

The Right to Amend State Constitutions

Jessica Bulman-Pozen & Miriam Seifter

ABSTRACT. This Essay explores the people’s right to amend state constitutions and threats to that right today. It explains how democratic proportionality review can help courts distinguish unconstitutional infringement of the right from legitimate regulation. More broadly, the Essay considers the distinctive state constitutional architecture that popular amendment illuminates.

INTRODUCTION

Nearly fifty years ago, Justice William J. Brennan, Jr. responded to the Burger Court’s weakening of federal constitutional rights by proposing a turn to the states. He celebrated state constitutions as “a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”¹ Today, as the Roberts Court weakens rights guarantees that even the Burger and Rehnquist Courts reaffirmed, commentators are again looking to state constitutional rights.

There remains much to be gained from attending to state constitutions, as Justice Brennan counseled, but we should not do so only in the way he advised or in the manner most attendant “new judicial federalism” scholarship has suggested. In keeping with Brennan’s recognition that “state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased,”² courts and scholars have focused on discrete clauses found in both state and federal constitutions.³ But this targeted approach

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. *Id.* at 495.

3. See, e.g., ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 113-231 (cavassing the new judicial federalism doctrine and scholarship).

overlooks significant state provisions and obscures fundamental differences between state and federal constitutions.

In this Essay, we focus on a state constitutional right that has no federal analogue and that both informs and illuminates the distinctive state tradition: the right to amend the state constitution. In contrast to the relatively static Federal Constitution, state founding documents have been regularly transformed since the eighteenth century. Constitutional amendment underlies state constitutions' particular approach to rights, as thousands of amendments have generated the balances these documents strike between individual liberty and collective welfare, government limits, and government obligations.⁴

Less appreciated, amendment is itself an important state constitutional right. In forty-nine states, the people must vote directly on proposed amendments, and eighteen states further recognize the people's right to adopt amendments by constitutional initiative. Together with other democratic rights that appear in state constitutions but not the federal charter—from affirmative rights to vote to rights to alter and abolish government—the right to amend recognizes the people's sovereignty as an active, ongoing commitment. It is a cornerstone of state constitutions.

Today, the right to amend is under attack. Across the country, state legislatures are imposing signature requirements for popular initiatives that would make the ballot-qualification process nearly impossible; introducing supermajority approval requirements; and adopting deadlines, mandatory reviews, and wording requirements for popular initiatives that do not apply to amendments the legislature itself proposes.⁵ Many of these burdens on the popular-initiative process cannot be viewed as good-government reforms. Indeed, some legislators have been quite explicit about their desire to limit the amendment power or to block particular measures supported by the people but not their representatives—the very divergence that inspired adoption of the constitutional initiative to privilege the people.⁶

This Essay describes the right to amend state constitutions, canvasses current threats, and considers both practical and theoretical implications. Part I begins by characterizing the state constitutional amendment right and then explores the constitutional architecture this right illuminates. In federal constitutional law, power is the purview of government, and rights are held by

4. We explore the distinctive state constitutional approach to rights in Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights & Democratic Proportionality*, 123 COLUM. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4430913> [<https://perma.cc/5PK7-XMT3>]. For a comprehensive treatment of state constitutional amendment, see JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* (2018).

5. See *infra* Part II.

6. See *infra* Section III.B.1.

individuals. Moreover, rights are commonly understood to protect minority interests from majority excesses. But because they are committed to active popular sovereignty,⁷ state constitutions contain numerous democratic rights – such as the right to amend – that upend familiar federal distinctions. Democratic rights are both sovereign powers that the people reserve to themselves and rights in the archetypal sense that they impose limits on the permissible scope of government action. State constitutions further suggest that the majority’s exercise of its powers may protect, and not only threaten, minority rights. In recent years, for example, popular amendments have advanced the interests of women, people of color, people who lack insurance, individuals convicted of criminal offenses, and more against hostile state legislatures.

These popular amendments have generated fierce backlash from state legislatures, and Part II turns to ongoing attacks on the right to amend. Despite widespread awareness of state legislative threats to rights such as abortion and voting, the threat to popular amendment as such has gone largely unnoticed – even when it is deployed to target reproductive rights or the franchise. When they are discussed at all, attacks on the right to amend are generally cast as legislative maneuvering, or dirty politics,⁸ but they are potential constitutional violations as well.

Accordingly, Part III considers how courts and others charged with implementing state constitutions should evaluate laws regulating popular amendment. It describes the adjudicative framework of democratic proportionality and its application to the right to amend. Democratic proportionality review, we argue, can help courts distinguish valid regulation of the initiative process from subversion of it.

As the right to amend highlights, state constitutions enable people to wield power at the same time as they enjoy rights, and they point to the possibility of popular majorities acting in service of both democracy and minority protection. This is the very prospect that many state legislatures are working to extinguish and that democratic proportionality review can help to preserve.

7. See generally Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 881-87, 896-98 (2021) (describing the state constitutional commitment to popular sovereignty as both popular authorship and continuous present consent, and contrasting this commitment with the federal constitutional approach).

8. See, e.g., Kate Zernike & Michael Wines, *Losing Ballot Issues on Abortion, G.O.P. Now Tries to Keep Them Off the Ballot*, N.Y. TIMES (Apr. 23, 2023), <https://www.nytimes.com/2023/04/23/us/republicans-abortion-voting.html> [<https://perma.cc/WQ2H-WNL8>].

I. STATE CONSTITUTIONAL AMENDMENT

To understand state constitutional rights, we must first consider state constitutions on their own terms. Looking through the familiar federal lens has obscured state constitutions' distinctive approach to rights, power, and popular sovereignty. Note just a few salient differences.⁹ In contrast to the Federal Constitution's spare enumeration of rights, state constitutions guarantee abundant rights. In contrast to the Federal Constitution's exclusively negative rights, state constitutions recognize positive rights and affirmative government duties. In contrast to the Federal Constitution's neglect of community, state constitutions temper strong rights with attention to communal welfare. And in contrast to the Federal Constitution's focus on individual liberties, state constitutions treat rights as a means of guaranteeing democracy as well as personal freedom.

As we have described elsewhere, the state constitutional rights tradition that emerges from these and related features is one that prizes both individual and collective self-determination.¹⁰ State constitutions seek at once to guarantee the ability of individuals to direct their lives, free from arbitrary interference or neglect, and the ability of the people to direct government so that it remains responsive to the popular will. They propose, moreover, that such individual and collective self-determination can be mutually reinforcing. State constitutions treat individual rights as vehicles of popular self-rule, and, in turn, they rely on the collective will to protect individual rights.

Constitutional amendment lies at the heart of the distinctive state tradition. First, the practice of regular constitutional amendment has shaped the balances state constitutions strike among individual, community, and government. In broad strokes, this point is a familiar one: Amendments have generated most of the state constitutional rights we enjoy today. While roughly 12,000 amendments have been proposed to both the U.S. Constitution and the fifty state constitutions, state constitutions have been amended more than 7,000 times for the U.S. Constitution's twenty-seven.¹¹ These amendments have continually reshaped states' founding documents, but a persistent feature is that many amendments have emphasized popular control over government as a means of guaranteeing rights.¹² From nineteenth-century reforms that sought to combat

9. We explore these differences at greater length in Bulman-Pozen & Seifter, *supra* note 4.

10. *See id.* at 65.

11. DINAN, *supra* note 4, at 12-13, 19-20; COUNCIL OF STATE GOV'TS, BOOK OF THE STATES 5 tbl.1.3, (2021 ed.), https://issuu.com/csg.publications/docs/bos_2021_issuu [<https://perma.cc/96Y4-DRMM>].

12. *See generally* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853 (2022) [hereinafter Marshfield, *Misunderstood Rights*] (arguing that, while federal constitutional rights constrain popular majorities, state constitutional rights empower

government capture by the wealthy¹³ to twentieth-century positive rights concerning welfare, health, the environment, and more, state constitutional amendments have recognized new individual rights at the same time as they have insisted upon the democratic majority's control over government to protect these rights.¹⁴ In the state self-determination tradition, rights and self-government travel together.

The second observation is less appreciated: Amendment is itself a core democratic right underlying the project of constitutional self-determination. It is to this point that we now turn.

A. Amendment Rights

If the state constitutions we live with today are constitutions made by popular amendment, so too is amendment itself a constitutional right. At first glance, describing a “right to amend” may appear odd, given the default federal lens for constitutional analysis. But state constitutions cast as rights a large number of matters concerning the composition and operation of government and, above all, the role of people in directing it.¹⁵ To facilitate active popular sovereignty, every state constitution guarantees an affirmative right to vote,¹⁶ and the vast majority recognize numerous other democratic rights, from the right to

popular majorities to control government, so that individual rights are always subject to democratic revision).

13. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94-135 (1998); James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 820 (1991).
14. See Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523 (2010); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1697-99 (2014).
15. See *infra* Section I.B (considering the rights/power dichotomy in federal versus state constitutional law).
16. ALA. CONST. art. VIII, § 177; ALASKA CONST. art. V, § 1; ARIZ. CONST. art. VII, § 2; ARK. CONST. art. 3, § 1; CAL. CONST. art. II, § 2; COLO. CONST. art. VII, § 1; CONN. CONST. art. VI, § 1; DEL. CONST. art. V, § 2; FLA. CONST. art. VI, § 2; GA. CONST. art. II, § 1; HAW. CONST. art. II, § 1; IDAHO CONST. art. VI, § 2; ILL. CONST. art. III, § 1; IND. CONST. art. 2, § 2; IOWA CONST. art. II, § 1; KAN. CONST. art. 5, § 1; KY. CONST. § 145; LA. CONST. art. I, § 10; ME. CONST. art. II, § 1; MD. CONST. art. I, § 1; MASS. CONST. Declaration of Rights, art. IX; MICH. CONST. art. II, § 1; MINN. CONST. art. VII, § 1; MISS. CONST. art. 12, § 241; MO. CONST. art. VIII, § 2; MONT. CONST. art. IV, § 2; NEB. CONST. art. I, § 22; NEV. CONST. art. 2, § 1; N.H. CONST. pt. 1, art. 11; N.J. CONST. art. II, § 3; N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 1; N.C. CONST. art. VI, § 1; N.D. CONST. art. II, § 1; OHIO CONST. art. V, § 1; OKLA. CONST. art. 3, § 1; OR. CONST. art. II, § 2; PA. CONST. art. VII, § 1; R.I. CONST. art. II, § 1; S.C. CONST. art. I, § 5; S.D. CONST. art. VII, § 2; TENN. CONST. art. IV, § 1; TEX. CONST. art. VI, § 2; UTAH CONST. art. IV, § 2; VT. CONST. ch. II, § 42; VA. CONST. art. II, § 1; WASH. CONST. art. VI, § 1; W. VA. CONST. art. IV, § 1; WIS. CONST. art. III, § 1; WYO. CONST. art. 6, § 2.

participate in free and equal elections, to the right to alter or abolish government.¹⁷ These guarantees have been central to the state constitutional project of self-governance from the start.

Across the states, the right to amend assumes two main forms. First, in forty-nine states, the right to amend governs constitutional amendments that are proposed by the legislature for popular consideration. Every state but Delaware requires the people to vote on legislatively referred amendments.¹⁸ In those states that possess the constitutional initiative, legislative referral is a complement to amendments proposed by the people; in other states, it is the only established route to amendment other than convention. Although state constitutions without the initiative provide a less comprehensive role for the people, these constitutions nonetheless make clear that the popular role in reviewing proposed amendments is not up to legislative discretion but is constitutionally guaranteed.¹⁹

The people's right to vote on legislatively referred amendments emerges from reading amendment-specific clauses together with express democratic rights such as the right to vote and the reservation of all political power to the people.²⁰ As the Kansas Supreme Court has recognized, for example,

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

18. COUNCIL OF STATE GOV'TS, *supra* note 11, at 8 tbl.1.4.

19. Contrast this mandatory role for the people in state-level ratification with the far more limited popular role in ratifying federal constitutional amendments. There is no federal constitutional guarantee of direct popular involvement, and there has been only one federal amendment ratified by state conventions (rather than state legislatures) in U.S. history. See David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2358-59 (2021).

20. Forty-nine constitutions include an express commitment to popular sovereignty, most commonly stating that "all political power is inherent in the people." ALA. CONST. art. I, § 2; ALASKA CONST. art. I, § 2; ARIZ. CONST. art. II, § 2; ARK. CONST. art. II, § 1; CAL. CONST. art. II, § 1; CONN. CONST. art. I, § 2; FLA. CONST. art. I, § 1; IDAHO CONST. art. I, § 2; IOWA CONST. art. I, § 2; KAN. CONST. bill rts., § 2; KY. CONST. § 4; MICH. CONST. art. I, § 1; NEV. CONST. art. I, § 2; N.J. CONST. art. I, § 2; N.D. CONST. art. I, § 2; OHIO CONST. art. I, § 2; OKLA. CONST. art. II, § 1; S.D. CONST. art. VI, § 26; TEX. CONST. art. I, § 2; UTAH CONST. art. I, § 2; WASH. CONST. art. I, § 1. Other states provide slightly different formulations, including that "all political power is vested in and derived from the people" or that "all power is inherent in

[I]t is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right . . . of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted.²¹

Courts have also recognized more specific entailments of the right to vote on legislatively referred amendments, including the “electorate[s] inviolable right to be informed of all proposed constitutional amendments upon which it will pass judgment.”²² Because the people are always reviewing the legislature's proposals, the relevant right might often better be described as a right *not* to amend: Insofar as the legislature wishes to amend the state constitution, it is the people's prerogative to reject such proposals.²³

the people.” IND. CONST. art. I, § 1; ME. CONST. art. I, § 2; OR. CONST. art. I, § 1; PA. CONST. art. I, § 2; TENN. CONST. art. I, § 1; WYO. CONST. art. I, § 1; MINN. CONST. art. I, § 1; VT. CONST. ch. I, art. VI; COLO. CONST. art. II, § 1; MISS. CONST. art. III, § 5; MO. CONST. art. I, § 1; MONT. CONST. art. II, § 1; N.M. CONST. art. II, § 2; N.C. CONST. art. I, § 2; S.C. CONST. art. I, § 1; MASS. CONST. declaration rts., art. V; N.H. CONST. pt. I, art. VIII; VA. CONST. art. I, § 2; W. VA. CONST. art. III, § 2; GA. CONST. art. I, § 2; LA. CONST. art. I, § 1; *see* MD. CONST. Declaration of Rights, art. I; ILL. CONST. art. I, § 1; NEB. CONST. art. I, § 1; WIS. CONST. art. I, § 1. DEL. CONST. pmb.; R.I. CONST. art. I, § 1. Every state affirmatively guarantees the right to vote. *See supra* note 16. *See generally* Bulman-Pozen & Seifter, *supra* note 4 (addressing the importance of reading state constitutional clauses together).

21. Moore v. Shanahan, 486 P.2d 506, 511 (Kan. 1971) (“Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right [to vote on amendments to the Constitution] strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized.”); Gray v. Golden, 89 So.2d 785, 790 (Fla. 1956) (“[W]e are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they [k]eep within the confines of the Federal Constitution.”).
22. Fox v. Grayson, 317 S.W.3d 1, 18 (Ky. 2010) (“[Section] 256 of our Kentucky Constitution provides that after appropriate passage of a proposed amendment by the General Assembly, ‘such proposed amendment or amendments shall be submitted to the voters of the State for their ratification or rejection . . .’ Obviously, therefore, the will of the people regarding constitutional amendments is paramount . . . [T]he electorate has an inviolable right to be informed of all proposed constitutional amendments upon which it will pass judgment . . .”).
23. When the people reject a legislatively referred amendment, their decision may have important interpretive consequences. For example, after the Florida Supreme Court recognized that the state constitutional right to privacy includes a right to abortion, the legislature proposed a constitutional amendment to overturn that decision and instead interpret state abortion rights in lockstep with the Federal Constitution. The decision by Florida's citizens to reject that amendment offers strong support for the state court's abortion-protective interpretation. *See Florida Amendment 6, State Constitution Interpretation and Prohibit Public Funds for Abortions Amendment (2012)*, BALLOTPEdia, [https://ballotpedia.org/Florida_Amendment_6_State_Constitution_Interpretation_and_Prohibit_Public_Funds_for_Abortions_Amendment_\(2012\)](https://ballotpedia.org/Florida_Amendment_6_State_Constitution_Interpretation_and_Prohibit_Public_Funds_for_Abortions_Amendment_(2012)) [https://perma.cc/F8BZ-BEJT].

Second, and our focus in this Essay, a more expansive and potent right to amend is found in the eighteen state constitutions that guarantee the people's right to amend by proposing as well as ratifying amendments. The constitutions of Arizona,²⁴ Arkansas,²⁵ California,²⁶ Colorado,²⁷ Florida,²⁸ Illinois,²⁹

-
24. ARIZ. CONST. art. IV, pt. 1, § 1 (“[T]he people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . .”).
 25. ARK. CONST. art. V, § 1 (“[T]he people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly . . .”).
 26. CAL. CONST. art. II, § 8 (“The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.”).
 27. COLO. CONST. art. V, § 1 (“[T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly . . .”).
 28. FLA. CONST. art. XI, § 3 (“The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . .”).
 29. ILL. CONST. art. XIV, § 3 (“Amendments to Article IV of this Constitution may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election.”). In Illinois, initiatives can only be used to amend Article IV of the constitution, which concerns the state legislature. *Id.*

Massachusetts,³⁰ Michigan,³¹ Mississippi,³² Missouri,³³ Montana,³⁴ Nebraska,³⁵ Nevada,³⁶ North Dakota,³⁷ Ohio,³⁸ Oklahoma,³⁹ Oregon,⁴⁰ and South Dakota⁴¹ all recognize the people’s right to adopt amendments by initiative. These provisions were added to state constitutions in the twentieth century, beginning in the Progressive Era when a strong movement for direct democracy emerged from

-
30. MASS. CONST. amend. XLVIII (“[T]he people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection . . .”). In Massachusetts, initiated measures must be approved at two legislative sessions before being submitted to the electorate for ratification. *Id.*
 31. MICH. CONST. art. XII, § 2 (“Amendments may be proposed to this constitution by petition of the registered electors of this state.”).
 32. MISS. CONST. art. XV, § 273 (“The people reserve unto themselves the power to propose and enact constitutional amendments by initiative.”). The provision states that, for an initiative to be placed on the ballot, “signatures of the qualified electors from any congressional district shall not exceed one-fifth (1/5) of the total number of signatures required to qualify an initiative petition for placement upon the ballot.” *Id.* In a deeply misguided 2021 decision concerning an initiated measure approved by voters legalizing medical marijuana, the Mississippi Supreme Court held that, because the state’s congressional districts had been reduced to four following the 2000 census, the initiative process outlined in the state constitution had been effectively nullified. *Butler v. Watson*, 330 So. 3d 599, 607-08 (Miss. 2021).
 33. MO. CONST. art. III, § 49 (“The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly . . .”).
 34. MONT. CONST. art. XIV, § 9 (“The people may also propose constitutional amendments by initiative.”).
 35. NEB. CONST. art. III, § 1 (“The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative.”).
 36. NEV. CONST. art. XIX, § 2 (“[T]he people reserve to themselves the power to propose, by initiative petition, statutes and amendments to statutes and amendments to this constitution, and to enact or reject them at the polls.”).
 37. N.D. CONST. art. III, § 1 (“[T]he people reserve the power . . . to propose and adopt constitutional amendments by the initiative . . .”).
 38. OHIO CONST. art. II, § 1 (“[T]he people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote . . .”).
 39. OKLA. CONST. art. V, § 1 (“[T]he people reserve to themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature . . .”).
 40. OR. CONST. art. IV, § 1(2)(a) (“The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.”).
 41. S.D. CONST. art. XXIII, § 1 (“Amendments to this Constitution may be proposed by initiative . . .”).

concerns about unrepresentative government.⁴² After Oregon pioneered the initiative in 1902, twelve states adopted it between 1907 and 1918, and four more followed suit in the late 1960s and early 1970s.⁴³

Today, such constitutional initiative provisions are a concrete expression of the state constitutional commitment to popular sovereignty. Complementing the longstanding recognition that “all political power is inherent in the people,”⁴⁴ these provisions generally state that “the people reserve for themselves the power” to propose constitutional amendments, notwithstanding grants of law-making authority to the legislature. Operating in tandem with popular sovereignty clauses and democratic rights such as the franchise, the right to amend guarantees the people’s ability to author and continually revise their fundamental law.

Already, state courts have recognized the people’s right to amend their constitutions (even if they have not always robustly enforced this right). Notwithstanding the language of “power” in most of the relevant provisions,⁴⁵ courts in all but one initiative state describe amendment as a “right.”⁴⁶ State courts also

42. John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Amendment Processes*, 69 ARK. L. REV. 283, 289 (2016).

43. *Id.* Mississippi first adopted the initiative in 1914, the state supreme court invalidated it in 1922, the state re-enacted the initiative in 1992, and now the court has again effectively nullified it. *Id.*; *supra* note 32.

44. *See supra* note 20 (collecting provisions).

45. *See supra* notes 24-41. Only Illinois’s amendment provision does not refer to amendment as a right or power. *See* ILL. CONST. art. 14, § 3 (“Amendments to Article IV of this Constitution may be proposed by a petition . . .”). Arizona’s amendment provision refers to amendment as both a right and power. *See* ARIZ. CONST. art. IV, pt. 1, § 1(1)-(2) (“The first of these reserved powers is the initiative. Under this power . . . fifteen percent [of the qualified electors] shall have the right to propose any amendment to the constitution.”). South Dakota’s amendment provision refers to amendment specifically as a right, *see* S.D. CONST. art. III, § 1, though elsewhere the state constitution refers to the people’s inherent political power, *see* S.D. CONST. art. VI, § 26.

46. Only Mississippi—which also has no operative popular initiative at present, *see supra* note 32—appears to lack case law describing amendment as a right. For examples from the other seventeen popular-initiative states, *see* League of Ariz. Cities & Towns v. Brewer, 146 P.3d 58, 60 (Ariz. 2006); Thurston v. Safe Surgery Ark., 619 S.W.3d 1, 13 (Ark. 2021); Bldg. Indus. Ass’n of S. Cal. v. City of Camarillo, 718 P.2d 68, 74 (Cal. 1986); Colo. Project-Common Cause v. Anderson, 495 P.2d 220, 221, 222 (Colo. 1972); Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956); Hooker v. Ill. State Bd. of Elections, 63 N.E.3d 824, 838 (Ill. 2016); Carney v. Att’y Gen., 850 N.E.2d 521, 531 (Mass. 2006); League of Women Voters v. Sec’y of State, 975 N.W.2d 840, 857 (Mich. 2022); Prentzler v. Carnahan, 366 S.W.3d 557, 559 (Mo. Ct. App. W.D. 2012); State *ex rel.* Mont. Citizens for the Pres. of Citizens’ Rts. v. Waltermire, 729 P.2d 1283, 1285 (Mont. 1986); Hargesheimer v. Gale, 881 N.W.2d 589, 597 (Neb. 2016); We the People Nevada *ex rel.* Angle v. Miller, 192 P.3d 1166, 1174 (Nev. 2008); Zaiser v. Jaeger, 822 N.W.2d 472, 476 (N.D. 2012); State *ex rel.* Ohioans for Secure & Fair Elections v. LaRose, 152 N.E.3d 267, 269 (Ohio 2020); *In re* State Question No. 820, Initiative Petition No. 434, 507 P.3d 1251, 1253 (Okla.

emphasize that amendment is an especially important right. The California Supreme Court, for example, has deemed amendment “one of the most precious rights of our democratic process,”⁴⁷ and the Nebraska Supreme Court has stated that “the right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.”⁴⁸ Courts across the nation similarly indicate that they interpret the initiative right liberally,⁴⁹ treat it as fundamental,⁵⁰ or make every effort to protect it.⁵¹

What should we make of the fact that state constitutions overwhelmingly describe popular amendment as a “power” and state courts overwhelmingly describe it as a “right”? Both less and more, we submit, than it may seem.

B. *Of Rights and Power*

Although state courts seldom explain their pivots between rights and power, the move is well founded. State constitutions dissolve dichotomies that we take for granted at the federal level – in particular, between rights and power.

Federal constitutional law rests on a distinction between structural provisions that recognize the powers of government and rights provisions that protect individuals from exercises of government power.⁵² James Madison famously described individual rights and government power as “two sides of the same coin,” with one beginning where the other ends.⁵³ Even as recent scholarship

2022); *Harisay v. Clarno*, 474 P.3d 378, 383 n.6 (Or. 2020); and *Brendtro v. Nelson*, 720 N.W.2d 670, 675 (S.D. 2006).

47. *Bldg. Indus. Ass’n of S. Cal.*, 718 P.2d at 74 (quoting *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563 (1961)).

48. *Hargesheimer*, 881 N.W.2d at 597.

49. See, e.g., *Ferency v. Sec’y of State*, 297 N.W.2d 544, 550 (Mich. 1980) (“[U]nder a system of government based on grants of power from the people, constitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed.”) (quoting *Kuhn v. Dep’t of Treasury*, 183 N.W.2d 796, 799 (1971)).

50. *Zaiser*, 822 N.W.2d at 476.

51. *We the People Nev.*, 192 P.3d at 1174.

52. See, e.g., Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1849–53 (2019) (chronicling the rise and persistence of the “divide between power and rights” in public law); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1449 (2013) (“Accounts of the Constitution from its inception take pains to stress the difference between rights and structure.”); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1288 (2012) (“A central organizing principle of doctrine, scholarship, and curriculum is the distinction between the ‘structural’ provisions of the Constitution, which create the institutional framework of democratic government, and the ‘rights’ provisions, which place limits on what that government is permitted to do.”).

53. Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 3 (1980) (quoting Letter from James Madison to George Washington (Dec. 5, 1789), in 5 THE WRITINGS OF JAMES MADISON

emphasizes a closer relationship between rights and power, in which voting and political representation may substitute for individual or group protections,⁵⁴ direct exercises of sovereign power remain the purview of government.

In state constitutions, by contrast, the rights-structure boundary is porous, and the people themselves possess both powers and rights. Because these constitutions emphasize the people as active popular sovereigns, not only individuals who must be shielded from government action, they endow the public with authorities as well as protections. From the start, the many democratic rights they have enumerated have sought to ensure popular control over government as much as protection from that government. For example, the earliest state declarations of rights effectuated popular self-government at the same time as they enumerated individual protections. These declarations cast as rights not only safeguards that would come to be included in the Federal Bill of Rights, such as freedom of the press and the right to a jury trial, but also the people's power to control their representatives and direct the operations of government.⁵⁵ Through amendments across the nineteenth and twentieth centuries, including the introduction of direct democracy, state constitutions have continued to prioritize democratic rights, orienting significant rights provisions around maintaining popular control over government.

At the state level, this means that rights and power are closer to the same side of the coin. The people possess powers at the same time as they hold rights, and whether they are properly conceptualized as exercising one or the other frequently depends on context. Rights and powers emerge not as alternatives but as more fluid concepts: When the people act in the first instance, they exercise sovereign power; when the legislature infringes the people's exercise of their sovereign power, the people also have a right that lies against the legislature.

432 (Gaillard Hunt ed. 1904)) (“If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”). Although the Tenth Amendment to the U.S. Constitution speaks of “powers” being “reserved to the States respectively, or to the people,” U.S. CONST. amend. X, there are no affirmative references to popular powers in the U.S. Constitution, an omission that tracks the absence of any mechanisms for direct popular lawmaking.

54. See Blackhawk, *supra* note 52, at 1849 (arguing that Federal Indian law recognizes power rather than rights as “a necessary solution to certain kinds of minority subordination”); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (describing how federalism allows minorities to rule at the state level—an exercise of power that rivals rights guarantees); Levinson, *supra* note 52, at 1288 (arguing that “rights and votes” can both “be used in domains of collective decisionmaking to protect minorities (or other vulnerable groups) from the tyranny of majorities (or other dominant social and political actors)”).
55. *E.g.*, VA. DECLARATION OF RIGHTS OF 1776, ch. I, §§ II-III, VIII, XII; MASS. CONST. pt. I, arts. IV-V, XII, XXI.

In the context of constitutional amendment, this explains why state provisions affirmatively declare the people’s power. Colorado’s typical provision, for example, states that “the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly.”⁵⁶ But it also explains why Colorado courts have properly referred to amendment as a self-executing right, establishing a rule that “[a]ny legislation which directly or indirectly limits, curtails or destroys the rights given by those provisions is invalid as violative of the rights reserved by the people to themselves.”⁵⁷ Amendment may be pursued as a popular power and defended as a right. Because we focus in this Essay on legislative threats, we explore amendment as a right against legislative incursion, while recognizing that amendment is also a power the people retain to change their constitutions.⁵⁸

C. *Majority Rule and Minority Rights*

A second familiar distinction that state constitutions partially dissolve is between majority rule and minority rights. State constitutional amendment rights suggest that majoritarian democracy may be a vehicle for protecting rather than threatening minority interests.

At the federal level, concerns about majorities oppressing minorities have long animated constitutional rights discourse,⁵⁹ and rights are generally understood as guarantees that protect minority interests by removing matters from popular control.⁶⁰ But state constitutions confer rights as a means of protecting

56. COLO. CONST. art. V, § 1(1).

57. *Colo. Project-Common Cause v. Anderson*, 495 P.2d 220, 222 (Colo. 1972).

58. For a suggestion that the state statutory initiative should be analyzed as a power, not a right, see Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 128 (2022). Although we agree with the bulk of Johnstone’s argument, we believe the problems he addresses do not follow from rights analysis per se but rather from federal-style rights analysis—something we have critiqued elsewhere. See Bulman-Pozen & Seifter, *supra* note 4, at 24-33. For instance, the parity principle he advocates (under which the legislature may not place greater burdens on the initiative process than it imposes on its own process) could equally be realized through democratic proportionality review. See *infra* Section III.B.3.

59. See Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 329-30 nn.281-82 (2022) (gathering sources).

60. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.”).

the people, including the popular majority, from government malfeasance.⁶¹ Not only do these constitutions propose “direct popular intervention as a necessary antidote for government recalcitrance,”⁶² but they also suggest that statewide majorities may safeguard minorities from government mistreatment. With government oppression or under-representation as their main focus, state constitutions complicate the assumed relationship between majority rule and minority rights.

The right to amend is a case in point, both offering the people protection against legislatures that would thwart popular majorities and offering a channel for those majorities to protect minority interests as well as majority interests that are not recognized by government. To be clear, we do not suggest that popular majorities can be relied on to protect minorities. There are too many contrary examples, and as Derrick A. Bell, Jr., Erwin Chemerinsky, and others have emphasized, direct democracy (whether constitutional or statutory) may pose distinct risks for people of color, the LGBTQ community, and other minority groups.⁶³

But as courts and commentators have rightly devoted attention to the question of how to constrain amendments that may trench on minority rights, they have neglected the opposite possibility: that popular constitutional amendment may protect minorities from government oppression.⁶⁴ There is no necessary connection between majority rule and minority domination. Indeed, many amendments that have been proposed and adopted in recent years reflect popular majority support for broad liberty and equality rights. These initiatives have responded to discriminatory and repressive government measures by seeking to

61. Marshfield, *Misunderstood Rights*, *supra* note 12, at 859 (“[A]lthough the Federal Bill of Rights may operate as a bulwark against abusive majorities, state bills of rights grew from the belief that extra precautions are necessary to prevent government officials from using their political power to thwart or oppress democratic majorities.”).

62. *Id.*

63. See Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2 (1978) (“[T]he growing reliance on the referendum and initiative poses a threat to individual rights in general and in particular creates a crisis for the rights of racial and other discrete minorities.”); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1702 (2010) (“State constitutions are generally more majoritarian than the United States Constitution because they are easier for the majority to change, such as through the initiative process. Advancing individual liberties and furthering equality is thus inherently more problematic under state constitutions because it puts the rights of the minority more in the hands of the majority.”).

64. See, e.g., Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 131-42 (2019) [hereinafter Marshfield, *Forgotten Limits*].

recognize reproductive rights,⁶⁵ to guarantee sex equality,⁶⁶ to raise the minimum wage,⁶⁷ and to restore voting rights to people convicted of felonies,⁶⁸ among other things.⁶⁹

It is precisely when the people support such rights against the will of their representatives that we see the harshest attacks on the right to amend. The Florida Legislature's gutting of the Voting Rights Restoration Amendment, adopted overwhelmingly by the people of Florida in 2018, previewed new legislative efforts to curtail the amendment power itself.⁷⁰ Exercises of direct democracy that have legalized marijuana, expanded Medicaid, and curtailed gerrymandering have similarly inspired legislative backlash.⁷¹

-
65. See, e.g., Michelle Long, *2022 State Ballot Initiatives on Abortion Rights*, KFF (Nov. 14, 2022), <https://www.kff.org/policy-watch/2022-state-ballot-initiatives-abortion-rights> [<https://perma.cc/WQ4P-EXYF>].
66. E.g., Barbara K. Cegavske, Nev. Sec'y of State, *Silver State General Election Results 2022*, STATE OF NEV. (Nov. 22, 2022), <https://silverstateelection.nv.gov/ballot-questions> [<https://perma.cc/K56Y-RZX9>] (amending the state constitution to guarantee that "equality of rights under the law shall not be denied or abridged by this State or any of its cities, counties, or other political subdivisions on account of race, color, creed, sex, sexual orientation, gender identity or expression, age, disability, ancestry, or national origin").
67. *Minimum Wage on the Ballot*, BALLOTPEDIA (2022), https://ballotpedia.org/Minimum_wage_on_the_ballot [<https://perma.cc/2KGT-L53V>] (collecting provisions showing that from 1996 to 2022, voters approved twenty-six of twenty-eight proposed minimum-wage increases).
68. *Voting Restoration Amendment*, FLA. DIV. ELECTIONS (Nov. 6, 2018), <https://dos.elections.myflorida.com/initiatives/initdetail.asp?account=64388&seqnum=1> [<https://perma.cc/5B4M-Z6BZ>].
69. Statutory and constitutional initiatives have also sought to expand Medicaid over the opposition of state government, to shore up and expand voting rights, to combat gerrymandering, to legalize marijuana, and more. See, e.g., *Ballot Measures Results 2022*, CNN (Apr. 26, 2023, 4:23 PM EDT), <https://www.cnn.com/election/2022/results/ballot-measures> [<https://perma.cc/3BH4-HGMN>]; *Ballot Measures Results 2020*, CNN (Mar. 11, 2021, 4:26 PM EST) <https://www.cnn.com/election/2020/results/ballot-measures> [<https://perma.cc/833A-V8NC>].
70. See generally *Raysor v. DeSantis*, 140 S. Ct. 2600, 2600-02 (2020) (mem.) (Sotomayor, J., dissenting from denial of application to vacate stay) (recounting the history of Florida's Amendment Four). Florida has a supermajority requirement for constitutional amendments, but a 2023 legislative proposal would have raised the requirement from sixty percent to 66.67 percent. H.R.J. Res. 129, 2023 Leg., Reg. Sess. (Fla. 2023); see also *infra* note 82 and accompanying text (discussing additional new burdens on the initiative process in Florida).
71. See, e.g., Caroline Sullivan, *Lawmakers Look to Restrict Ballot Initiative Process in Florida, Missouri and Ohio*, DEMOCRACY DOCKET (Jan. 13, 2023), <https://www.democracydocket.com/news-alerts/lawmakers-look-to-restrict-ballot-initiative-process-in-florida-missouri-and-ohio> [<https://perma.cc/7SL2-MXBN>].

In the last year, abortion has become the fiercest battleground. Following the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*,⁷² people across the country are mobilizing to protect abortion rights under state constitutions. In August 2022, for example, Kansas voters rejected a proposal to eliminate the state constitutional right to abortion, effectively ratifying the state supreme court's earlier rights-protecting decision.⁷³ A few months later, voters in California, Michigan, and Vermont amended their constitutions to expressly protect reproductive rights.⁷⁴ But as popular majorities are seeking to guarantee abortion rights in other states, including Ohio and Missouri, state legislatures are trying to strip them of their ability to amend their constitutions to do so. It is these attacks on the right to amend that we now explore.

II. AMENDMENT UNDER ATTACK

The people's right to amend state constitutions is under attack. In more than half the states with a popular-initiative process, state legislatures have attempted to make the amendment process harder to use or to change the rules to thwart amendments they disfavor. In each of the last few years, the Ballot Initiative Strategy Center has tracked over 100 bills that would limit popular initiatives.⁷⁵ Many of the new restrictions reflect open disdain for the initiative right rather than policy responses to fraud or inefficiency. Rather than oppose policies that the people might pursue through state constitutional amendment, some state legislatures are trying to subvert the right to amend itself.

Recent measures have come overwhelmingly from Republican legislatures responding to or anticipating popular initiatives that depart from the party's policy agenda—including initiatives that would guarantee abortion rights, a

72. 42 S. Ct. 2228 (2022).

73. See Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022, 2:18 AM), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/PPD8-KBSN>]; Hodes & Nauser, MDs, *PA v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019) (recognizing that the Kansas Constitution protects “the right of personal autonomy,” including abortion); see also *supra* note 23 (discussing interpretive implications of rejected amendments). Kentucky voters rejected a similar measure. See Bruce Schreiner & Beth Campbell, *Kentucky Voters Reject Constitutional Amendment on Abortion*, PBS (Nov. 9, 2022), <https://www.pbs.org/newshour/politics/kentucky-voters-reject-constitutional-amendment-on-abortion> [<https://perma.cc/3UWC-YPS6>].

74. CAL. CONST. art. I, § 1.1; MICH. CONST. art. I, § 28; VT. CONST. ch. I, art. 22.

75. See Jonathan Chang & Meghna Chakrabarti, *The Growing Threat to Ballot Initiatives*, WBUR (Nov. 7, 2022), <https://www.wbur.org/onpoint/2022/11/07/ballot-measures-about-ballot-measures> [<https://perma.cc/93SB-E574>].

minimum wage, marijuana legalization, and Medicaid expansion.⁷⁶ There is, however, nothing inevitable about the partisan and ideological valence of attacks on direct democracy. In the aughts, for example, social conservatives, supportive of amendments limiting gay marriage, opposed barriers to state constitutional amendment, while civil rights groups supported such barriers.⁷⁷

The discussion that follows provides an overview of recent attacks, organized around approaches that repeat across states: (1) changes to the requirements and timing for signature gathering; (2) changes to the preballot vetting and approval requirements; and (3) changes to the ultimate approval thresholds or requirements. We consider in Part III the appropriate legal analysis for these burdens. By way of preview, we do not argue that all regulation of the popular-initiative process is problematic—far from it. But the examples in this Part show a concerning trend of legislatures trying to stamp out the initiative.

A. Signatures and Timing

One way that state legislatures are attacking the initiative process is by adding new, nearly insurmountable prerequisites. For example, in Arkansas, where voters have recently used the constitutional and statutory initiative processes to legalize medical marijuana and raise the minimum wage, respectively,⁷⁸ the legislature has tried twice to amend the constitution to make the popular-initiative process much more onerous. The first amendment, in 2020, would have required signatures from fifty of the state’s seventy-five counties, rather than the constitutionally specified fifteen counties.⁷⁹ Voters rejected the amendment. The legislature has recently taken a more brazen approach, passing a *statute* imposing

76. See, e.g., Zernike & Wines, *supra* note 8; Scott S. Greenberger, *As Abortion Measures Loom, GOP Raises New Barriers to Ballot Initiatives*, STATELINE (Feb. 15, 2023, 12:00 AM), <https://stateline.org/2023/02/15/as-abortion-measures-loom-gop-raises-new-barriers-to-ballot-initiatives> [<https://perma.cc/DK39-7M22>]; Reid J. Epstein & Nick Corasaniti, *Republicans Move to Limit a Grass-Roots Tradition of Direct Democracy*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/politics/republican-ballot-initiatives-democrats.html> [<https://perma.cc/MF8U-SXQ8>].

77. Dinan, *supra* note 43, at 297, 307–08.

78. For analysis of the developments in Arkansas, see Quinn Yeargain, *Arkansas Republicans Just Unconstitutionally Limited Access to Direct Democracy*, GUARANTEED REPUBLICS (Mar. 20, 2023), <https://guaranteedrepublics.substack.com/p/did-arkansas-republicans-just-unconstitutionally> [<https://perma.cc/23WY-7378>].

79. The Arkansas Constitution calls for signatures from “at least fifteen of the counties of the State.” ARK. CONST. art. 5, § 1. As Quinn Yeargain notes, while the legislature seems to read this as a minimum that it can exceed, other constitutional text suggests it was intended as a prescribed number of counties. The section states that a petition is not invalid if it contains “a greater number of signatures than required herein.” ARK. CONST. art. 5, § 1; Yeargain, *supra*.

the steeply increased fifty-county requirement that voters rejected,⁸⁰ even as Democrats (and now litigants) have questioned its constitutionality.⁸¹

Other states have also dramatically increased signature requirements. Florida, for example, passed legislation in 2020 that raises the threshold of signatures for a petition to advance through Florida's mandatory judicial-review process from ten percent of voters in one-third of Florida congressional districts to twenty-five percent of voters in half of its districts, while also raising the amount that proponents must reimburse counties for signature verification.⁸² The Michigan legislature likewise passed a 2018 law that limited the percent of signatures that could be gathered from any single congressional district,⁸³ a change that would have made the process more complex and costly.⁸⁴

In several other states, the constitutional text already establishes precise signature requirements, so a legislature seeking to increase the requirements must refer potential constitutional amendments to voters. And they have tried. In

80. See Act 236, 94th Gen. Assemb., Reg. Sess. (Ark. 2023), <https://www.lwv.org/sites/default/files/2023-03/ACT236-bill-text.pdf> [<https://perma.cc/N2XJ-98UD>]; see also News Release, Arkansas House of Representatives, Election Legislation from the 2023 Regular Session, (Apr. 14, 2023), <https://www.arkansashouse.org/news/post/21162/election-legislation-from-the-2023-regular-session> [<https://perma.cc/Y8MX-Z8ZK>] (describing Act 236).

81. See *King v. Thurston*, Case Summary, LEAGUE OF WOMEN VOTERS U.S. (Mar. 21, 2023), <https://www.lwv.org/legal-center/king-v-thurston> [<https://perma.cc/4VUF-GNQ3>]; Complaint at ¶¶ 15-16, *King v. Thurston*, No. 60cv-23-1816 (Ark. Cir. Ct. Mar. 10, 2023).

82. FLA. STAT. § 15.21 (2022); S.B. 1794, 2020 Leg., Reg. Sess. (Fla. 2020) (enacted); see also, e.g., John Haughey, *Florida House adopts 'Ballot for Billionaires' Bill in Partisan Vote*, CTR. SQUARE (Mar. 11, 2020), https://www.thecentersquare.com/florida/article_ocdo8bac-63fo-11ea-a4b2-73aded24f5ef.html [<https://perma.cc/T7AD-F4T8>] (describing Florida Senate Bill 1794 and the context of its proposal); Lawrence Mower, *Florida Senate Approves Making the Constitution Harder than Ever to Change*, TAMPA BAY TIMES (Mar. 9, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/03/10/florida-senate-approves-making-the-constitution-harder-than-ever-to-change> [<https://perma.cc/S6QP-6ZZG>] (reporting on the Florida Senate's approval of S.B. 1794 and its implications).

83. MICH. COMP. LAWS § 168.482a (2018); H.B. 6595, 99th Leg., Reg. Sess. (Mich. 2018). The Michigan Supreme Court ultimately rejected the change as, inter alia, an unconstitutional burden on the right to amend. *League of Women Voters of Mich. v. Sec'y of State*, 975 N.W.2d 840, 858 (Mich. 2022). For further discussion of Michigan's increased signature requirements, see Bulman-Pozen & Seifter, *supra* note 7, at 925.

84. See *League of Women Voters of Mich. v. Sec'y of State*, 952 N.W.2d 491, 509-10 (2020), *affirmed in part and vacated in part by League of Women Voters*, 975 N.W.2d at 840.

Arizona,⁸⁵ Colorado,⁸⁶ Missouri,⁸⁷ North Dakota,⁸⁸ Ohio,⁸⁹ and Oklahoma,⁹⁰ legislatures have recently proposed signature increases by constitutional amendment. Although changing amendment rules by amendment raises different legal considerations (especially when voters approve the amendments),⁹¹ the apparent legislative determination to limit democratic rights marks a concerning departure from past eras that focused on broadening amendment rights.⁹²

Other state legislatures are pursuing death by a thousand cuts. Rather than burden the process with one significant obstacle, these laws add discrete requirements to the initiative process that may confuse, delay, and drive up the price.⁹³ Arizona's burdensome precirculation registration requirements are illustrative.⁹⁴ Beginning in 2014, the law has required circulators to register with the secretary of state before they can circulate a petition or else the state will invalidate their collected signatures.⁹⁵ Additional provisions streamline the process for subpoenaing a circulator, and failing to comply with a subpoena similarly forfeits all signatures. The public, too, can challenge a circulator's paperwork, and the legislature has lengthened the time period for such challenges.⁹⁶ The legislature has also extended the time period for the secretary's review of registration paperwork,⁹⁷ adding a delay for initiative proponents. Other additions to the law require that each petition circulated by an out-of-state or paid circulator include a notarized affidavit signed by the circulator and that each page of each petition

-
85. S.C.R. 1015, 56th Leg., 1st Reg. Sess. (Ariz. 2023) (amending ARIZ. CONST. art. IV, pt. 1, § 1) (pending voter approval).
86. H.B. 22-1045, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (defeated).
87. See, e.g., H.R.J. Res. Nos. 20, 2, 9, & 27, 101st Gen. Assemb., 1st Reg. Sess. (Mo. 2021) (defeated); see also H.R.J. Res. 43, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023) (proposing a new requirements for initiative petitions and a supermajority approval requirement).
88. S. Con. R. 4013, 68th Leg. Assemb. (N.D. 2023) (pending voter approval).
89. Ohio Statewide Issue 1 (rejected Aug. 8, 2023).
90. H.R.J. Res. 1002, 58th Leg., 1st Sess. (Okla. 2021) (defeated).
91. See *infra* note 125125.
92. See Dinan, *supra* note 43, at 289-90.
93. See, e.g., Liz Crampton & Mona Zhang, *The Next Republican Target: Ballot Campaigns*, POLITICO (July 21, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/21/republicans-ballot-campaigns-voting-rights-500347> [<https://perma.cc/5G87-NDSL>] (“Critics say lawmakers are intentionally trying to complicate the ballot process so that it becomes too expensive and cumbersome for grassroots organizers to get issues directly in front of voters.”).
94. ARIZ. REV. STAT. ANN. § 19-118 (2019).
95. See *id.*; ARIZ. REV. STAT. ANN. § 19-111 (2021).
96. H.R. 2404, 53d Leg., 1st Reg. Sess. (Ariz. 2017) (amending ARIZ. REV. STAT. ANN. § 19-118(D)).
97. S.B. 1451, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

circulated by an out-of-state or paid circulator feature that circulator's registration number on the petition.⁹⁸ Arizona has also enacted a strict-compliance standard of review indicating that the statutory requirements for the process must be strictly construed.⁹⁹

Similarly, South Dakota has layered requirements that border on the absurd, entailing not only paperwork and filing requirements but also printing and font-size requirements that require proponents to carry petitions resembling large beach towels.¹⁰⁰ Beginning in 2018, lawmakers began a multiyear effort to add requirements including a new registry and disclosure system for petition circulators that required them to wear badges and publicly disclose their personal contact information.¹⁰¹ So far, federal judges have enjoined these additional burdens as insufficiently tailored to state interests,¹⁰² but the legislature seems intent on continuing to find ways to discourage initiative proponents. For instance, a state law recently converted missteps in the petition-circulation process from misdemeanors to felonies.¹⁰³

B. Review by State Officials

Other states have adopted complex processes for reviewing ballot petitions before and after signatures are gathered.

Montana provides a leading example. Thanks to statutes passed in 2021 and 2023, Montana goes beyond onerous signature-collection requirements like those discussed above.¹⁰⁴ It also imposes an extensive substantive approval

98. Ariz. Rev. Stat. Ann. § 19-118 (2019), as amended by S.B. 1451, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

99. ARIZ. REV. STAT. ANN. § 19-102.01.

100. See S.B. 77 §§ 1-2, 2021 Leg., 96th Reg. Sess. (S.D. 2021) (amending S.D. CODIFIED LAWS § 2-1-1.1, 2-1-1.2); see Seth Tupper, *Republican-Backed Bills Complicate Citizen Lawmaking*, S.D. PUB. BROAD. (Mar. 11, 2021), <https://listen.sdpb.org/news/2021-03-11/republican-backed-bills-complicate-citizen-lawmaking> [https://perma.cc/93MZ-JUT5].

101. See H.B. 1094 §§ 3-7, 2019 Leg., 94th Reg. Sess. (S.D. 2019) (amending S.D. CODIFIED LAWS § 2-1); S.B. 180 §§ 3-7, 2020 Leg., 95th Reg. Sess. (S.D. 2020) (amending S.D. CODIFIED LAWS § 2-1-1.1, 2-1-1.3, 2-1-1.5, 2-1-1.6, 2-1-1.7, 2-1-1.8, 2-1-1.9).

102. *Dakotans for Health v. Noem*, 543 F. Supp. 3d 769, 794 (D.S.D. 2021), *aff'd*, 52 F.4th 381, 385 (8th Cir. 2022).

103. S.B. 46 § 1(5), 2023 Leg., 98th Reg. Sess. (S.D. 2023) (amending S.D. CODIFIED LAWS § 2-1-10) (making false attestation on a petition circulator's verification affidavit a class six felony rather than a class one misdemeanor).

104. Specifically, it requires a hefty filing fee to register paid petition circulators, prohibits initiatives that are "substantially the same as" those defeated in the past four years, and bans the use of e-signatures for petitions. S.B. 93 § 4(6)-(7), 23, 68th Leg., Reg. Sess. (Mont. 2023); see also Keila Szpaller, *Lawsuit Challenges Fee, Restrictions on Montana Citizen Initiative Process*,

process,¹⁰⁵ under which multiple state actors must review a proposed popular initiative prior to signature gathering. Both the executive and legislative branches play a role. The legislative services division must review the proposed initiative and ballot statements for “clarity, consistency, and conformity with [the legislature’s drafting manual],” as well as “any other factors that the staff considers when drafting proposed legislation.”¹⁰⁶ Proponents then transmit their proposal to the secretary of state, who reviews it to ensure compliance with the legislative services division’s recommendations, and then transmits complaint proposals to the budget director and attorney general.¹⁰⁷ The budget director must then determine whether a fiscal note is required and prepare one if necessary.¹⁰⁸ The attorney general reviews a proposal for several criteria, including “substantive legality,” and may reject a proposal that he deems legally insufficient.¹⁰⁹ The attorney general’s review may shape the trajectory even of petitions he does not reject. For instance, if the attorney general so designates, a petition must bear the text: “WARNING: The Attorney General of Montana has determined the proposed ballot issue will likely cause significant material harm to one or more business interests in Montana.”¹¹⁰ After review by the attorney general, a proposed petition goes back to the secretary of state, who must review the attorney general’s opinion and pass along proposals deemed “legally sufficient” to the relevant legislative committee, which then must take and report back a non-binding vote on whether it supports the proposal.¹¹¹ Any of these numerous veto points or delays might derail an initiative.

Oklahoma, another state with an onerous state review process, shows how state officials’ review can thwart an initiative campaign. Going into 2020, state law already established a difficult path for initiative proponents: Oklahoma has

MISSOULA CURRENT (May 31, 2023), <https://missoulacurrent.com/lawsuit-ballot-process> [<https://perma.cc/WV9J-KTM4>] (highlighting a lawsuit challenging those changes).

105. See S.B. 93 § 5, 68th Leg., Reg. Sess. (Mont. 2023).

106. *Id.* § 10(1).

107. *Id.* § 5(3)-(4).

108. *Id.* §§ 5(5), 12.

109. *Id.* §§ 1(7), 5(6)(a), 8(a), 11. A former GOP state legislator recently challenged this veto point as a separation-of-powers violation. See Darrell Ehrlick, *Can the Montana Attorney General Stop Constitutional Initiatives?*, MISSOULA CURRENT (June 20, 2023), <https://missoulacurrent.com/constitutional-initiatives> [<https://perma.cc/M8EM-CG5L>].

110. H.B. 651 § 5(2), 67th Leg., Reg. Sess. (Mont. 2021); see also S.B. 93 § 30(2), 68th Leg., Reg. Sess. (Mont. 2023) (amending MONT. CODE ANN. § 13-27-207).

111. S.B. 93 § 13, 68th Leg., Reg. Sess. (Mont. 2023).

one of the country's shorter signature-gathering periods, at just ninety days,¹¹² and provides two guaranteed opportunities for preballot judicial review of popular initiatives (but not legislatively referred amendments).¹¹³ Organizers have nonetheless navigated the process in the past decade, teeing up measures establishing a state lottery benefiting education, expanding Medicaid, and legalizing medical marijuana. In turn, legislators have repeatedly sought to limit the initiative process.¹¹⁴ The most draconian of these measures have failed.¹¹⁵ In 2020, one seemingly modest adjustment passed: The state modified its signature requirement to require verification rather than plain tabulation,¹¹⁶ a task it then delegated to a company owned by the lobbyist who advocated for the legislation.¹¹⁷

In a process with narrow margins for success, the additional delay added by the new signature-verification process—paired with the discretion of state officials—kept a marijuana-legalization measure off the 2022 general-election ballot.

-
112. See Sabine Brown, *Oklahoma's State Question Process Should Be Protected*, OKLA. POL'Y INST. (Apr. 12, 2022), <https://okpolicy.org/oklahomas-state-question-process-should-be-protected> [https://perma.cc/D6QN-669A].
113. For an overview of the process, see *Outline of the Oklahoma Initiative and Referendum Petition Process*, OKLA. SEC'Y OF STATE, https://www.sos.ok.gov/gov/petition_process.aspx [https://perma.cc/Z88V-Y8SM]. See also Paul Monies, *Why Recreational Cannabis Question Isn't on the November Ballot*, OKLAHOMAN (Sept. 27, 2022, 7:01 AM CT), <https://www.oklahoman.com/story/news/drugs/marijuana/2022/09/27/why-recreational-marijuana-isnt-on-oklahomas-november-ballot/69520245007> [https://perma.cc/6MYV-YKWC] (“Oklahoma’s voter-led initiative petition process is among the hardest in the nation, with multiple chances to challenge the wording of the petition, voter signatures and the summary that appears on the ballot.”). The Oklahoma Supreme Court has held since the 1970s that it has authority to engage in substantive pre-election review of popular initiatives, a power now codified in statute, but it has declined to extend that ruling to legislatively referred initiatives. *Save the Ill. River, Inc. v. State ex rel. Okla. State Election Bd.*, 2016 OK 86, ¶ 8, 378 P.3d 1220, 1222.
114. See, e.g., Mike W. Ray, *GOP Proposal Would Require State Questions to Be Approved by Supermajority of Voters*, SW. LEDGER NEWS (Jan. 26, 2023), <https://www.southwestledger.news/news/gop-proposal-would-require-state-questions-be-approved-super-majority-voters> [https://perma.cc/VB9X-DYMP] (quoting Oklahoma State Sen. Warren Hamilton as identifying the lottery, medical marijuana, and Medicaid measures as “notable disasters” that demonstrate the need to change Oklahoma’s initiative process).
115. See, e.g., H.R.J. Res. 1002 § 2, 2022 Leg., Reg. Sess. (Okla. 2022) (proposing a distribution requirement for signatures); S.J. Res. 30 § 1, 58th Leg., 2d Reg. Sess. (Okla. 2022) (proposing to increase the approval threshold to two-thirds).
116. H.B. 3826 § 7, 2020 Leg., Reg. Sess. (Okla. 2020) (striking the word “physical” from the signature verification requirement and authorizing the purchase of “tangible or intangible assets, including . . . software,” to complete the task) (enacted).
117. See *Nichols v. Ziriach*, 518 P.3d 883, 885 (Okla. 2022); Brianna Bailey & Dylan Goforth, *How Oklahoma Is Making It Harder for Citizen-led Measures to Get on the Ballot*, FRONTIER (Dec. 21, 2022), <https://www.readfrontier.org/stories/how-oklahoma-is-making-it-harder-for-citizen-led-measures-to-get-on-the-ballot> [https://perma.cc/CD6T-5Q5H].

Proponents filed their petition on the first business day in January, were permitted to begin signature collection in May, and submitted their signatures in early July, well before both the statutory deadline for mailing ballots and the deadline informally requested by the Election Board for ease of printing ballots.¹¹⁸ But the contractor’s inaugural signature-verification experience encountered staffing and software problems and took nearly seven weeks instead of the traditional two to three weeks; the software generated “wildly inaccurate” text, requiring manual work by the contractor’s “four employees—who happen to be [the lobbyist’s] family members.”¹¹⁹ The Board and Secretary of State did eventually verify the requisite number of signatures, but the Election Board deemed the matter too late.¹²⁰ The Oklahoma Supreme Court held that because rehearing was still available for protests resolved in the mandatory protest period, the state had no mandatory duty to certify the measure for the November ballot.¹²¹ That paved the way for the governor to certify the measure for a low-turnout special election rather than the general election the proponents had sought.¹²² Only twenty percent of eligible voters turned out for the election, one of three separate elections in the spring of 2023, and the measure failed.¹²³

C. Approval Thresholds

At the time of writing, most states—sixteen out of eighteen—require a simple majority vote for popular initiatives.¹²⁴ Recently, some states have attempted

^{118.} *Nichols*, 518 P.3d at 884.

^{119.} *Id.* at 885.

^{120.} *See id.*; *see also* Monies, *supra* note 113 (detailing the reasons for the delay in the signature verification process that resulted in the initiative being kept off the general election ballot).

^{121.} *Nichols*, 518 P.3d at 888.

^{122.} Daniel Nichanian, *Oklahomans Reject Recreational Weed in Low-Turnout Election*, BOLTS (Mar. 8, 2023), <https://boltsmag.org/oklahoma-rejects-recreational-marijuana> [<https://perma.cc/W4MC-PAF5>].

^{123.} *Id.*

^{124.} The two outliers are recent developments. Florida raised its threshold from a simple majority to sixty percent in 2006. H.R.J. Res. 1723, 37th Sess. (Fla. 2005) (approved). Colorado’s “Raise the Bar” amendment increased its approval threshold to fifty-five percent in 2016, but the increased threshold does not apply to initiatives that would repeal an existing constitutional provision. COLO. CONST. art. XIX, § 2. For background, see Corey Hutchins and Kelsey Ray, *Amendment 71, aka “Raise the Bar,” Explained*, COLO. INDEP. (Oct. 19, 2016), <https://www.coloradoindependent.com/2016/10/19/colorado-raise-the-bar-amendment-71> [<https://perma.cc/VU8C-AUW5>]. A third state, Illinois, requires a supermajority of voters voting on the amendment or a simple majority of voters voting in the election. ILL. CONST. art. XIV, § 3. Nevada requires a simple majority vote, but requires majority approval at two successive general elections. *See* NEV. CONST. art. 19, § 2.

to increase the approval threshold required for passage of an amendment. Although it is not clear that state constitutions do or ought to cement a particular percentage for an amendment's passage, recent efforts evince hostility to constitutional amendment or specific amendments rather than attempts to ensure popular engagement.

Unlike signature, timing, and approval requirements that have been adopted by legislatures without the people's direct involvement, a change to approval thresholds requires constitutional amendment and thus involves legislative proposals that would be put before the voters before becoming law. Although burdens on the initiative that are ratified by voters demand analysis that lies beyond the scope of this Essay,¹²⁵ we focus here on legislative manipulation of this process to alter approval thresholds.

A prominent recent example comes from Ohio. There, proponents of a potential initiative that would protect abortion rights were confident, based on polling, that their measure would pass the required majority threshold for approval.¹²⁶ In turn, the legislature proposed an amendment that would raise the threshold to sixty percent (though only a fifty percent vote would be required for the change).¹²⁷ The legislature also manipulated the timing of the vote: In January 2023, the legislature had eliminated most August special elections due to cost and efficiency concerns,¹²⁸ but it called for its new supermajority requirement to be voted upon in an August special election prior to the November

125. For example, there is a significant literature on unconstitutional constitutional amendments both globally and in the states. See, e.g., Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 240-42 (2016); Marshfield, *Forgotten Limits*, *supra* note 64, at 131-46; Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441, 491-93 (2014). See generally YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017) (exploring constraints on the constitutional amendment power); John Dinan, *The Unconstitutional Constitutional Amendment Doctrine in the American States: State Court Review of State Constitutional Amendments*, 72 RUTGERS U. L. REV. 983 (2020) (concluding that state courts have generally not embraced the unconstitutional constitutional amendment doctrine); Lawrence Friedman, *The Potentially Unamendable State Constitutional Core*, 69 ARK. L. REV. 317 (2016) (arguing that some state constitutions likely do include substantive limits on the amendment power).

126. Zernike & Wines, *supra* note 8.

127. 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/2MXR-B9PS>]; S.J. Res. 2, 135th Gen. Assemb. (Ohio 2023). The amendment would also raise the signature requirement to all eighty-eight counties (instead of forty-four) and eliminate the curing period. Balz, *supra*.

128. See Derek Clinger, *Ohio Supreme Court Clears Way for August Vote on Legislative Effort to Curb Direct Democracy*, ST. DEMOCRACY RSCH. INITIATIVE (June 16, 2023), <https://statedemocracy.law.wisc.edu/featured/2023/ohio-supreme-court-clears-way-for-august-vote-on-legislative-effort-to-curb-direct-democracy> [<https://perma.cc/W9YU-Q879>].

election on the abortion measure. After on-the-ground organizing closely linked the proposed supermajority requirement to the upcoming abortion initiative, turnout in the state was unprecedented for an August election and the measure failed, leaving the fifty percent threshold in place.¹²⁹

Ohio legislators have not been alone in seeking – but, as yet, failing – to impose across-the-board supermajority requirements in recent years. After Arkansas’s 2020 effort to burden the signature process failed, in 2021, it proposed increasing the approval threshold for initiatives to sixty percent.¹³⁰ Voters rejected the measure.¹³¹ Oklahoma and South Dakota have likewise proposed across-the-board supermajority requirements, only to see them rejected by voters.¹³²

In Missouri, obstructing the initiative process has been a stated priority for Republicans for several years, fueled by voter circumvention of the legislature on issues like marijuana legalization.¹³³ In its 2022 session, the state legislature “debated nearly 20 different bills” that would have impeded popular initiatives,¹³⁴ and the legislature’s perceived urgency has only increased with an abortion initiative on the horizon. Most recently, legislators proposed a supermajority approval threshold.¹³⁵ Notwithstanding requirements that the language of ballot measures not be misleading, the supermajority proposal was going to “be described on the ballot only as a measure to require voters to be properly registered U.S. citizens and Missouri residents” – something existing law already

129. See Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html> [<https://perma.cc/EAD3-HMA3>].

130. H.R.J. Res. 1005 §§ 2-5, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

131. Neal Early, *State’s Voters Reject Issues 1, 2*, ARK. DEMOCRAT GAZETTE (Nov. 9, 2022, 5:29 AM), <https://www.arkansasonline.com/news/2022/nov/09/states-voters-reject-issues-1-2> [<https://perma.cc/32VQ-6YGS>].

132. In contrast, supermajority requirements involving taxation have fared better. In 2022, Arizona voters approved an amendment requiring supermajority approval for initiated amendments that propose a new tax. See *Arizona Proposition 132, 60% Vote Requirement for Ballot Measures to Approve Taxes Amendment (2022)*, BALLOTPEDIA, [https://ballotpedia.org/Arizona_Proposition_132_60%25_Vote_Requirement_for_Ballot_Measures_to_Approve_Taxes_Amendment_\(2022\)](https://ballotpedia.org/Arizona_Proposition_132_60%25_Vote_Requirement_for_Ballot_Measures_to_Approve_Taxes_Amendment_(2022)) [<https://perma.cc/UM4J-QG9B>].

133. See, e.g., Emily Manley & Kevin S. Held, *What Missouri Lawmakers Didn’t Pass this Legislative Session*, FOX4 (May 15, 2023), <https://fox4kc.com/politics/missouri-capitol-bureau/what-missouri-lawmakers-didnt-pass-this-legislative-session> [<https://perma.cc/9GM5-LEJX>].

134. *Missouri Ballot Initiative Process Survives Legislative Attack*, LAB. TRIB. (May 23, 2022), <https://labortribune.com/missouri-ballot-initiative-process-survives-legislative-attack> [<https://perma.cc/BHV3-PSNA>].

135. Abigail Tracy, *“They’re Afraid of the Majority”*: Republicans Are Pushing a Quiet Assault on Direct Democracy, VANITY FAIR (May 19, 2023), <https://www.vanityfair.com/news/2023/05/abortion-bans-ballot-initiatives> [<https://perma.cc/96NP-9XGW>].

requires.¹³⁶ Intraparty disagreements prevented passage of the new initiative burdens in 2023, but the Senate President has stated that this simply “puts more pressure on us next year.”¹³⁷

* * *

These are not the only ways state legislatures have recently attempted to burden the ballot-initiative process. We also do not include in this Essay the many examples of legislatures dragging their feet to *implement* initiatives after they have been enacted.¹³⁸ Still, these recent developments underscore an important development in state regulation of the ballot-initiative process: Whereas state legislatures once sought to make initiatives more available, the present political landscape is defined by burdensome measures that have the intent or practical effect of thwarting specific initiatives or the process in general.

III. DEMOCRATIC PROPORTIONALITY AND THE RIGHT TO AMEND

Recognizing the people’s right to amend state constitutions underscores that the legislative measures canvassed in Part II are not simply political machinations but also potential constitutional violations. Although a line of federal case law imposes a First Amendment limit on ballot-initiative burdens, this approach

136. Zernike & Wines, *supra* note 8; see also Rudi Keller, *Major Overhaul of Initiative Process One Step from Missouri Ballot*, MO. INDEP. (May 9, 2023, 11:56 AM), <https://missouriindependent.com/2023/05/09/major-overhaul-of-initiative-process-one-step-from-missouri-ballot> [<https://perma.cc/M2U5-E4KT>] (describing the ploy).

137. Manley & Held, *supra* note 133133.

138. See generally ELISABETH R. GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* (2001) (describing how government actors adequately enforce some state initiatives after they are enacted, but not others). In one twist on this theme, the Michigan legislature developed an “adopt and amend” technique, which exploited a constitutional provision that keeps initiative statutes off the ballot if the legislature adopts them itself “without change or amendment.” MICH. CONST. art. II, § 9. Under the state legislature’s practice, the legislature would enact a provision but then immediately gut it, thwarting the policy while also eliminating the people’s ability to vote on it. The Michigan Supreme Court will soon hear a challenge to the tactic. See *AG Nessel Asks Michigan Supreme Court to Weigh in on Adopt and Amend*, MICH. DEP’T ATT’Y GEN. (Mar. 10, 2023), <https://www.michigan.gov/ag/news/press-releases/2023/03/10/ag-nessel-asks-michigan-supreme-court-to-weigh-in-on-adopt-and-amend> [<https://perma.cc/PV87-943K>].

captures only a particular set of harms trained on individual expression,¹³⁹ and the Supreme Court has recently signaled skepticism that “neutral, procedural regulation[s]” present a First Amendment question at all.¹⁴⁰ The Federal Constitution does not track the state constitutional right to amend or provide redress for the distinctive harm that burdens on the ballot-initiative process impose on the people of a state.

Once we see that ballot-initiative burdens implicate state constitutional rights, new frameworks come into view. Democratic proportionality review, we argue, can help courts, attorneys general, and others responsible for implementing state constitutions better protect the people’s right to amend their founding documents.¹⁴¹ To some extent, state courts have already recognized the need to look closely at burdens on the popular-initiative process.¹⁴² Most popular-initiative states have, through case law, constitutional text, or both, a legal standard that seeks to distinguish appropriate regulation of the initiative right from impermissible subversion.¹⁴³ Michigan, for example, prohibits “undue burdens”

139. See *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616–17 (2020) (distinguishing neutral, procedural regulations from laws that “restrict political discussion or petition circulation”); Johnstone, *supra* note 58, at 141–42.

140. *Reclaim Idaho*, 140 S. Ct. at 2616–17.

141. See Bulman-Pozen & Seifter, *supra* note 4, at 37–38 (advocating for democratic proportionality review as a state-centered approach to constitutional adjudication).

142. See, e.g., *Coal. for Pol. Honesty v. State Bd. of Elections*, 415 N.E.2d 368, 376 (Ill. 1980) (“State courts have carefully protected constitutionally protected initiative plans from unnecessarily burdensome legislative restrictions.”).

143. See, e.g., MASS. CONST. art. XLVIII, General Provisions, VII (stating that the initiative power is “self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.”); N.D. CONST. art. III, § 1 (“Laws may be enacted to facilitate and safeguard, but not to hamper, restrict, or impair” the initiative process); OHIO CONST. art. II, § 1g (stating that initiative-power provisions are “self-executing,” and “[l]aws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved”); *Stanwitz v. Reagan*, 429 P.2d 1138, 1138 (Ariz. 2018) (recognizing legislation as permissible if it “does not unreasonably hinder or restrict the constitutional provision and . . . reasonably supplements the constitutional purpose”) (quoting *Direct Sellers Ass’n v. McBrayer*, 503 P.2d 951, 953 (Ariz. 1972)); *Thurston v. Safe Surgery Ark.*, 619 S.W.3d 1, 13 (Ark. 2021) (prohibiting “unwarranted restrictions”); *Loonan v. Woodley*, 882 P.2d 1380, 1387 (Colo. 1994) (stating that “the legislature may, so long as it does not diminish these rights, enact provisions regarding their exercise” and identifying strict scrutiny as the standard when “a regulation actually limits or hinders the ability of people to initiate legislation”) (quoting *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 314 (Colo. 1975)); *Browning v. Florida Hometown Democracy, Inc.*, 29 So.3d 1053, 1068 (Fla. 2010) (holding that a “neutral, nondiscriminatory procedural regulation” is allowed, but statutes or rules that restrict the initiative process must be “necessary for ballot integrity in the strictest sense of the word”); *Coal. for Pol. Honesty v. State Bd. Of Elections*, 415 N.E.2d 368, 378 (Ill. 1980) (requiring state actors to “adopt the least drastic means to achieve their ends” in regulating the initiative) (quoting Illinois State

on the initiative right;¹⁴⁴ Nevada recognizes that the legislature may “facilitate,” but not “unreasonably inhibit” the initiative;¹⁴⁵ and the Arkansas Constitution itself provides that “no legislation shall be enacted to restrict, hamper, or impair the exercise of” the amendment right.¹⁴⁶ These legal standards demand not only greater usage but also conceptual refinement, and democratic proportionality review can help judges draw lines and weigh competing interests.

At the outset, we emphasize again that laws regulating the initiative process are not inherently problematic. Democratic proportionality review allows us to distinguish constitutionally deficient burdens from regulations that comport with, or even enhance, the state constitutional commitment to democracy. This Part first addresses how democratic proportionality review conceptualizes constitutional rights and power and then discusses how such review would apply to recent developments.

A. Foundations: Rethinking Rights and Power

Democratic proportionality review protects state constitutional rights while honoring the democratic imperatives of state constitutions. In separate work, we have offered a description and defense of this approach to adjudicating state constitutional rights.¹⁴⁷ In lieu of recapitulating that work here, we highlight two salient ways in which democratic proportionality reorients thinking about rights and power away from familiar federal adjudicative models.

Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1978)); United Lab. Comm. of Mo. v. Kirkpatrick, 572 S.W.2d 449, 454-55 (Mo. 1978) (stating that legislation “cannot limit or restrict” constitutional rights, including the initiative) (quoting State *ex rel.* Elsas v. Mo. Workmen’s Comp. Comm’n, 2 S.W.2d 796, 801 (Mo. 1928)); State *ex rel.* Stenberg v. Moore, 602 N.W.2d 465, 474-75 (Neb. 1999) (permitting legislation that “tends to insure a fair, intelligent, and impartial” initiative process, but deeming unconstitutional legislation that “hampers or renders ineffective the power reserved to the people”) (quoting State *ex rel.* Stenberg v. Beermann, 485 N.W.2d 151, 152 (Neb. 1992)); We the People Nevada *ex rel.* Angle v. Miller, 192 P.3d 1166, 1177 (Nev. 2008) (recognizing that the state may facilitate, but not unreasonably inhibit the initiative); State v. Campbell, 506 P.2d 163, 165-66 (Or. 1973) (holding that a legislation-regulating initiative must be “reasonable, not curtailing the right or placing any undue burdens on its exercise”) (citing State *ex rel.* McPherson v. Snell, 121 P.2d 930, 934 (Or. 1942)); Headley v. Ostrout, 76 N.W.2d 474, 475-76 (S.D. 1956) (holding that a legislation-regulating initiative must be “suitable,” or “reasonable,” rather than a “palpable invasion of the right to refer a law to the people,” and stating that “[i]n case of doubt, the court should give effect to the will of the legislature”).

144. League of Women Voters of Mich. v. Sec’y of State, 975 N.W.2d 840, 852 (Mich. 2022).

145. We the People Nevada *ex rel.* Angle v. Miller, 192 P.3d 1166, 1177 (Nev. 2008).

146. ARK. CONST. art. 5, § 1.

147. Bulman-Pozen & Seifter, *supra* note 4, at 37-52.

First, democratic proportionality review requires thorough engagement with state constitutional rights. Recognizing the abundance and complexity of such rights, democratic proportionality review calls for a holistic interpretation of state constitutions. And recognizing the privileging of popular sovereignty, including its advancement through rights provisions, democratic proportionality review calls for special solicitude for those rights that undergird democratic self-governance. The constitutional initiative is just such a core “self-determination” right that has special status.¹⁴⁸

Even in states that lack the initiative and contemplate popular decision-making with respect only to legislatively referred amendments, the people’s role is described in several layered, and foundational, provisions of the state constitution. As the Kansas Supreme Court has recognized, for example, the right to vote on proposed amendments follows from both “[t]he right to vote . . . [, which] is pervasive of other basic civil and political rights, and is the bed-rock of our free political system” and “the right of every elector to vote on amendments to our Constitution . . . [, which is a right] of sovereignty.”¹⁴⁹ Additional democratic rights, including express commitments to popular sovereignty and to alter and abolish government, enhance the right to amend.¹⁵⁰ Across the country, the right to amend warrants special weight in state constitutional orders committed to popular majority rule.

The second relevant precept of democratic proportionality review is a complement to the first, focused on power more than rights: Decision makers must distinguish the legislature from the people themselves and carefully review the work of the people’s representatives. As they foreground popular sovereignty, state constitutions insist that legislatures are not the only or best voice of the people.

Again, this requires us to revisit assumptions from federal public law. Given the extreme limits on constitutional amendment, the nonrepresentative character of most other government actors, and the absence of direct democracy, Congress does most closely approximate the people in federal governance, a point

148. Advisory Op. to the Att’y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) (describing the deep commitment to “self-determination” in the context of initiated constitutional amendments); *see also* Pope v. Gray, 104 So. 2d 841, 842 (Fla. 1958) (“There is no lawful reason why the electors of this State should not have the right to determine the manner in which the Constitution may be amended. This is the most sanctified area in which a court can exercise power. Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment to the organic law of the State, limited only by those instances where there is an entire failure to comply with a plain and essential requirement of [the law].”).

149. *See, e.g.*, Moore v. Shanahan, 486 P.2d 506, 511 (Kan. 1971).

150. *See* Bulman-Pozen & Seifter, *supra* note 4, at 37-43.

that rightly informs federal judicial review and much else.¹⁵¹ But state constitutions emphasize shortcomings of legislative representation and ensure channels for less mediated popular self-governance, including constitutional amendment.¹⁵² When we analyze state legislative power and limits, judicial review, and other central constitutional questions, we must always bear in mind the distinction between the people and their representatives. Among other things, this means that state legislatures should not receive the same deference Congress receives under rational-basis review¹⁵³ and that courts and other constitutional expositors should privilege direct expressions of the popular will.

To evaluate laws regulating constitutional amendment, then, state courts cannot assume a rational-basis-like posture of deference to the legislature. Instead, they must differentiate the people from their representatives and determine whether the legislature is in fact acting reasonably and noninvidiously. We turn now to the more specific questions courts should ask as they conduct democratic proportionality review in the context of state constitutional amendment.

B. Applying Democratic Proportionality

In brief, democratic proportionality review requires courts to (1) ascertain the right(s) at stake; (2) determine whether the government is pursuing a legitimate objective through appropriate means and whether it could have adopted a less rights-impairing approach; and, if necessary, (3) balance the achievement of the government's objectives against the harm to rights.¹⁵⁴ Although at this level of generality the review is standard proportionality review, the "democratic" modifier informs each step. As we have suggested, for example, core democratic rights receive special consideration at the first step, while legislative decisions are not equated with the popular will at the second.

To illustrate, consider three distinct problems raised by the measures described in Part II. Each of these measures implicates the right to amend, a core right reinforced by overlapping constitutional provisions. That a right is at stake, even a particularly weighty right, does not conclude the analysis, but rather leads the inquiry to the infringing action, asking whether the government is pursuing an acceptable purpose and if its means are rational and minimally impair the

151. See Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1754-55, 1754 n.144 (2021).

152. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87, 90 (Elliott Abrams ed., 2002).

153. See Bulman-Pozen & Seifter, *supra* note 4, at 25.

154. *Id.* at 37-38.

right. In the case of laws burdening the right to amend, this government-focused inquiry is particularly important because legislative regulation of the amendment process is not inherently suspect; to the contrary, it is often necessary. State legislatures appropriately play a role in establishing and regulating amendment processes, even for popularly initiated petitions. For an amendment to reach the ballot and receive voter approval, a state must have procedures and ground rules in place. State legislatures generally establish those rules in the first instance, subject to constitutional limits.¹⁵⁵ They may also adjust such rules and procedures as problems are discovered.¹⁵⁶

At the same time, as the examples in Part II underscore, legislatures may attempt to undermine the amendment process. Indeed, initiated amendment practices were adopted largely to circumvent intransigent legislatures, so there has long been concern that legislatures will attempt to impede the process in self-serving ways.

To distinguish legitimate regulation from rights-infringing violations, reviewing courts should ask whether the legislature is pursuing an end other than undermining people's ability to amend their constitution and, if there is a legitimate end, whether the legislature's means of pursuing this end are appropriate or whether they could have been achieved with a lesser burden. In the examples that follow, as above, we focus on measures passed by the legislature, not voter-approved changes. But certain legislative referrals also implicate this framework. For example, when legislatures manipulate timing to ensure a particular electorate or inaccurately describe a proposed measure to mislead voters, these measures may amount to constitutional infractions.¹⁵⁷

1. *Illegitimate Objectives: Intent to Subvert the Initiative*

Start with a simple point: Seeking to undermine the constitutional initiative is not a legitimate government objective.¹⁵⁸ Under democratic proportionality

155. One example of such a limit is the Arkansas Constitution's provision that "[n]o legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people." ARK. CONST. art. V, § 1.

156. Although not our focus here, legislatures also play a role in implementing the substance of voter-initiated amendments. See, e.g., Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1119 (2005) (stating, regarding the statutory initiative, that "[w]hen voters choose to enact comprehensive reforms, like campaign finance reform or new redistricting institutions, the legislature must be allowed to retain some ability to modify the regulatory structure in the future to take account of changed circumstances or to solve problems caused by infelicitous wording").

157. See *supra* notes 126–133 and accompanying text.

158. Cf. Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2009–10 (2018) (proposing that partisan gerrymandering is unconstitutional

review, a court must always ascertain whether the legislature has a proper objective and some state legislators have been surprisingly candid about their goals.¹⁵⁹ For example, although some proponents of Ohio's approval-threshold change made pat arguments about protecting the state from out-of-state spending or reducing constitutional volatility, key legislative leaders acknowledged that their goal was to block the abortion amendment, not to improve the initiative process.¹⁶⁰ After initially denying that making amendment harder was related to abortion, the Secretary of State likewise told supporters that the vote threshold change was "100%" about blocking the abortion amendment.¹⁶¹ In Missouri, too, there was no mistaking the legislature's intent to thwart a popular abortion amendment: House Speaker Dean Plocher argued that an abortion amendment would "[a]bsolutely" pass without changes to the initiative process,¹⁶² and that "[i]f the Senate fails to take action on IP [initiative petition] reform, . . . the Senate should be held accountable for allowing abortion to return to Missouri."¹⁶³

Other states' legislators also have been candid about their desire to undermine the initiative process. In South Dakota, legislative leaders have ratcheted up burdens on the initiative process as they have openly lamented its use,¹⁶⁴ and they have made clear that burdening the initiative process is a way to block or preempt measures, like Medicaid expansion, that the GOP leadership

when motivated by "invidious partisan intent"); Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 115 (2013) (proposing that felon disenfranchisement is unconstitutional when motivated by viewpoint discrimination).

159. See *supra* Section III.B.

160. See, e.g., Balz, *supra* note 127 (describing statements by State Representative Brian Stewart and State Senate President Matt Huffman); Avery Kreemer, *Hearings Set for this Week on Effort to Amend Ohio Constitution Ahead of Abortion-Rights Vote*, DAYTON DAILY NEWS (Apr. 16, 2023), <https://www.daytondailynews.com/local/hearings-set-for-this-week-on-effort-to-amend-ohio-constitution-ahead-of-abortion-rights-vote/VZRZBGWOVZFYVIRX3GQL3PSQ7U> [<https://perma.cc/2GYC-C88B>] ("[State Representative Phil] Plummer acknowledged that the abortion initiative is a motivating factor for the resolution.").

161. Morgan Trau, *Ohio Sec. of State LaRose Admits Move to Make Constitution Harder to Amend is '100% About . . . Abortion'*, NEWS 5 CLEVELAND (June 2, 2023, 6:34 PM), <https://www.news5cleveland.com/news/politics/ohio-politics/ohio-sec-of-state-larose-admits-move-to-make-constitution-harder-to-amend-is-100-about-abortion> [<https://perma.cc/U2JX-M6JN>].

162. Tracy, *supra* note 135 (quoting Speaker Dean Plocher stating that he believed an initiative petition "to allow choice" on abortion would "[a]bsolutely" pass without changes to the initiative process).

163. Manley & Held, *supra* note 133 (quoting Speaker Plocher).

164. Seth Tupper, *Republican-Backed Bills Complicate Citizen Lawmaking*, S.D. PUB. BROAD. (Mar. 26, 2021), <https://www.sdpb.org/blogs/politics-public-policy/republicanbacked-bills-complicate-citizen-lawmaking> [<https://perma.cc/6FBT-JRRS>].

disfavors.¹⁶⁵ In Arizona, a petition-registration law included legislative findings lamenting that a prior initiative had protected popular initiatives from legislative amendment.¹⁶⁶ Once the legislature could no longer undo enacted initiatives, it instead chose to try to stop their enactment in the first place.

Such express intent to thwart direct democracy is a red flag in any constitutional analysis. It is one thing to regulate the ballot-initiative process to limit fraud or improve efficiency.¹⁶⁷ It is quite another for legislators to act with invidious intent to limit the people's ability to amend the state constitution. The latter implicates a state constitutional right without a legitimate objective, let alone the requisite tailoring and balance.

2. *Inappropriate Means: Effectively Undermining the Initiative*

In many cases, legislators do not articulate an intent to defeat the popular initiative when introducing new burdens. In these cases, democratic proportionality calls for an inquiry into the fit between means and ends, “asking whether the government is pursuing an acceptable purpose and if its means are rational and minimally impair the right.”¹⁶⁸ To the extent legislators invoke facially legitimate purposes for new popular-initiative burdens (such as ensuring a representative process or avoiding fraud), a lack of fit between these objectives and the burden on the right to amend may prove fatal.

Many states' dramatic increases for required signatures,¹⁶⁹ for example, substantially burden the initiative without serving legitimate goals, much less minimally impairing the right. A recent decision from the Idaho Supreme Court recognized this problem. In *Reclaim Idaho v. Denney*, the court considered a law requiring signatures from all of the state's thirty-five legislative districts and questioned the constitutional legitimacy of the legislature's two defenses:

165. See, e.g., Epstein & Corasaniti, *supra* note 76 (“State Senator Lee Schoenbeck, a Republican, said in March that he specifically wanted to block Medicaid expansion.”); Cooper Seamer, *Amendment C Arguments Continue as June Primary Nears*, DAKOTA NEWS NOW, (Apr. 22, 2022, 10:50 PM EDT), <https://www.dakotane.wsnow.com/2022/04/23/amendment-c-arguments-continue-june-primary-nears> [<https://perma.cc/C94Y-VVNQ>] (describing requests by State Senate President Pro Tempore Lee Schoenbeck to hold a vote on the initiative process before “another ballot measure that would expand Medicaid in the state”).

166. See Act of Apr. 14, 2017, ch. 151, § 3, 2017 Ariz. Leg. Serv. (West).

167. Cf. *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) (stating, in a federal First Amendment challenge to a state ballot-initiative regulation, that “reasonable, nondiscretionary restrictions are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support”).

168. Bulman-Pozen & Seifter, *supra* note 4, at 37.

169. See *supra* Section II.A.

requiring initiatives to have a “modicum of statewide support” to qualify for the ballot and avoiding “cluttered” ballots.¹⁷⁰ The court held that neither justification comports with the right to amend: The Idaho Constitution gives the amendment right to “the majority of the people,” not to particular districts or geographic areas.¹⁷¹ Similarly, the supposed problem of ballot “clutter” was not “a sufficient reason to limit fundamental rights.”¹⁷² Even if either of these counted as a legitimate reason, as other states might find, Idaho’s decision establishes a contextually grounded way to ascertain minimal impairment. Idaho has historically had few initiatives qualify for the ballot, demonstrating the absence of a clutter problem. And, the court observed, even if statewide support were relevant, the legislature identified no logical reason that support in every district was required.¹⁷³

Laws that would tend to put the popular initiative out of reach, either alone or cumulatively, may likewise fail to establish the requisite means-ends fit even when the legislature articulates a legitimate objective. Montana’s recent suite of laws has been challenged on that basis, with plaintiffs arguing that the series of burdens “effectively denies the people of Montana their reserved power to enact laws using the initiative and/or referendum process.”¹⁷⁴

If, however, the legislature does have a legitimate purpose, regulation of popular amendment may in fact be warranted. In the First Amendment context, for example, federal courts have distinguished between state laws that require name badges and public disclosure of all of a petition circulator’s personal information during the collection phase, which may invite harassment, and state laws that require submission of an affidavit (including personal information) at the time circulators submit their signed petitions to allow the state to contact circulators if needed.¹⁷⁵ State courts, likewise, can properly identify procedures designed to inform the public, such as a required fiscal-impact summary for measures affecting taxes.¹⁷⁶ Nor is there anything inherently suspect in Oklahoma’s decision to verify rather than merely tabulate signatures – though its particular aggregation of delays might create unacceptable obstruction as applied.¹⁷⁷ In short, noninvidious regulation can survive review if the burdens on the right are not

170. 497 P.3d 160, 187–88 (Idaho 2021).

171. *Id.* at 188.

172. *Id.*

173. *Id.*

174. Szpaller, *supra* note 104.

175. See *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 199–200 (1999); *SD Voice v. Noem*, 432 F. Supp. 3d 991, 1000–02 (D.S.D. 2020).

176. See, e.g., COLO. REV. STAT. ANN. § 1-40-106(3)(j) (West 2022).

177. See *supra* notes 113–114 and accompanying text.

disproportionate to the benefits of the regulation. Although the inquiry may prove demanding, state courts are well-suited to conduct it and to defend the democratic commitments of state constitutions.¹⁷⁸

3. *Non-Minimal Impairment: Disparate Burdens*

Another constitutional problem with many new burdens is that they single out popular initiatives for disparate burdens: They impose new restrictions on constitutional amendments proposed by the people, but do not impose those restrictions on legislatively referred constitutional amendments (LRAs) or other statewide campaigns. Yet these processes – the popular initiative, the LRA, and candidate campaigns to appear on statewide ballots – are similar in important respects; each implicates a state’s desire to vet a proposal or candidate seeking to appear on the statewide ballot. Across all three of these processes, a state understandably may wish to have ballots that are accurate rather than misleading, uncluttered and readable, and free of unserious issues or candidates. The fact that the popular initiative alone faces roadblocks in many states suggests that even if the legislature has a legitimate objective, it is not using appropriate or minimally rights-impairing means to achieve it.

Consider ballot wording requirements. Both popular initiatives and LRAs require clear language that voters can understand. Yet the amped-up vetting processes to review ballot language for clarity and constitutionality – like Montana’s attorney-general review¹⁷⁹ and Florida’s preballot judicial-review process¹⁸⁰ – are typically imposed only on popular initiatives, not their legislatively referred counterparts. In some cases, these requirements were never imposed on LRAs; in others, the LRA review processes have been rolled back. In the 1990s, for example, the Oklahoma legislature amended its laws to exempt its own ballot language from statutory requirements regarding word limits and simplicity.¹⁸¹ And only the wording of Oklahoma’s popular initiatives, not the wording of its LRAs, is subject to state-supreme-court review.¹⁸²

178. See Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 WIS. L. REV. 1337, 1356-65.

179. See *supra* notes 104-111 and accompanying text.

180. See FLA. STAT. § 16.061(1) (2023); FLA. STAT. § 101.161(1) (2023).

181. Act of May 3, 1994, 1994 Okla. Sess. Laws 418, 421 (removing the requirement that “[t]he official ballot title for the proposal as finally enacted by the Legislature shall fully comply with all of the requirements specified” in the subsection detailing requirements for initiated constitutional-amendment ballot language); see also OKLA. STAT. tit. 34, § 10(A)-(B) (2022) (providing for petitions to challenge ballot language for initiated constitutional amendments and specifically excluding legislatively referred constitutional-amendment ballot language).

182. OKLA. STAT. tit. 34, § 10(A)-(B) (2022).

A host of other changes likewise disfavor popular initiatives. For example, some state laws have set disparately strict deadlines for initiative petitions. In Nebraska, only popular initiatives, not LRAs, must comply with a four-month filing deadline.¹⁸³ In North Dakota, only popular initiatives must be submitted by a specific pre-election deadline.¹⁸⁴

Additional disparities accompany the processes of certification for the ballot and approval by voters. Some states, like Colorado, require fiscal-impact statements for popular initiatives but not for LRAs.¹⁸⁵ Arizona imposes its strict-compliance standard of review only for popular initiatives, not other statewide ballot campaigns,¹⁸⁶ and allows electronic signatures for statewide and legislative candidates' petitions but does not have a similar provision for initiative petitions.¹⁸⁷ Finally, proposals like Missouri's would raise the approval threshold only for popular initiatives, and not for LRAs.¹⁸⁸

To be sure, there may be some disparate burdens on popular initiatives that are justified. To the extent a signature collection process for ballot proposals (and statewide candidates) is a proxy for statewide support, a state may reasonably conclude that any LRA that clears the legislature already demonstrates such support. But the supercharged burdens on the initiative process described in this Essay – those that put it out of reach in terms of dollars, time, or both – create a veto point for popular initiatives that LRAs do not face and suggest that the legislature is not employing appropriate constitutional means.

CONCLUSION

The right to amend is a defining part of state constitutions. It is also under attack. In this Essay, we have attempted to elaborate the nature of the right, canvas current threats, and identify a framework for adjudication.

¹⁸³. NEB. REV. STAT. § 32-1412(1) (2018).

¹⁸⁴. H. CON. R. 3034, 63d Leg., Reg. Sess. (N.D. 2013).

¹⁸⁵. See Colo. REV. STAT. § 1-40-106(3)(j) (requiring that a ballot title “for a measure that either increases or decreases the individual income tax rate” include a fiscal summary in compliance with COLO. REV. STAT. § 1-40-105.5(2)(a)); Colo. REV. STAT. § 1-40-105.5(2)(a) (describing the form of fiscal-impact statements for “every initiated measure” but not for other statewide ballot campaigns).

¹⁸⁶. ARIZ. REV. STAT. ANN. § 19-102.01(A).

¹⁸⁷. ARIZ. REV. STAT. ANN. § 16-316 (2017) (permitting electronic signatures specifically for statewide and legislative candidates' petitions).

¹⁸⁸. For example, the Missouri House passed a joint resolution last month that would create a sixty percent supermajority requirement for constitutional initiatives. See H.R.J. Res. 43, 102d Gen. Assemb., 1st Reg. Sess. (Mo. 2023); see also S.J. Res. 2, 135th Gen. Assemb. (Ohio 2023) (same).

Attending to the right to amend generates several observations about state constitutional law that defy conventional federal wisdom and warrant further exploration. State constitutions intermingle structure and rights, establish the people as simultaneous repositories of rights and powers, and complicate assumed distinctions between majority rule and minority rights.

As they cast the people as power-wielders and rights-holders, as sovereigns and as subjects, and as a collective that may act to protect its members against oppressive government, state constitutions suggest new possibilities for reformers heeding Justice Brennan's call. For such reformers, and others seeking new pathways in constitutional law, the right to amend is a good place to start.

Jessica Bulman-Pozen, Betts Professor of Law, Columbia Law School.

Miriam Seifter, Professor of Law and Rowe Faculty Fellow in Regulatory Law, University of Wisconsin Law School.

For helpful comments and conversation, we thank Allie Boldt, Derek Clinger, Andy Coan, Anuj Desai, David Pozen, Jane Schacter, Anthony Schutz, Robert Yablon, and participants in the Stanford Law School seminar on Direct Democracy and a faculty workshop at the Oklahoma City University School of Law. We are also grateful to Hannah Gruen, Sadie Murray, and Jacob Neeley for excellent research assistance, to the editors of the Yale Law Journal for valuable insights and editorial work, and to the Abraham M. Buchman Fellowship for Administrative Law at Columbia Law School for support.