mean

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[26] *See* Jordan Boyd, *Abortion Radicals Will Expand Their Schemes from Ohio to Your State. Here's How to Be Ready*, THE FEDERALIST (Nov. 7, 2023), https://thefederalist.com/2023/11/07/abortion-radicals-will-expand-their-schemes-from-ohio-to-your-state-heres-how-to-be-ready [https://perma.cc/9F37-PJ8T] (urging that "Republican-controlled states should consider reevaluating the merits of their constitutional amendment process long before they think they will become targets").

[27] *See id.*

[28] Sutton, *supra* note 23, at 176.

[29] *Id.* at 177.

[30] *See* SUTTON, *supra* note 1, at 2.

to scholars and students, and why all of them, no matter how they feel about the current majority of the Supreme Court, and no matter what their future career ambitions are, will find studying state constitutions a rewarding enterprise. Specifically, I will argue that studying state constitutions will allow scholars and students to define what it means to be "American" in the twenty-first century in a way no other area of law realistically offers and that viewing state constitutions in this light will have unique practical benefits.

II
What State Constitutions Have Meant and Can Mean

A. Making America

It is no exaggeration to say that state constitutions have played an instrumental role in forming our identity as Americans, and that it has done so in ways the U.S. Constitution has not.[31] If I had to pick a text that speaks most concisely to what America is, it would be the Declaration of Independence. Drawing upon George Mason's draft Bill of Rights to the 1776 Virginia Constitution, Jefferson stated:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, —That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[32]

This eloquent language has inspired us for almost 250 years and vexed us for just as long. Among the questions we are still struggling with are: How should we define "Liberty" and who is entitled to it? Who are "the People" who hold political power? Under what conditions are people justified in altering or abolishing their government? How should they go about doing so? And what happens when we disagree on the proper

[31] *See generally infra* Part II.

[32] The Declaration of Independence para. 2 (U.S. 1776); *see also* Steven G. Calabresi & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 Tex. L. Rev. 1299, 1319 (2015); Pauline Maier, American Scripture: Making the Declaration of Independence 97–105 (1997).

answers to those questions? State constitutions have been our most important vehicle to take these issues on.

1. What are "Liberty" and "Equality"?

Before the U.S. Constitution was drafted in 1787, state constitutions started giving "liberty" more definite contours. The chief way they did so was in dealing with slavery. South Carolina's 1776 constitution condemned England for "proclaim[ing] freedom to servants and slaves, enticed or stolen them from, and armed them against their masters."[33] A desire to protect slavery and a fear of losing it was at the core of its constitutional vision. Other state constitutions imitated South Carolina, sometimes in more subtle ways. For example, North Carolina's 1776 constitution explicitly limited "liberty" to "freemen."[34] Meanwhile, Vermont's 1777 constitution declared that "all men are born equally free and independent," and adopted a gradual emancipation scheme.[35] "Liberty" in Vermont meant freedom for slaves. The battle lines around slavery were drawn.

The U.S. Constitution failed to settle the debate over slavery. On one hand, it provided for the return of fugitive slaves[36] and prevented the federal government from abolishing the international slave trade.[37] On the other hand, the delegates in Philadelphia could not bring themselves to actually use the word "slave" in the Constitution, a fact abolitionists would later cite to argue that the Constitution was implicitly antislavery.[38] Moreover, delegates in Philadelphia expressed misgivings about slavery. George Mason gave eloquent voice to those misgivings when he claimed:

> Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country. As nations can not be rewarded or punished in the next world they must be in this. By an inevitable chain of causes & effects providence punishes national sins, by national calamities.[39]

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33 S.C. Const. of 1776.

34 *See generally* N.C. Const. of 1776, Declaration of Rights VIII ("That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.").

35 Vt. Const. of 1777, Declaration of Rights § 1 ("Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years.").

36 *See* U.S. Const. art. IV, § 2.

37 *See* U.S. Const. art. I, § 9.

38 *See* Frederick Douglass, Oration, Delivered in Corinthian Hall, Rochester 36 (July 5, 1852); *see also* Conlin, *supra* note 4, at 45.

39 James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 444 (1920).

With the question of slavery left unresolved as new states entered the Union, newly admitted states and territories seeking statehood took sides in the debate.[40] Mississippi showed no reticence about using the word "slave" in its 1817 constitution and forbade the state legislature from abolishing slavery or preventing new residents from moving in with slaves.[41] Courts in midwestern states with constitutional language along the lines of "all men are by nature equally free and independent" relied upon it to find slavery unconstitutional.[42] In addition, state constitutions themselves explicitly abolished slavery.[43] These clashing constitutional definitions of "liberty" came to a head in Kansas during the 1850s. Settlers swarmed into the territory and needed four tries before they could successfully adopt a constitution.[44] The dueling sides in Kansas each drafted their own constitution. The Topeka Constitution written by Free-Staters (those opposed to slavery) abolished slavery.[45] The proslavery Lecompton Constitution declared that the "right of property is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase is the same, and as inviolable as the right of the owner of any property whatever."[46] The Leavenworth Constitution then abolished slavery.[47] Kansas did not successfully adopt a constitution that both abolished slavery and was accepted by Congress until right before the Civil War.[48]

When the Thirteenth Amendment abolished slavery in 1865, it merely followed in the footsteps of many northern and midwestern states.[49] It also forced their definition of "liberty" on the defeated confederate states. If it is now accurate to say that America is a "free" country, at least in the sense that it no longer tolerates slavery, state constitutions played a major role in making it so.

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40 Ind. Const. of 1816, art. XI, § 7 (abolishing slavery); Miss. Const. of 1817, Slaves, § 1 (establishing protections for slavery).

41 Miss. Const. of 1817, Slaves, § 1.

42 *See* Calabresi & Vickery, *supra* note 32, at 1328–40.

43 *See, e.g.*, Ohio Const. of 1802, art. VIII, § 2; Ill. Const. of 1818, art. VI, § 1.

44 *See generally* Nicole Etcheson, Bleeding Kansas: Contested Liberty in the Civil War Era (2004).

45 Topeka Const. art. I, § 6 (1855).

46 Lecompton Const. art. VII, § 1 (1857).

47 Leavenworth Const. art. I, § 6 (1858).

48 *See* Sidney Webster, *Responsibility for the War of Secession*, 8 Pol. Sci. Q. 268, 268 (1893).

49 *See, e.g.*, Ill. Const. of 1848, art. XIII, § 16 ("There shall be neither slavery nor involuntary servitude in this state, except as a punishment for crime whereof the party shall have been duly convicted."); Iowa Const. of 1857, art. I, § 23 ("There shall be no slavery in this State; nor shall there be involuntary servitude, unless for the punishment of crime."); Ohio Const. of 1851, art. I, § 6 ("There shall be no slavery in this State; nor involuntary servitude, unless for the punishment of crime.").

Speaking of "liberty" more broadly, we generally use it in both a negative and a positive sense. The U.S. Constitution is, by and large, an example of the former. Its amendments explain what the government cannot do to you—restrict your religious freedom or force you to incriminate yourself—but not what the government must do for you. By contrast, state constitutions have embraced positive liberty. The best example of this is education. While the U.S. Constitution does not mention education at all, all fifty state constitutions do.[50] Maryland, North Carolina, and Wyoming explicitly declare a right to an education in the same way that a citizen has the right to a jury trial.[51] Many other state courts have held that even absent such language, their constitutions confer a right to education.[52] Another example is welfare. Almost half of all state constitutions contemplate government assistance to the needy in some form in their texts.[53] The Alabama, Kansas, New York, and Oklahoma constitutions explicitly command the state to provide government aid.[54]

A second example has to do with the environment. Most state constitutions have provisions discussing how to steward natural

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50 *See* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU Educ. & L.J. 1, 3 (1997).

51 Md. Const. Declaration of Rights art. XLIII ("That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People."); N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."); Wyo. Const. art. I, § 23 ("The right of the citizens to opportunities for education should have practical recognition. The legislature shall suitably encourage means and agencies calculated to advance the sciences and liberal arts.").

52 *See* Trish Brennan-Gac, *Educational Rights in the States*, A. B. A. (April 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states [https://perma.cc/46Q3-E6BA] (discussing California, Connecticut, Washington State, West Virginia, Mississippi, Oklahoma, Wisconsin, Kentucky, Alabama, Arkansas, Kansas, Massachusetts, New Hampshire, North Carolina, South Carolina, and Texas).

53 Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 Rutgers L.J. 863, 864 (2008) (identifying that twenty-three state constitutions implicitly or explicitly provide welfare rights provisions).

54 Ala. Const. art. IV, § 88 ("It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."); Kan. Const. art. VII, § 4 ("The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the aid of society. The state may participate financially in such aid and supervise and control administration thereof."); N.Y. Const. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); Okla. Const. art. XVII, § 3 ("The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.").

resources and/or the environment.[55] The constitutions of Hawaii, Illinois, Massachusetts, Montana, New York, and Pennsylvania give residents the right to a quality environment.[56]

2. *Popular Sovereignty*

America is based on the idea of popular sovereignty.[57] That simple truth obscures the complicated questions of who "the People" are and how much power they really have. Early state constitutions wrestled with these questions a decade before the U.S. Constitution studiously avoided it. In fact, it delegated the task of defining eligible voters to the states.[58] At the founding, all states except one required men to own property before voting.[59] But, and without any federal intervention, states gradually abandoned property qualifications on suffrage before

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55 John C. Dernbach, *The Environmental Rights Provisions of U.S. State Constitutions: A Comparative Analysis, in* Environmental Law Before the Courts 35, 36 (Giovanni Antonelli et al. eds., 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390853 [https://perma.cc/B35A-CJWH] ("Nearly all U.S. state constitutions have environmental or natural resources provisions.").

56 Haw. Const. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings."); Ill. Const. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."); Mass. Const. art. XCVII ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment. . . . The general court shall have the power to enact legislation necessary or expedient to protect such rights."); Mont. Const. art. II, § 3 ("All persons are born free and have certain inalienable rights[, including] the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways."); N.Y. Const. art. I, § 19 ("Each person shall have a right to clean air and water, and a healthful environment."); Pa. Const. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.").

57 The Declaration of Independence para. 2 (U.S. 1776) ("That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.").

58 U.S. Const. art. I, § 2.

59 Robert J. Steinfeld, *Property and Suffrage in the Early Republic*, 41 Stan. L. Rev. 335, 339–40 (1989) (discussing that "by the time of the Revolution only South Carolina retained a taxpaying qualification for the vote" rather than a property ownership requirement); *see also* Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 Yale L.J. 473, 476–79 (1997) (highlighting the rise and fall of the property ownership requirement from the founding through the nineteenth century).

the Civil War.[60] The disenfranchised and their champions argued that voting was a natural right like owning property or religious freedom instead of a privilege that could be given or withheld by those in power.[61] That they prevailed in the long term is evident in how we today speak of voting as a "right."[62]

Perhaps somewhat surprisingly, not every state at the founding disenfranchised racial minorities[63] though other state constitutions explicitly limited voting to white men.[64] By the Civil War, Maine, Massachusetts, Rhode Island, and Vermont permitted Blacks to vote on the same terms as whites.[65] Others permitted Black men to vote if they met certain conditions.[66] The Fifteenth Amendment, which forbade race discrimination in voting, reflected the North's emerging consensus on who "the people" were. Before women nationwide petitioned Congress for suffrage during Reconstruction,[67] Kansan women presented Kansas's 1859 convention with a similar petition.[68]

Not all of the state constitutional history is positive. States that initially permitted racial minorities to vote sometimes later barred them from doing so.[69] Southern whites launched coup d'états against governments that featured prominent Black representation during Reconstruction and then used state constitutions to impose literacy tests and disenfranchise felons so they could eliminate Blacks from political life.[70] Nonetheless, even disheartening stories like these still illustrate

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60 *See* Steinfeld, *supra* note 59, at 336 (describing the trend away from property qualifications toward taxpaying qualifications and later "white manhood suffrage").

61 Thomas Wilson Dorr, An Address to the people of Rhode Island from the Convention Assembled at Providence (Feb. 26, 1834) ("[A] participation in the choice of those who make and administer laws is a Natural Right; which cannot be abridged nor suspended any farther than the greatest good of the greatest number imperatively requires.").

62 *Elections and Voting*, The White House, https://www.whitehouse.gov/about-the-white-house/our-government/elections-and-voting [https://perma.cc/LJ5H-TGFR] ("One of the most important rights of American citizens is the franchise—the right to vote.").

63 Cogan, *supra* note 59, at 489–90 (discussing how states handled Black suffrage at the founding and in the 19th century).

64 *E.g.*, Ga. Const. of 1777, art. IX; S.C. Const. of 1778, art. XIII.

65 Richard C. Rohrs, *Exercising Their Right: African American Voter Turnout in Antebellum Newport, Rhode Island*, 84 New Eng. Q. 402, 402 (2011).

66 *Id.*

67 Akhil R. Amar, The Bill of Rights: Creation and Reconstruction 240 (1998) ("At least five petitions from women on the suffrage issue were presented on the floor of Congress in the first two months of 1866 alone.").

68 *Constitutional Convention: Fifth Day—Morning Session*, White Cloud Kan. Chief, July 21, 1859.

69 Cogan, *supra* note 59, at 489.

70 *See, e.g.*, Richard Zuczek, State of Rebellion 3 (1996) (discussing how South Carolina whites used violence to overthrow South Carolina's government during Reconstruction); *see also* Jim Brisson, *"Civil Government Was Crumbling Around Me": The Kirk-Holden War of 1870*, 88 N.C. Hist. Rev. 123, 123–24 (2011) (discussing how North Carolina whites used

that the state constitutions have played a major role in defining "the people."

At the same time Americans debated who counted as "the people," they had to determine how "the people" make constitutions and laws. Numerous questions presented themselves. How much power should institutional gatekeepers like the legislature have over the process? At specified times, Georgia, Massachusetts, Pennsylvania, and Vermont, answered with "none." Georgia's and Massachusetts's first constitutions both required calling a convention once enough residents voted to do so.[71] Pennsylvania and Vermont both elected a separate group called a council of censors who could call a constitutional convention without the legislature's approval.[72]

A logical extension of this question was: Can the people assemble without government sanction and draft a constitution? Thomas Dorr and his supporters in 1842 thought so when they sought to displace Rhode Island's existing government.[73] In 1855, Free-State Kansans dismayed by a hostile pro-slavery territorial legislature made the same claims.[74] Behind them were powerful convictions on specific issues—suffrage in Rhode Island and slavery in Kansas. But just as important was the idea that popular sovereignty was an expansive concept. After the American Revolution, Dorr argued that "the whole People" writ large had taken on the power that King George III and parliament had, meaning that they had something resembling absolute power.[75] The "People" were the boss and the legislature the agent. Just as a boss could at any time revoke power it had given to an agent, the "People" could revoke the power it had given elected officials.[76] At any time, it could also change the rules elected officials operated under. It is an understatement to say that these views were controversial in the nineteenth century, but it

violence to drive Republicans out of power during Reconstruction); *see* S.C. CONST. of 1895, art. II, §§ 4(a), 4(c), 4(d), 6 (imposing literacy test alongside a grandfather clause); *see* N.C. CONST. of 1875, art. VI, § 1 (disenfranchising felons). At North Carolina's 1875 constitutional convention, one delegate said the "measure [to disenfranchise felons] was intended to disenfranchise his people" and was ruled out of order by the presiding office when he called felon disenfranchisement "villainous." *Constitutional Convention*, WILMINGTON MORNING STAR, Oct. 8, 1875.

[71] *E.g.*, GA. CONST. of 1777, art. LXIII; MASS. CONST. ch. VI, art. X.

[72] *E.g.*, PA. CONST. of 1776, § 47; VT. CONST. of 1777, ch. 2, § 44.

[73] *See* ERIK J. CHAPUT, THE PEOPLE'S MARTYR: THOMAS WILSON DORR AND HIS 1842 RHODE ISLAND REBELLION 3–4 (2013).

[74] *Next Tuesday—State Constitution*, HERALD OF FREEDOM, Oct. 6, 1855.

[75] THOMAS W. DORR, THE RIGHT OF THE PEOPLE OF RHODE ISLAND TO FORM A CONSTITUTION: THE NINE LAWYERS' OPINION 69 (1842) ("The sovereign power of this State having been forever divested from the king, to whom could it have passed, if not to the whole People?").

[76] *Id.* at 72 ("If the present government be valid, because the People assent to it, it may become invalid by the dissent, definitely expressed.").

may be even more surprising to observe that they may be finding new purchase among scholars in the twenty-first century.[77] On the other side of this issue were profound worries about tyranny of the majority and a belief that institutional gatekeepers were necessary to preserve the stability and integrity of the political system.[78] One of Dorr's opponents, Francis Wayland, worried that "[a]ll that would be necessary, in order to establish unlimited power over us, would be, without the forms of law, to lay claim to a majority, and assemble a sufficient number of armed men to carry its decisions into effect."[79] In that case, "[t]he only law that would be known, would soon be the law of force."[80] Over the sweep of American history, both Wayland and Dorr have won the argument. On one hand, Americans no longer meet in unsanctioned constitutional conventions.[81] But on the other, fourteen states automatically offer voters the opportunity to call a constitutional convention at regular intervals.[82] And eighteen allow voters to place constitutional amendments on the ballot without the legislature's approval and (usually) a majority of voters to ratify.[83]

Popular sovereignty has continued to develop at the state level in ways that it has not at the federal level. At the federal level, we often think of judges as the guardians of constitutional texts against both other government branches and popular majorities.[84] Their appointment by the President, confirmation by the Senate, and life tenure supposedly makes them uniquely able to perform that task. Starting in the mid-nineteenth century, Americans chose to value accountability and popular control of judges by subjecting them to elections.[85] Judicial elections became entrenched in a majority of states by the outbreak of

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77 *See* Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 Fordham L. Rev. 2555, 2617 (2024) ("Pulling these doctrines together, it follows that the people have an inherent right to call their own convention. This right is not dependent on positive law, and it cannot be eliminated by positive law. Nor is it dependent on legislative recognition.").

78 *See* Francis Wayland, The Affairs of Rhode Island: A Discourse 7 (1842).

79 *Id.*

80 *Id.*

81 Marshfield, *supra* note 77, at 2579 ("Despite the growing misalignment in state government, and the convention's unique design as a popular accountability device, we are now in a momentous convention drought.").

82 John Dinan, The American State Constitutional Tradition 31 (2006).

83 *See id.* at 31–32.

84 *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 Vill. L. Rev. 745, 759 (2001) (describing the judiciary as "a check on the powers of the executive and legislative branches").

85 *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 Harv. L. Rev. 1061, 1097 (2010) (describing the adoption of judicial elections throughout the states during the mid-nineteenth century).

the Civil War.[86] This enabled state electorates to punish judges whose rulings they disapprove of and reward judges whose rulings they support. The Progressive Era produced the Sixteenth, Seventeenth, Eighteenth, and Nineteenth Amendments to the U.S. Constitution authorizing an income tax, direct election of U.S. Senators, prohibition of alcohol, and women's suffrage on the national level.[87] These were significant changes, but what happened at the state level in those years was even more consequential. Twenty-one states have authorized ordinary citizens to exercise legislative power by adopting initiatives and referenda in their constitutions.[88] Citizens can begin the process of making a statute by placing an initiative petition on the ballot without legislative sanction and end it by voting on whether to adopt the proposal.[89] In a crucial way, they can exercise *more* legislative authority than the legislature because governors generally cannot veto initiatives.[90] Nineteen states allow citizens to recall officials before their terms are up.[91] Citizens can place recall petitions without legislative sanction and then vote to remove officials.[92] Initiative and recall efforts in just one state have received national attention over the years as California can attest. Proposition 13 famously capped property taxes[93] before California used the recall to make Arnold Schwarzenegger its second actor-turned-governor.[94] When asked what form of government we have, many Americans would answer "Democracy."[95] If that is an accurate description, state constitutions are more responsible for it being so than the U.S. Constitution, which gives life tenure to federal judges, uses an electoral

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86 *Id.* ("By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges.").

87 U.S. Const. amends. XVI, XVII, XVIII, XIX.

88 Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 876 (2021) ("In states that recognize the initiative, constitutional provisions generally declare that '[t]he people may propose and enact laws by the initiative' or that 'the people reserve to themselves the power to propose legislative measures, laws, and amendments to the Constitution,' and they contemplate approval by majority vote.").

89 *See id.*

90 *Id.* at 877 (describing states where governors cannot veto referenda); *e.g.*, Alaska Const. art. XI.

91 Bulman-Pozen & Seifter, *supra* note 88, at 878.

92 *Id.*

93 *See* Jay Rappaport, *The Constitutionality of Proposition 13 Under the Equal Protection Clause*, 26 Real Prop. Prob. & Tr. J. 235, 240–44 (1991) (detailing the provisions of Proposition 13).

94 *See* David A. Carrillo, Joshua Spivak, Natalie Kaliss & Jared Madnick, *California's Recall Is Not Overpowered*, 62 Santa Clara L. Rev. 481, 500–01 (2022) (describing the Davis gubernatorial recall and the attempted recall of Governor Gavin Newsom).

95 *See* Bulman-Pozen & Seifter, *supra* note 88, at 860–61.

college to select the president, and gives small states disproportionate control over our politics.[96]

Americans have also had to consider how much we should value constitutional stability. How frequently should we change our constitutions? At the founding, Jefferson and Madison sparred on the topic. Madison claimed in the Federalist Papers that "frequent appeals" for constitutional change "would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability."[97] Jefferson later responded that "no society can make a perpetual constitution, or even a perpetual law" and that the current generation had a right to "manage [the constitution] then, & what proceeds from it, as they please. . . ."[98] Madison's view—at least as a matter of formal amendment—has prevailed at the federal level. The Bill of Rights aside, the U.S. Constitution has only received seventeen amendments in more than two-hundred years.[99] However, Jefferson's view has prevailed at the state level. America has witnessed hundreds of constitutional conventions and thousands of amendments.[100] At the federal level, we have only had two constitutions—the Articles of Confederation and U.S. Constitution, but Louisiana has had eleven constitutions.[101] Michigan[102] and Illinois have had four.[103] These conflicting attitudes towards the desirability of constitutional change have led to fateful design choices. The U.S. Constitution is practically impossible to amend. Two thirds of both houses must agree to propose an amendment and then three quarters of states must ratify.[104] Or two thirds of states can call a constitutional convention; three quarters of

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96 *See generally id.* (discussing ways that state constitutions allow for more direct involvement).

97 The Federalist No. 49 (James Madison).

98 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) (on file with the Library of Congress), https://www.loc.gov/item/mjm023633 [https://perma.cc/B5A5-9XZB].

99 Thomas F. Schaller, *Democracy at Rest: Strategic Ratification of the Twenty-First Amendment*, 28 Publius 81, 81 (1998).

100 *See* Marshfield, *supra* note 77, at 2559; Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 Yale L.J.F. 192, 192 (2023).

101 *See Louisiana Constitutional Law History: Home*, LSU L. Libr., https://libguides.law.lsu.edu/c.php?g=191371 [https://perma.cc/T9TP-CDSD].

102 *Michigan Constitutional Conventions*, Univ. of Mich. Bentley Hist. Libr., https://bentley.umich.edu/legacy-support/politics/conventions.php [https://perma.cc/XS6E-CL2B].

103 *Illinois Constitution (1818)*, Office of the Illinois Secretary of State, https://www.ilsos.gov/departments/archives/online_exhibits/100_documents/1818-il-con.html [https://perma.cc/PT2B-CXF8].

104 U.S. Const. art. V.

states would then have to ratify.[105] However, the process is much less difficult in most states.[106]

We are still wrestling with difficult questions of how to define "liberty," "equality," "the people," and popular sovereignty. Take abortion and gerrymandering, two issues responsible for the fact that state constitutions are increasingly in the spotlight. Does "liberty" encompass the right to terminate a pregnancy? Does a focus on "equality" mean avoiding abortion restrictions which uniquely burden women? And do our answers to those questions affect how we define popular sovereignty? After abortion rights supporters succeeded in passing a citizen-sponsored amendment in Michigan, Ohio Republicans attempted to change the threshold to pass constitutional amendments from 50% of voters to 60%.[107] After Ohio voters used a citizen-sponsored initiative to amend the state constitution to protect abortion rights, one conservative commentator urged "Republican-controlled states should consider reevaluating the merits of their constitutional amendment process long before they think they will become targets."[108] Republican officials have cited single-subject clauses in their state constitutions as a reason why citizen sponsored amendments cannot go forward.[109] The basic thrust of their argument is that amendments addressing protections for contraception and abortion address different subjects when their constitutions require an amendment to address only one.[110] One judge even suggested that "abortion" and "abortion care" were different subjects.[111] Most state constitutions include language along the lines of: "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness."[112]

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105 *Id*.

106 *See* John Dinan, *Constitutional Amendment Processes in the 50 States*, Brennan Ctr. State Ct. Rep. (July 24, 2023), https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states [https://perma.cc/EX7B-A8Z5]; *see also* Dinan, *supra* note 82, at 43–45.

107 Dan Balz, *Ohio Republicans Try to Change Rules to Defeat Abortion Rights Amendment*, Wash. Post (Apr. 22, 2023), https://www.washingtonpost.com/politics/2023/04/22/abortion-ohio-constitution-amendment [https://perma.cc/KRH4-YEPJ].

108 Boyd, *supra* note 26.

109 *See* Marcus Gadson & Amanda Olejarz, *Single-Subject Rules Can Prevent Perverse Outcomes but Give Judges Enormous Power*, Brennan Ctr. State Ct. Rep. (Jan. 24, 2024), https://statecourtreport.org/our-work/analysis-opinion/single-subject-rules-can-prevent-perverse-outcomes-give-judges-enormous [https://perma.cc/QYM4-PD2F] (Montana and Nevada courts used the single-subject rule to bar residents from voting on a proposed state constitution amendment by citizens for abortion rights).

110 *Id.*

111 *Id.*

112 Pa. Const. art. I, § 2. *See, e.g.*, 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

To see how we have still failed to agree on how to define "the people" in 2024, consider all the recent back-and-forth about whether to permit people with felony convictions to vote. In 2018, for example, Florida voters amended their constitution to permit people with felony convictions to vote once they completed all terms of their sentence.[113] On its face, voters had declared clearly that they preferred a more expansive definition of "the people" than had previously prevailed in Florida. Yet, the Florida Legislature soon passed a bill requiring people with felony convictions to pay all fines, fees, court costs, and restitution before they could vote.[114] Since then, the Minnesota, North Carolina, and Tennessee Supreme Courts have issued rulings narrowing the circumstances under which people with felony convictions can vote.[115] Debates over how to interpret legal texts and the scope of a legislature's authority to implement constitutional amendments should not obscure the deeper questions felon disenfranchisement poses. Who are "the people" who hold political power and which people get to decide that?

B. Addressing the Declaration of Independence's Contradictions Today

If state constitutions have uniquely exposed how difficult it was for prior generations to agree on what the Declaration of Independence meant, they provide a unique opportunity to explore what it means today. In fact, state constitutions have several advantages over the U.S. Constitution in defining liberty, equality, who "the people" are, and how they should go about changing their government.

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upon their will only, and is instituted solely for the good of the whole."); VA. CONST. art. I, § 2 ("That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."); TEX. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit.").

113 FLA. CONST. art. VI, § 4; Rebecca Nelson, *In 2018, Florida Enfranchised Former Felons. They're Still Fighting for the Right to Vote*, WASH. POST, (Nov. 1, 2020), https://www.washingtonpost.com/lifestyle/magazine/in-2018-florida-enfranchised-former-felons-theyre-still-fighting-for-the-right-to-vote/2020/10/23/f5adc0fc-04e4-11eb-a2db-417cddf4816a_story.html [https://perma.cc/2PQT-XPWM].

114 Sam Levine, *How Republicans Gutted the Biggest Voting Rights Victory in Recent History*, THE GUARDIAN (Aug. 6, 2020), https://www.theguardian.com/us-news/2020/aug/06/republicans-florida-amendment-4-voting-rights [https://perma.cc/E88Q-C5TG].

115 *See* Schroeder v. Simon, 985 N.W.2d 529 (Minn. 2023) (finding a statute regulating conditions under which right to vote is restored did not violate the Minnesota Constitution); Cmty. Success Initiative v. Moore, 886 S.E.2d 16 (N.C. 2023) (ordering that all felons not in jail or prison to register and vote was improper); Falls v. Goins, 673 S.W.3d 173 (Tenn. 2023) (finding that statute specifying criteria felons had to satisfy to recover right to vote did not violate the North Carolina Constitution).

First, as has been alluded to, the U.S. Constitution is simply more static than the state constitutions. In these polarized political times, it is difficult to imagine two thirds of both houses of Congress and three quarters of states agreeing on an amendment to the U.S. Constitution.[116] Yet, as also stated earlier, state constitutions are significantly easier to amend.[117] Are you particularly convinced that "liberty" or "popular sovereignty" in the twenty-first century require recognizing new rights or restructuring government? The reality is that you have little chance to translate that conviction into constitutional text at the federal level. But you have a better chance to do so at the state level. In eighteen states, you do not even have to get the legislature to propose an amendment; you and others of like mind can write an amendment, work together to gather signatures, and place it directly on the ballot.[118] In fourteen states, you will periodically have an opportunity to convince fellow citizens to call a constitutional convention regardless of whether the legislature wants to call one.[119] Even in states that do not permit these options, you will still have an easier time convincing a majority of the legislature to propose an amendment or call a convention than you will getting a supermajority of both houses of Congress to do so.[120] Cumulatively, the ease of changing state constitutions compared to changing the U.S. Constitution means that scholars and students can participate in constitution-making. The process of constitution-making necessarily entails coming up with a dream of how your ideal society would look, finding others who share a similar vision, and then translating that dream into constitutional text. That is what abolitionists who used their state constitutions to abolish slavery before the Civil War did,[121] and what people who believed every child should have access to education did earlier in our history.[122] Studying state constitutions gives you an outsized ability to do that today.

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[116] U.S. Const. art. V; *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Calif. L. Rev. 2005, 2007 (2022) ("[T]he current dynamics of constitutional politics have thwarted coordination between the national and state governments, and between the two national political parties. These factors have frozen the Constitution, making it virtually impossible today for any constitutional amendment proposal to be ratified.").

[117] *See* Dinan, *supra* note 82, at 41–45 (giving an overview of the state constitution amendment processes and finding them to be more flexible than the rigid federal approach).

[118] Alicia Bannon, *Learning from State Constitutional Amendments*, N.Y.U. J. Legis. & Pub. Pol'y Quorum (2023), https://nyujlpp.org/quorum/bannon-learning-from-state-constitutional-amendments [https://perma.cc/8Y6P-LEGD].

[119] *Id.*

[120] *See* Dinan, *supra* note 82, at 43–45; U.S. Const. art. V.

[121] Vt. Const. of 1776, Decl. of Rights § 1; *e.g.*, Ia. Const. of 1857, art. I, § 23.

[122] *See* N.C. Const. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

Second, questions about the proper interpretation of state constitutional law are open to more voices than questions about the proper interpretation of the U.S. Constitution. There are only nine U.S. Supreme Court Justices, and eight of them attended Harvard or Yale.[123] Their law clerks overwhelmingly come from a handful of "elite" institutions.[124] And the Justices will be there a while.[125] That is why we can speak of the "New Deal Court," the "Warren Court," or the "Roberts Court." This all means that a tiny minority of lawyers will dominate the constitutional conversation at the federal level. But state courts are different and necessarily so. Glance at any state supreme court, and you will find the justices coming from a far broader array of institutions besides Harvard and Yale.[126]

State constitutional law also gives you a greater chance to change the composition of a court which interprets constitutional texts in ways you oppose. Most states use some form of election to select judges.[127] And court composition can change far more abruptly than it does at the federal level. For example, the 2022 midterm elections saw the North Carolina Supreme Court switch from majority Democrat to majority Republican.[128] As a result, the court overruled recent decisions, including one in the same case![129] This behavior raises serious questions about how much force stare decisis has in state courts that rely on partisan elections to choose members.[130] The flip side, though, is that concerned citizens have an easier time changing court decisions that contradict

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[123] *See Biographies of the Justices*, SCOTUS Blog, https://www.scotusblog.com/biographies-of-the-justices [https://perma.cc/QL3M-S5H5].

[124] Michael T. Nietzel, *"Show Us Your Pedigree." The Elite College Pipeline to the Supreme Court*, Forbes (Feb. 6, 2023), https://www.forbes.com/sites/michaeltnietzel/2023/02/06/show-us-your-pedigree-the-elite-college-pipeline-to-the-supreme-court/?sh=612e8d442a9b [https://perma.cc/Q7NC-G4LS].

[125] *See* Nigel Chiwaya & Jiachuan Wu, *Chart: How Long Have the Supreme Court Justices Served?* NBC News (Jan. 26, 2022), https://www.nbcnews.com/news/us-news/chart-how-long-have-supreme-court-justices-served-n1288052 [https://perma.cc/6GSK-DWLC] (displaying current Supreme Court Justices' years of service in a chart).

[126] *See, e.g.*, *Biography of Richard Dietz*, N.C. Jud. Branch, https://www.nccourts.gov/judicial-directory/richard-dietz [https://perma.cc/8QGP-TLUY].

[127] *See* Bulman-Pozen & Seifter, *supra* note 88, at 872–73 (describing various methods of judicial elections).

[128] *See* Aaron Mendelson, *'Lose the Courts, Lose the War': The Battle Over Voting in North Carolina*, USA Today (July 25, 2023), https://www.usatoday.com/in-depth/news/nation/2023/07/25/republicans-seized-control-nc-state-supreme-court-what-happened/70357923007 [https://perma.cc/Y8EG-PFNW].

[129] Marcus Gadson, *Judicial Whiplash in North Carolina Redistricting Case*, Brennan Ctr. State Ct. Rep. (May 18, 2023), https://statecourtreport.org/our-work/analysis-opinion/judicial-whiplash-north-carolina-redistricting-case [https://perma.cc/NTU4-H2A7]; *see also* Hall, 886 S.E.2d at 399 (treating partisan gerrymandering claims as "political questions").

[130] *See* Alicia Bannon, *Stare Decisis in the Spotlight*, Brennan Ctr. State Ct. Rep. (Mar. 2, 2023), https://statecourtreport.org/our-work/analysis-opinion/stare-decisis-spotlight [https://

their understanding of a constitutional text. You do not have to wait for a justice whose constitutional interpretation you oppose to resign or die (which could take decades). Instead, the longest you have to wait to remove such a judge is the next election cycle. And in several states, you can file a recall petition to remove the judge even sooner.[131] Should you wish to use the expertise you gain about state constitutions as a judge, you can at least put yourself forward as a candidate in several states instead of waiting on a U.S. Senator or the President to pick you.[132]

III
Practical Benefits of Studying State Constitutional Law

Both Justice Brennan and Judge Sutton have ably explained how devoting yourself to the study of state constitutions—both drafting and interpreting them—has practical benefits for you and the country at large.[133] I want to add three more: increasing respect for state constitutions, avoiding a constitutional crisis at the state level, and saving American democracy.

A. Increasing Respect for State Constitutions

In spite of what they have contributed to our constitutional heritage, Americans do not respect state constitutions as much as they do the U.S. Constitution. There is a national holiday commemorating the U.S. Constitution,[134] but I have yet to find even a single state with a holiday celebrating its constitution. The esteemed Robert Williams once noted that a majority of Americans did not even know their state had a constitution![135]

For now, though, I want to contemplate the upside of increasing respect for state constitutions and how considering state constitutionalism from the perspective of answering big questions about what America is can help accomplish that objective. State constitutions offer an opportunity

perma.cc/J4RV-AC6Q] (expressing concerns about stare decisis in states using judicial elections, including North Carolina).

131 *Report on Recall of State Officials*, Nat'l Conf. of State Legislatures (Sept. 15, 2021), https://www.ncsl.org/elections-and-campaigns/recall-of-state-officials [https://perma.cc/S9M7-B7UV].

132 *See* Dmitry Bam, *Tailored Judicial Selection*, 39 U. Ark. Little Rock L. Rev. 521 (2017) (discussing various methods of judicial election).

133 *See supra* Part I.

134 *Commemorating Constitution Day and Citizenship Day*, U.S. Dep't of Educ., https://www2.ed.gov/policy/fund/guid/constitutionday.html [https://perma.cc/P2FV-5SZU].

135 *See* Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. Legal Educ. 243, 243 (1991) (noting that even many lawyers and law school students are not aware of state constitutions).

to foster civic pride and engagement at the state and local level. They can build norms and institutions that promote a functional political process.[136] In our polarized climate, having state residents of different political persuasions and racial and religious identities do the hard work of understanding competing perspectives and forging compromises that promote a common vision of how their state will confront the questions posed by the Declaration of Independence is a chance to bring them closer together.[137] An America where state residents have genuine pride in their constitutions and perceive a stake in their success would mean the end of seeing state constitutions as a temporary fallback option for the losing side of a case at the U.S. Supreme Court. Instead, they would have independent standing in the eyes of the public. The result could well be less pressure on the U.S. Constitution to resolve disputes about "liberty" and "equality" and lower stakes for Supreme Court cases. In such an environment, a seat opening on the U.S. Supreme Court might not elicit the bitter struggles to which we have become accustomed. Increasing respect for state constitutions, then, very well might improve the federal court system.

B. Preserving Constitutional Stability

In recent years, Americans have had to worry about constitutional crises at the national level. January 6, 2021 left many fearful that the peaceful transition of power was a relic of the past. Subsequently, the Supreme Court has had to answer the question of whether a former president is disqualified from office because he engaged in an insurrection by attempting to overturn an election.[138]

Our states are every bit as at risk of constitutional instability as the federal government and perhaps even more so. As distressing as it is to say, we have fifty-one chances of constitutional crisis in any given moment. How can I be so confident of that? Because it has happened before. State constitutions have repeatedly failed throughout American history. Other state constitutions have been defeated.

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136 *See generally* Miriam Seifter, *Saving Democracy, State by State?*, 110 Calif. L. Rev. 2069 (2022).

137 *See* Marshfield, *supra* note 77, at 2558 (noting that a common vision exists to preserve the institution of democracy and promote basic democratic structural reforms among Americans).

138 Trump v. Anderson, 601 U.S. 100 (2024) (reversing the Colorado Supreme Court's decision to remove former President Trump from the ballot because he had engaged in insurrection within the meaning of the 14th Amendment).

Two examples serve to illustrate the point (although many more exist).[139] The first involves an election dispute and someone demanding that onlookers "stop the steal."[140] Election Day is normally the end of the campaign, but in Kentucky in 1899, it was the beginning of chaos. Two men, Democrat William Goebel and Republican William Taylor, both claimed to have been elected. Both sides believed fraud tainted the results.[141] As rumors of violence swirled, Kentucky's incumbent governor asked President William McKinley to provide 1,000 soldiers and send the state militia rifles and ammunition.[142] Three election commissioners, all of whom were Democrats and two of whom had campaigned for Goebel, initially ruled that Taylor had won.[143] Taylor was therefore officially inaugurated.[144] A less determined man might have conceded under these circumstances, but not Goebel. He challenged the determination in the state legislature, which was also in Democratic hands.[145]

As the legislature met in Frankfort, 1,000 armed Republicans from across the state came to the city.[146] Before the legislature could decide Goebel's election challenge, an assassin shot him.[147] The news soon spread and Frankfort's streets thronged with gun-toting citizens, some of them Democrats threatening revenge.[148] With Goebel's life hanging in the balance and the Democratic legislature about to resolve the election challenge, Taylor attempted to proclaim that the legislature would be adjourned for a week and then reconvene in another city.[149]

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139 *See, e.g.*, *About the Buckshot War*, N.Y. Times, Dec. 18, 1887 (discussing Pennsylvania's contested 1838 election which saw the state house of representatives break into two separate bodies, mobs swarm the state capitol, death threats against prominent politicians, and the state militia called out to maintain order); Logan Scott Stafford, *Judicial Coup D'état, Mandamus Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*, 20 U. Ark. Little Rock L. Rev. 891, 954 (1998) (discussing how after a disputed election in Arkansas in 1872, the candidate who lost in the official count took over the state house with armed followers, supporters of the ousted candidate kidnapped two Arkansas Supreme Court justices, and about 20 men died in combat between the two militias that formed to support the two men claiming to be Arkansas's true governor); Edward B. Foley, Ballot Battles 161 (2016) (relating how after a disputed election in West Virginia in 1888, the defeated candidate in the official count held his own inauguration ceremony and marched on the state house with armed followers).

140 James C. Klotter, William Goebel: The Politics of Wrath 88 (1977).

141 *Id.*

142 *Id.* at 89. McKinley declined to send the requested aid.

143 *Id.* at 91–92.

144 *Id.* at 92.

145 *Id.*

146 *Id.* at 98.

147 *Id.* at 100.

148 *Id.* at 102.

149 *Id.* at 102–03.

As constitutional authority for the move, he claimed that an insurrection had broken out in Kentucky.[150] Taylor had 30 soldiers guard his wife and children in the governor's mansion and 500 guard him while he was on the capitol's grounds to prevent a retaliatory assassination attempt.[151]

Democrats attempted to meet at the capitol building and then at an opera house.[152] When state militia refused them entrance, Democrats snuck into a hotel, called a legislative session to order, and then declared Goebel the rightful governor.[153] Goebel survived long enough to take the oath of office before expiring from his wounds.[154]

Taylor reacted by suing to prevent Goebel's lieutenant governor, J.C.W. Beckham, from becoming governor and pursued the case all the way to the U.S. Supreme Court.[155] The Court ruled against him, finding in part that Taylor's claim that the legislature had deprived Kentucky voters of a "republican form of government" as promised by the U.S. Constitution was a "political question."[156] Taylor eventually fled to Indiana.[157] If you ever wondered what it might have looked like for the 2020 election to spiral even further out of control, you need wonder no more. If that is a sobering thought, here is another: State after state has experienced disputed elections that degenerated into chaos.[158]

The second example is the Dorr Rebellion, which deserves, and has received, book length treatment.[159] I provide a brief sketch here to help illustrate how states can fall into constitutional crisis. By 1841, Rhode Island remained the only state in the Union that had not adopted a constitution; it continued to operate under a charter granted by King Charles II.[160] A majority of the state's white men could not vote because they did not own sufficient property,[161] even though

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150 *Id.* at 103.

151 *Id.*

152 *Id.* at 103–04.

153 *Id.* at 104.

154 *Id.*

155 *See* Taylor v. Beckham, 178 U.S. 548, 560–61 (1900) (reviewing writ of error against lower court decision declaring Beckham to be entitled to the office of Kentucky governor).

156 *See id.* at 559, 567.

157 Nicholas C. Burckel, *From Beckham to McCreary: The Progressive Record of Kentucky Governors*, 76 Reg. Ky. Hist. Soc'y. 285, 288 (1978).

158 *See generally* Foley, *supra* note 139 (giving countless examples of disputed elections over the centuries).

159 *See generally* Chaput, *supra* note 73 (providing a historical account of Dorr's Rebellion).

160 *See id.* at 2–3 (noting that up until the contested adoption of a constitution in 1841, Rhode Island was governed by the 1663 Charter of King Charles II, despite eleven other colonies adopting new constitutions during the Revolution). *See generally* Charter of R.I. and Providence Plantations of 1663.

161 Chaput, *supra* note 73, at 3.

universal white male suffrage was becoming the norm nationwide.[162] In addition, the legislature was badly malapportioned with relatively sparsely inhabited places receiving more representation than rapidly growing ones like Providence.[163] Reformers had tried and failed to draft a constitution to address these grievances.[164] In 1840, they formed the Rhode Island Suffrage Association and in the subsequent year called a constitutional convention, elected delegates, and proceeded to draft a constitution, all without the legislature's approval.[165] The so-called "People's Constitution" guaranteed white men the right to vote, more fairly apportioned the legislature, and adopted measures to secure fair elections such as requiring secret ballots.[166] Perhaps most importantly, it recognized, as most other state constitutions do—to be sure, in varied language—to this day, that:

> All political power and sovereignty are originally vested in, and of right belong to the People. All free governments are founded in their authority, and are established for the greatest good of the whole number. The People have therefore an inalienable and indefeasible right, in their original, sovereign and unlimited capacity, to ordain and institute government, and, in the same capacity, to alter, reform, or totally change the same, whenever their safety or happiness requires.[167]

The Suffrage Association even held an unsanctioned ratification vote where 13,944 voted in favor of the new constitution and only 52 voted against.[168] This meant that, although those loyal to the charter authorities

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162 *Id.* at 3; Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. Early Republic 219, 248 (2013) (stating that by 1828, "overall the United States was already a functioning mass democracy for white males, and in many states substantially had been for some considerable time before the rise to political prominence of Andrew Jackson").

163 *See* William M. Wiecek, *"A Peculiar Conservatism" and the Dorr Rebellion: Constitutional Clash in Jacksonian America*, 22 Am. J. of Legal Hist. 237, 241 (1978) (commenting that, by 1840, "[t]he apportionment of the lower house [in Rhode Island] was rigid: each town, no matter what its population, sent two representatives, except that Providence, Portsmouth, and Warwick sent four and Newport six").

164 *See Rhode-Island Convention*, Newport Mercury, Sept. 13, 1834, at 2 (reporting that a convention assembled to reform, among other topics, apportionment of representatives and the right to suffrage but that "no decision was had").

165 *See* Chaput, *supra* note 73, at 51, 53–54 (describing the Rhode Island Suffrage Association's attempts to thwart the Landholders' Convention sponsored by the General Assembly by calling for a separate constitutional convention, selecting their own delegates, and declaring that members would "carry into effect a new constitution").

166 *See* Const. of the State of R.I. and Providence Plantations of 1841, art. II, §§ 1, 6–8 (granting all white male citizens of age suffrage and prescribing all votes to be anonymous); *id.* at art. V, §§ 1–4 (establishing new apportionment scheme for House of Representatives); *id.* at art. VI, §§ 1–2 (establishing new apportionment scheme for Senatorial Districts).

167 *Id.* at art. I, § 3.

168 Chaput, *supra* note 73, at 76–77.

boycotted the vote, even a majority of those enfranchised under the restrictive charter had supported ratification.[169] In spite of continued opposition from authorities, People's Constitution supporters held elections for assorted offices, and chose Thomas Dorr for governor.[170]

Neither side was willing to give way. Both sides appealed to the federal government for support[171] and Dorr led a failed attack on a state armory building before fleeing the state.[172] Newspapers nationwide devoted considerable space to covering the Dorr Rebellion's events.[173] Eventually, Dorr became the first American convicted of treason against a state[174]—an exclusive club that later counted John Brown among its ranks.[175]

Why bring up these two crises in particular? Because they both speak to contemporary risks too few Americans appreciate. The events of January 6, 2021, and subsequent debates about whether President Trump was disqualified from office for engaging in an "insurrection" demonstrate danger around disputed elections, even where the result is not particularly close.[176] As we consider how events might have spiraled even more out of control on that day, it would be wise to reflect on the fact that events bearing important similarities to January 6, 2021, have happened repeatedly at the state level throughout our history. Kentucky shows us that this could even lead to political assassinations. Scholars could do a great service by studying the history of election disputes at the state level and helping us design constitutional safeguards to avoid the worst outcomes. Importantly, there have been recent signs Americans are willing to engage in political violence. In Oregon in 2020, residents protesting measures to combat the spread of COVID-19 made their way into the state capitol building and used bear spray and chemicals on

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169 *See id.* at 77 (noting that the votes for the People's Constitution included a majority of freeholders).

170 *See id.* at 79 (describing Dorr's efforts to assemble "the People's ticket" for April 1842 elections and eventually running unopposed for governor on the ticket).

171 *See id.* at 87 (noting that, shortly after the Charter authorities made their way to D.C. to petition for federal intervention, the Suffrage Association sought an audience with President John Tyler for same).

172 *See* Charles Coffin Jewett, The Close of the Late Rebellion, in Rhode-Island: An Extract from a Letter by a Massachusetts Man Resident in Providence 8–11 (1842).

173 *See, e.g.*, *Very Important from Rhode Island—Rebellion Probably Put Down Without Bloodshed*, N.Y. Courier & Enquirer, May 20, 1842, *reprinted in* Augusta Daily Chron. & Sentinel, May 24, 1842, at 2 (relating the events of Dorr's Rebellion up to that time).

174 Erik J. Chaput, *The "Rhode Island Question" on Trial: The 1844 Treason Trial of Thomas Dorr*, 11 Am. Nineteenth Century Hist. 205, 209 (2010).

175 J. Taylor McConkie, *State Treason: The History and Validity of Treason Against Individual States*, 101 Ky. L.J. 281, 300 (2012–13).

176 *See Presidential Results*, CNN, https://www.cnn.com/election/2020/results/president [https://perma.cc/LT3X-8JPH] (showing final results of 2020 Presidential election with 306 electoral votes for Biden and 232 electoral votes for Trump).

officers.[177] Later that same day, protestors armed with guns attempted to break glass to force their way into the state capitol building.[178] Michigan residents angered by Governor Gretchen Whitmer's actions to contain COVID-19 conspired to kidnap her.[179] I worry that we will see similar incidents in the near future.

As noted earlier, in the context of abortion, we are having a national discussion about how much control institutions should have over constitutional change and how to proceed when a legislative majority is out of sync with a popular majority on a divisive issue.[180] That conversation ties into a larger discussion about how much we trust popular majorities and how expansive a vision of popular sovereignty we hold. Adding to the difficulty, we have to consider how our views of popular sovereignty and popular control of government interact with deeply held views of "life" and "liberty." Everything from the drawing of state legislative districts to permissible methods of constitutional change is implicated in that discussion.[181] The Dorr Rebellion illustrates that frustrated popular majorities who cannot achieve desired policy outcomes through the legally prescribed political process may eventually give up on it. But that does not mean popular majorities will give up on the pursuit of change. Instead, popular majorities could choose to work for change on the battlefield instead of at the ballot box. Scholars of state constitutions can provide the American people a valuable service by helping them think through all of the angles in our current debate about state constitutions and abortion, and by developing insight and then providing guidance on ways to structure state constitutions to avoid Dorr Rebellions.

At first, when I tell you there is a risk of disenchanted state residents drafting a new state constitution without legislative approval and then

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[177] Sara Cline, *Tensions Rise Inside and Outside of Oregon's Capitol*, A.P. News (Dec. 21, 2020, 9:59 PM), https://apnews.com/article/wildfires-coronavirus-pandemic-oregon-fires-salem-fea5a123958fd88f5e0da4d313bf4c3a [https://perma.cc/8CS8-5KCW].

[178] *Id*.

[179] Arpan Lobo, *3 Years After Plot to Kidnap Gov. Gretchen Whitmer, Here Are the Trial Outcomes, Verdicts*, Detroit Free Press (Sept. 18, 2023, 3:38 PM), https://www.freep.com/story/news/local/michigan/2023/09/18/whitmer-kidnapping-trial-verdict-guilty-acquitted/70889492007 [https://perma.cc/AFT5-TDYX].

[180] *See supra* notes 26–27 and accompanying text (discussing how states with legislatures who wish to ban abortion should consider altering the processes for amending a state constitution).

[181] *See* Boyd, *supra* note 26 (discussing one state's attempt to raise the voting threshold for amendment passage from a simple majority to a sixty percent supermajority); David A. Lieb, *Abortion Ruling Puts Spotlight on Gerrymandered Legislatures*, PBS (July 3, 2022, 12:30 PM), https://www.pbs.org/newshour/politics/abortion-ruling-puts-spotlight-on-gerrymandered-legislatures [https://perma.cc/D4G4-ARNL] (discussing gerrymandering in the context of abortion disputes).

seeking to put it in place by force, your instinct might be "that'll never happen." Just a few years ago I would have greeted a prediction that a mob would break into the Capitol building trying to disrupt the peaceful transition of power and that the Supreme Court would be forced to take arguments that a former president was an insurrectionist seriously with similar skepticism. While we are all assessing risks to the stability of our constitutional system that we would once have been inclined to dismiss, let's consider all of them. Studying state constitutions gives you a unique opportunity to help do that.

C. Saving American Democracy

The survival of democracy is not guaranteed. Perhaps no one better understood that truth than Robert Smalls. Born into slavery in South Carolina, Smalls managed to escape to freedom and then returned to his home state.[182] He participated in drafting South Carolina's 1868 Constitution[183] that allowed men of all races to vote, guaranteed "free and open" elections, that all citizens had "an equal right" to elect officials, and that elections should be free from "power, bribery, tumult or improper conduct."[184] South Carolina white supremacists formed two terrorist organizations to fight South Carolina's new constitutional order.[185] They threatened violence to suppress Black votes and committed fraud to prevail in elections.[186] Just twenty-seven years after Smalls helped turn South Carolina into something resembling what we would call a democracy, he appeared at South Carolina's 1895 convention that undid the progress.[187]

The handful of Black delegates were called racial slurs[188] and the constitution the convention produced eliminated Black involvement

182 *See* Tim White*, Robert Smalls: From Slave to War Hero, Entrepreneur, and Congressman*, Objective Standard (Jan. 31, 2020), https://theobjectivestandard.com/2020/01/robert-smalls-from-slave-to-war-hero-entrepreneur-and-congressman [https://perma.cc/GYC2-LFP7] (discussing Small's years as a slave, his efforts to gain freedom, and his career in the military and in South Carolina after resigning from the military).

183 *See* J. Woodruff, Proceedings of the Constitutional Convention of South Carolina, Held at Charleston, S.C., Beginning January 14th and Ending March 17, 1868, at 6 (1868) (listing Smalls as a delegate from Beaufort).

184 S.C. Const. of 1868, art. I, § 31–33; *id.* art. VIII, § 2.

185 *See* Francis Butler Simkins & Robert Hilliard Woody, South Carolina During Reconstruction 444–73, 566–69 (1932) (detailing the often violent opposition from the Ku Klux Klan and the Red Shirts in response to the 1868 constitution).

186 *See id*. at 514–15 (noting that many white voters cast multiple votes whereas many Black voters did not vote due to intimidation).

187 *See The Work of the Convention*, Charleston News & Courier, Oct. 27, 1895, at 1 (reporting that Smalls was arguing for Black men's right to vote at the 1895 convention).

188 *Id.*

in politics.[189] Smalls walked out of the convention having experienced a total democratic collapse. And he was far from alone. Blacks throughout the South who had seen new constitutions guarantee their ability to participate in the political process after the Civil War[190] also saw white supremacists succeed in using violence to overthrow the government in Louisiana,[191] Mississippi,[192] and North Carolina[193] before disenfranchising Black voters.

Thankfully, there are no similar efforts afoot—yet. But, this history should teach us not to take democracy's success for granted. And today, democracy is in a vulnerable position. Polls suggest that an alarming number of Americans are skeptical of democracy and open to autocracy—so long, of course, as the autocrat is on their side.[194] Polls also suggest that an increasing share of Americans view fellow citizens who vote differently as a threat to the national order and are willing to consider violence to achieve political objectives.[195] There are more mundane but equally dangerous threats to democracy afoot—extreme gerrymandering, intense polarization, and a growing distrust in government institutions chief among them.[196] Does it sound overwrought

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189 *See* D.D. Wallace, *The South Carolina Constitutional Convention of 1895*, 4 Sewanee Rev. 348, 355 (1896) (discussing how South Carolina's 1895 constitution implemented purportedly race-neutral restrictions on the right to vote, but with the aim of "disfranchis[ing] the ignorant negro . . .").

190 *See, e.g.*, Miss. Const. of 1868, art. VII, § 2 (guaranteeing men of all racial backgrounds the right to vote); Ga. Const. of 1868, art. II, § 2 (same); Ark. Const. of 1868, art. VIII, § 2 (same).

191 *See* Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974*, 47 S.U. L. Rev. 1, 22–30 (2019) (discussing racial and political violence against Black people and Republicans before white supremacists recaptured state government and made racial discrimination of various sorts legal again).

192 *See* William Alexander Mabry, *Disfranchisement of the Negro in Mississippi*, 4 J.S. Hist. 318, 318 (1938) (observing that "Political Reconstruction came to an abrupt and violent end in Mississippi in 1875" when white supremacist Democrats regained control of the state government).

193 *See* David Zucchino, Wilmington's Lie: The Murderous Coup of 1898 and the Rise of White Supremacy 329–30 (2020) (discussing insurrection in Wilmington and subsequent imposition of tactics like literacy tests to disenfranchise Black voters in North Carolina).

194 *See* Philip Elliott, *Americans Appear More Amenable to Autocracy in 2024*, Time (Jan. 1, 2024, 7:00 AM), https://time.com/6550686/trump-autocracy-dictator-polling [https://perma.cc/8HLU-WJ6Y] (describing national poll indicating that approximately forty percent of Americans "thought the country was so far afield from normal that it was time for a leader who would break the rules to fix the system").

195 Lauren Irwin, *Poll Finds Support for Exploring Alternatives to Democracy, Using Violence to Stop Opponents*, Hill (Oct. 18, 2023, 10:48 AM), https://thehill.com/homenews/campaign/4262455-poll-americans-trump-biden-voters-support-alternatives-to-democracy-violence-stop-opponents [https://perma.cc/A9FE-FNEC].

196 *See* Seifter, *supra* note 136, at 2073 (explaining how states can take the lead on addressing partisan gerrymandering, reducing political extremism); Pew Rsch. Ctr., Americans' Views of Government: Decades of Distrust, Enduring Support for Its Role

to express fear that these developments put our democracy at risk of failure? In his inaugural address as governor of California, Ronald Reagan shared profound wisdom we would all do well to consider:

> To a number of us, this is a first and hence a solemn and a momentous occasion, and yet, on the broad page of state and national history, what is taking place here is almost a commonplace routine. We are participating in the orderly transfer of administrative authority by direction of the people. And this is the simple magic of the commonplace routine, which makes it a near miracle to many of the worlds [sic] inhabitants. This continuing fact that the people, by democratic process, can delegate power, and yet retain the custody of it.
>
> Perhaps you and I have lived too long with this miracle to properly be appreciative. Freedom is a fragile thing and it's never more than one generation away from extinction. It is not ours by way of inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people. And those in world history who have known freedom and then lost it have never known it again.[197]

All indications are that our federal institutions are not up to the challenge at this moment. The U.S. Supreme Court has limited power to arrest these developments, and it has refused to use even that power to push back against partisan gerrymandering.[198] In large part because of polarization and gerrymandering, individual members of Congress often lack incentives to secure our democracy; in fact, the incentive is to pander to the forces tearing our country apart to secure reelection.[199] Reforming the U.S. Constitution to address these issues is impossible because (a) it is generally very difficult to amend even in a functional political environment and (b) would require cooperation from the same institutions that are shaped by forces undermining democracy.[200]

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4 (2022), https://www.pewresearch.org/wp-content/uploads/sites/20/2022/06/PP_2022.06.06_views-of-government_REPORT.pdf [https://perma.cc/577U-R3V7] (noting that Americans have sustained distrust against the federal government for nearly two decades).

197 Governor Ronald Reagan, Inaugural Address (Public Ceremony) (Jan. 5, 1967) (transcript available in the Ronald Reagan Presidential Library & Museum), https://www.reaganlibrary.gov/archives/speech/january-5-1967-inaugural-address-public-ceremony [https://perma.cc/X2DY-4Q9U].

198 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019) (treating partisan gerrymandering as a "political question[]").

199 *See* Dana Bash, Abbie Sharpe & Ethan Cohen, *How Gerrymandering Makes the U.S. House Intensely Partisan*, CNN (Jan. 25, 2022), https://www.cnn.com/2022/01/25/politics/gerrymandering-us-house-partisan/index.html [https://perma.cc/L7N4-QF2Z].

200 *See* U.S. Const. art. V (illustrating how difficult it is to amend the U.S. Constitution); Seifter, *supra* note 136, at 2076–78 (discussing why federal institutions, as currently constituted, are unlikely to take the lead on necessary reforms).

That leaves the state level as the most promising arena in which to fight for our democracy.[201] Scholars have identified some potential solutions that would bolster democracy at the state level.[202] But much work remains to be done. Scholars and students have a chance to contribute to this conversation in ways that move the needle. How can we reform the electoral process to promote both participation and confidence in its security and fairness? How can we redesign legislatures so that policy outcomes more closely match policy preferences? How can we ensure that checks and balances actually work as a practical matter? How can we make a state's congressional delegation more accurately reflect the state's partisan makeup? How can we use the political process to diminish partisan polarization rather than supercharge it?

Helping find answers to these questions at the state level will have national benefits. Citizens experiencing a vibrant, healthy democracy at the state level will have higher expectations of our federal institutions, a good impetus for change in and of itself. Perhaps more importantly, more democratic states will necessarily lead to a more democratic federal government. As an example, consider gerrymandering and voting access. States have the primary responsibility for drawing congressional districts and determining who is an eligible voter and how to cast a vote.[203] If states adopt reforms to ensure fair maps and reduce polarization, Congress will be more representative of Americans as a whole and contain more members willing to work together for the common good. In other words, states have the power to enhance democracy at the federal level. Studying state constitutions allows you to participate in such an effort.

IV
A Curriculum and Scholarly Agenda for State Constitutions

Now that I have laid out my vision for why you should study state constitutions and what some benefits of approaching state constitutions with that vision would be, it remains for me to define what it means to "study" state constitutions. Scholars of state constitutional law will

[201] *See* Seifter, *supra* note 136, at 2080 ("So far, I have argued that democratic decline resembles a super wicked problem, and I have argued that solving super wicked problems involves an all-hands-on deck strategy, including the need to start small. All of this suggests that we should turn our gaze to the states.").

[202] *E.g.*, Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 Duke L.J. 275, 348–52 (2022) (proposing interventions in state courts and public framing to safeguard state democracy).

[203] *See* U.S. Const. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]").

specialize in similar ways to scholars of the U.S. Constitution. Some will choose to focus on particular rights provisions or on advocating particular interpretive methods. Others will choose to focus on structure. Students will surely find some aspects of state constitutional law more interesting than others—as is the case in other courses. Three things at a minimum should be true about how both scholars and law students engage with state constitutional law.

First, and most importantly, both scholars and students must avoid studying state constitutions from a reactive posture. In other words, they should not obsess over whether the U.S. Supreme Court has made a bad decision on an issue and then decide to study state constitutions to see if they can get a different result at the state level. Instead, they should approach state constitutional law as an intellectually rewarding subject that deserves study for its own sake. Put aside either your frustration or joy with the current Supreme Court's rulings in particular cases and think about all the intellectual delights that could await from exploring 250 years of state constitutional history and what state constitutions say about us today and could say about us tomorrow.

Second, classes must emphasize drafting and revising constitutions. Students need to be prepared to think about how to translate their ideas of popular sovereignty and "liberty" into a constitutional text. They also need to understand the upsides and downsides of the different ways states permit constitutional change and reflect on how they might improve the amendment and drafting process. Scholars teaching courses in state constitutional law must be prepared to hone and teach these skills, even if they are more interested in constitutional interpretation.

Finally, scholars and students should not focus on state constitutions writ large to the total exclusion of their own state constitution. Whether you are a student or a scholar, I urge you to study in depth your own state constitution and its history. That might seem like a small request, but I am convinced it could have a large impact. One of the highest services a scholar in Michigan could provide is to help Michigan citizens, activists, and policymakers think through how and when to change the Michigan Constitution and offer rigorous, intellectually honest guidance to courts about how to interpret the Michigan Constitution. This would allow for the sort of "real world" impact most scholars yearn for. Taking a class on the Michigan Constitution today can help a law student in Michigan contribute to these endeavors tomorrow. This would foster a virtuous cycle. The Michigan Constitution would receive more visibility and engagement, leading to more interest and scholarship about it, resulting in better interpretations and revisions of it, and ultimately a superior product that deserves increased respect.

Now imagine if scholars and students did that in all fifty states. Americans who better understand and appreciate their state constitution would be in a better position to see why state constitutional law is generally important. Scholars who wish to make observations about state constitutional law as a whole would have richer data sets with which to do so. The country as a whole would be better off.

Conclusion

I have already explained how much state constitutions have helped define what our country has become and how they present an unrivaled opportunity to define it going forward. I have further explained how students and scholars committed to giving them the attention I believe they deserve will benefit us. Permit me to add a final point. There have been five great eras of state constitutional drafting and revision: the Founding Era, the Age of Jackson, Civil War and Reconstruction, the Progressive Era, and the 1960s.[204] Partly because of the U.S. Supreme Court sending important issues of rights and structure to the states,[205] and partly because we are dealing with social and technological upheavals as great as those faced by previous generations,[206] we are due for another era of constitution drafting and revision. If history is any guide, that era will further define our national identity in ways we cannot foresee. So here is my plea and my advice: Start preparing now so that you are ready to help with this important work.

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204 *See* Dinan, *supra* note 82, at 9–10 (2006).

205 *See supra* Introduction (describing the Supreme Court's recent retreat from an expansive view of the U.S. Constitution and the resulting increasing role of state courts in determining issues like the right to abortion and partisan gerrymandering).

206 *See* Mustafa Suleyman, *How the AI Revolution Will Reshape the World*, Time (Sept. 1, 2023, 7:05 AM), https://time.com/6310115/ai-revolution-reshape-the-world [https://perma.cc/4GN5-ZU73] (observing that AI-centered new technologies will lead to the "greatest redistribution of power in history").