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STATE INSTITUTIONS AND DEMOCRATIC OPPORTUNITY

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ABSTRACT

The burgeoning commentary on democratic decline in the United States focuses disproportionately on the national level. And seeing a national problem, reformers understandably seek to bolster democracy through large-scale federal solutions. Although their efforts hold popular appeal, they face strong institutional headwinds. As scholars have extensively documented, the Senate, the Electoral College, and the Supreme Court today are skewed against majority rule. Despair grows.

This Article urges legal scholars and reformers to turn their gaze to state-level institutions. State institutions, the Article shows, offer democratic opportunity that federal institutions do not. By design, they more readily give popular majorities a chance to rule on equal terms. Utilizing these opportunities can help stave off democratic decline in the short term and build a healthier democracy in the long term. But these opportunities are not guarantees, and they are in danger. State

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majoritarian institutions today face active threats from antidemocratic forces. These attacks—on state courts, ballot initiatives, and elected executives—have largely flown under the radar or been noticed only in isolation. Their proponents, moreover, have sought to disguise them as good-governance reforms, exploiting the muddled dialogue surrounding democracy generally.

After highlighting the vital role of state institutions in American democracy, the Article provides a holistic account of the attacks they face today. It then offers a theoretical framework for distinguishing appropriate constraints on popular majorities from those that should be out of bounds—because, for example, they would install minority-party rule. The Article suggests steps that state courts, state officials, and organizers can take to protect state institutions. At the highest level, it shows how a richer theory and discourse surrounding state institutions can advance both state and national democracy.

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INTRODUCTION

It is a sign of the times that fear of democratic decline now occupies a prominent place in both the academic literature[1] and popular commentary in the United States.[2] Commentators identify antidemocratic actions from voter suppression to partisan gerrymandering to a frighteningly fraught transfer of power following the 2020 presidential election.[3] They point to "warning flags"[4] of

1. *See generally, e.g.*, Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 8 (2020) [hereinafter Klarman, *Foreword*] (cataloguing "the recent degradation of American democracy" and explaining the Supreme Court's contribution to that degradation); STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018) (drawing from comparative examples of democratic breakdown and arguing that American democracy is in danger); TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY (2019) (describing reasons to be concerned about democratic decline and exploring law's potential and limits in helping to preserve democracy).

2. For examples of this theme turning up in the television, print, and digital news, see Judy Woodruff & Barton Gellman, *How a 'Mass Movement' Based on Election Lies Is Threatening American Democracy*, PBS NEWSHOUR (Dec. 9, 2021, 6:45 PM), https://www.pbs.org/newshour/show/how-a-mass-movement-based-on-election-lies-is-threatening-american-democracy [https://perma.cc/5MNY-MR2L]; Karen Morfitt, *'Pay Attention': Colorado Political Experts Reflect on Storming the Capitol Building*, CBS DENV. (Jan. 6, 2021, 10:00 PM), https://denver.cbslocal.com/2021/01/06/colorado-protests-capitol-building [https://perma.cc/9D5G-9NKW]; Zeb Larson, *Attack on the U.S. Capitol Sets a Precedent for Future Anti-Government Action*, TEEN VOGUE (Jan. 8, 2021), https://www.teenvogue.com/story/trump-revolt-capitol-history-anti-government-violence [https://perma.cc/9A6S-RWCD]; Miriam Berger, *U.S. Listed as a 'Backsliding' Democracy for First Time in Report by European Think Tank*, WASH. POST (Nov. 22, 2021, 11:18 AM), https://www.washingtonpost.com/world/2021/11/22/united-states-backsliding-democracies-list-first-time [https://perma.cc/F247-S95V]; Berry Craig, *Two Kentucky Historians Agree the GOP Is Steering the US Straight Toward Authoritarianism*, COURIER J. (Dec. 30, 2021, 1:59 PM), https://www.courier-journal.com/story/opinion/2021/12/29/gop-steering-us-toward-authoritarianism-historians-say-opinion/9032068002 [https://perma.cc/U52D-RU4Y].

3. *See supra* note 1.

4. *See, e.g.*, PIPPA NORRIS, ELECTORAL INTEGRITY IN THE 2020 U.S. ELECTIONS 5 (2020), https://static1.squarespace.com/static/58533f31bebafbe99c85dc9b/t/604784f8451f52636f8315bb/1615299838676/PEI-US-2020+Report.pdf [https://perma.cc/FN2Y-GB9K] (describing "warning flags"); INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, THE GLOBAL STATE OF DEMOCRACY 2021, at iii, 1, 5–6 (2021) (studying global democratic erosion and finding that the United States was "knocked down a significant number of steps on the democratic scale").

democracy's erosion and the specter of authoritarianism[5] or minority rule.[6] And they ask: "Can it happen here?"[7] Is it happening already?[8]

In moments of optimism, scholars and pollsters remind us that national majorities strongly support democracy. Majorities oppose authoritarianism, favor competitive elections, and support a multiracial society.[9] In spite of deep partisan animosity,[10] national

5. *See, e.g.*, Barton Gellman, *Trump's Next Coup Has Already Begun*, ATLANTIC (Dec. 9, 2021), https://www.theatlantic.com/magazine/archive/2022/01/january-6-insurrection-trump-coup-2024-election/620843 [https://perma.cc/8ZCS-R3RU].

6. *See, e.g.*, Lawrence Lessig, *Why the US Is a Failed Democratic State*, N.Y. REV. BOOKS (Dec. 10, 2021), https://www.nybooks.com/daily/2021/12/10/why-the-us-is-a-failed-democratic-state [https://perma.cc/6J5J-3P35].

7. *See generally, e.g.*, CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018) (collecting essays discussing past, present, and future authoritarianism in the United States).

8. *See generally, e.g.*, Gellman, *supra* note 5; Risa Brooks & Erica De Bruin, *18 Steps to a Democratic Breakdown*, WASH. POST (Dec. 10, 2021), https://www.washingtonpost.com/outlook/interactive/2021/january-6-next-coup-signs [https://perma.cc/H5WZ-M62C] (evaluating indicators of democratic backsliding in the United States); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022) (outlining steps to limit the risk of election subversion).

9. *See* Steven Levitsky, Richard Albert, Miriam Seifter & Tom Ginsburg, *The Third Founding: The Rise of Multiracial Democracy and the Authoritarian Reaction Against It*, CALIF. L. REV., at 10:56 (Nov. 4, 2021), https://www.californialawreview.org/event/2021-jorde-symposium-the-third-founding-the-rise-of-multiracial-democracy-and-the-authoritarian-reaction-against-it [https://perma.cc/9LPE-FZ5Y]. In making this observation, I do not mean to undermine the extent to which the nation has fractured into different epistemic communities, such that the two parties perceive different threats to democracy. *See* Domenico Montanaro, *Most Americans Trust Elections Are Fair, but Sharp Divides Exist, a New Poll Finds*, NPR (Nov. 1, 2021), https://www.npr.org/2021/11/01/1050291610/most-americans-trust-elections-are-fair-but-sharp-divides-exist-a-new-poll-finds [https://perma.cc/Y3MP-5J95]. Nor do I discount the risk that over time, dysfunctional government makes autocrats more attractive to the public. *See* Richard H. Pildes, *Political Fragmentation in Democracies of the West* 4 (N.Y.U. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 21-50, 2021), https://ssrn.com/abstract=3935012 [https://perma.cc/M74F-P22G]. Still, there appears to be sufficient common ground on fundamentals to believe that the will of the people still favors democracy rather than autocracy and that there are opportunities to leverage common sensibilities. *See, e.g.*, ROBERT BOSCH STIFTUNG & MORE IN COMMON, IT'S COMPLICATED: PEOPLE AND THEIR DEMOCRACY IN GERMANY, FRANCE, BRITAIN, POLAND, AND THE UNITED STATES 4, 10 (2021), https://www.moreincommon.com/media/qupjbcx1/more-in-common-bosch-democracy-executive-summary-eng.pdf [https://perma.cc/VL9F-3CWD].

10. *See* FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 5 (2016) (observing that close competition between the parties incentivizes "the sharp and contentious partisanship that is characteristic of contemporary American politics"). *See generally* LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018) (describing animosity and distrust between Democrats and Republicans).

majorities also support a wide range of seemingly common-sense policies that could indirectly strengthen democracy by lessening inequality or fostering basic government competence.[11] Majorities, then, might be a vital lifeline for democracy. Important calls urge them to mobilize.[12] But where can they rule?

Not, it seems, at the national level, where "[w]e are trapped by our institutions."[13] Prominent scholars of law, political science, and history have long recognized that the federal constitution is not very democratic.[14] Rule by the people faces formidable constitutional headwinds, including the structure of the Senate, Electoral College, and federal courts, as well as the difficulty of amending the founding document itself.[15] Today's politics and geography make the problem worse. In an era of political and geographic polarization, our national institutions can yield consistent minority-party control.[16] And, scholars warn, the move toward antidemocratic tactics in some wings of the

11. *See, e.g.*, Will Friedman & David Schleifer, *Hidden Common Ground: Why Americans Aren't As Divided on Issues As We Appear To Be*, USA TODAY (Apr. 27, 2021, 5:01 AM), https://www.usatoday.com/story/opinion/2021/04/27/case-unity-americans-arent-divided-issues-appears-column/7190411002 [https://perma.cc/3FN9-9QMD] (describing polling reflecting strong cross-party support on a range of policies, including "raising the minimum wage, investing in infrastructure to create jobs, creating a path to citizenship for undocumented immigrants who arrived in the U.S. as children," as well as regulating social media to decrease partisan animosity and improving economic opportunity for all).

12. *See, e.g.*, Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 163 (2021); Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 567 (2021); DAVID DALEY, UNRIGGED: HOW AMERICANS ARE BATTLING BACK TO SAVE DEMOCRACY 238–40 (2020).

13. Levitsky et al., *supra* note 9, at 43:47.

14. *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 6, 9 (2006); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 15–20 (2d ed. 2003) [hereinafter DAHL, HOW DEMOCRATIC]; Joyce Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 804 (1987).

15. *See also* David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 687 (2018) (reviewing RICHARD TUCK, THE SLEEPING SOVEREIGN (2016)) (discussing the difficulty of amending the U.S. Constitution). *See generally* LEVINSON, *supra* note 14 (arguing that the Constitution is insufficiently democratic).

16. *See generally* Laura Bronner & Nathaniel Rakich, *Advantage, GOP: Why Democrats Have To Win Large Majorities To Govern While Republicans Don't Need Majorities at All*, FIVETHIRTYEIGHT (Apr. 29, 2021), https://fivethirtyeight.com/features/advantage-gop [https://perma.cc/8XHB-C9NP] (analyzing the phenomenon from a political science perspective); Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59 (2022) (analyzing the phenomenon from a legal perspective).

Republican Party threatens to entrench minority rule for the long term in all three national branches.[17]

Majorities stand a greater chance in the states. This Article argues that state institutions offer crucial *democratic opportunity* that federal institutions thwart: the opportunity for popular majorities to rule on equal terms.[18] These state institutions—including state governors, ballot initiatives, state courts, and sometimes state legislatures—are majoritarian in structure and thus preserve space for democratic decision-making. What is more, they offer democratic opportunity in a broader sense. They can provide vital counterweights to national minoritarian domination and, in turn, buoy the prospect of American democracy's survival. Neither majority rule nor pro-democracy policies are guaranteed in these state institutions, for reasons this Article details. But within state institutions, determined majorities, shut out elsewhere, have an opening.

Once we see state institutions as the remaining outposts of majority rule, another development becomes unsurprising: these state institutions are under attack. Through hundreds of bills, state legislatures have impeded the ballot initiative process or attempted to do so.[19] A similar blizzard of legislation has stripped power from popularly elected governors to respond to emergencies and oversee other functions, including election administration.[20] A number of states are seeking to limit the role of statewide majorities in electing state judges.[21] Like so many state-level actions, these developments have

17. *See, e.g.*, Sean Wilentz, *The Tyranny of the Minority, from Calhoun to Trump*, 2 LIBERTIES (2021), https://libertiesjournal.com/articles/the-tyranny-of-the-minority-from-calhoun-to-trump [https://perma.cc/3B8S-2MX5]; Levitsky et al., *supra* note 9, at 12:14.

18. I explain the Article's definition of democracy and majority rule further in Part I. The concept of democratic opportunity this Article advances overlaps with the social science concept of "political opportunity," but with a particular focus on the institutional prospects for democratic rule. *See* Peter K. Eisinger, *The Conditions of Protest Behavior in American Cities*, 67 AM. POL. SCI. REV. 11, 25 (1973) (using the term "political opportunity structure" to refer to "the degree to which groups are likely to be able to gain access to power and to manipulate the political system"); William A. Gamson & David S. Meyer, *Framing Political Opportunity*, *in* COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS 275, 276 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996) (arguing for a more robust concept of political opportunity that allows for the recognition of opportunities "even in the absence of a challenging movement").

19. *See infra* Part II.

20. *See infra* Part II.

21. *See infra* Part II.

tended to fly under the radar.[22] When they have been noticed, commentary considers them only in isolation.[23]

These recent efforts to hamstring majoritarian institutions should instead be viewed as parts of a whole. Collectively, they threaten American democracy by kneecapping key bastions of popular majority rule. This Article offers these insights in service of intertwined goals of theory and reform. Changing the way we conceive of the state role in American democracy might direct us to productive solutions before the light goes out.

First, this Article's exploration of state democratic opportunity requires reimagining the interplay of democracy and federalism. To date, pro-democracy reformers have focused most of their attention on the national level. That is understandable; federal statutes foreclosing congressional gerrymandering and mandating fairer and more inclusive elections could be game-changing, even as their near-term prospects appear remote. And the states may seem an unlikely place to find help. Prevailing theories paint states as spaces for elevating and protecting national *minority* populations or outgroups, not providing a pathway for national majorities.[24] More practically, any turn to states must grapple with states' association with ineffectiveness or a lack of transparency,[25] with the history and threat of "subnational authoritarianism,"[26] and with some state legislatures'

22. On inattention to state institutions, see, for example, Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 146 (2018); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 777 (2017).

23. *See infra* Part II.

24. *See, e.g.*, Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 4 (2010) [hereinafter Gerken, *Federalism*] ("Federalism is a system that permits minorities to rule, and we are intimately familiar with its benefits: federalism promotes choice, competition, participation, experimentation, and the diffusion of power."); Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 106 (2016) ("Only certain kinds of groups—national minorities that can form state majorities—can conceivably benefit from decentralization.").

25. For a description of the longstanding view of state government as useless or incompetent, see generally JON C. TEAFORD, THE RISE OF THE STATES (2002) (critiquing this view). For a more recent exploration, see Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1108–25 (2018).

26. EDWARD L. GIBSON, BOUNDARY CONTROL: SUBNATIONAL AUTHORITARIANISM IN FEDERAL DEMOCRACIES 39 (2013) (describing "the rise and maintenance of state-level authoritarian regimes in the American South in the 19th and 20th centuries"); Johanna Kalb & Didi Kuo, *Reassessing American Democracy: The Enduring Challenge of Racial Exclusion*, 117 MICH. L. REV. ONLINE 55, 57 (2018) ("Democrats were given free rein to establish authoritarianism

countermajoritarian status.[27] Given all this, it is easy to ignore state institutions when racing to preserve a functional democracy.

But if conventional accounts count states out, they mistake addressable issues for hard-wired ones. States do not offer democratic perfection, but they do present an opportunity for a constitutional and institutional regime in which determined popular majorities can prevail if they mobilize. Indeed, this Article's institutional framework aligns with and helps explain the many works of law and policy suggesting that popular movements do or should begin with a state or local foothold.[28] Of course, states alone cannot be a complete answer to our present ills. But letting them, too, slip into minority rule will greatly exacerbate our problems. Like the distant collapsing ice shelves that signal climate catastrophe, cascading degradations of state-level democracy are both late-stage symptoms of democratic decline and drivers of its most potent consequences.

Second, at the same time that we put greater stock in state democratic opportunity, we should develop a discourse that can make better sense of both the necessity and limits of majority rule, in the states and beyond. To date, efforts to protect democracy have yielded a muddled public dialogue. The proponents of antidemocratic measures in the states sometimes argue they are improving democracy itself.[29] Other times, they warn of the downsides of majority rule (offering the "republic, not a democracy" refrain[30]), even when pushing

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in the southern states by eliminating political competition and instituting racial segregation."). *See generally* Jacob M. Grumbach, Laboratories of Democratic Backsliding (June 5, 2022) (unpublished manuscript), https://www.dropbox.com/s/c682q88keqycp6s/grumbach_laboratories_of_democratic_backsliding.pdf [https://perma.cc/L56X-W6Y5] (quantifying contemporary state-level democratic backsliding and finding that it correlated with Republican control of state government).

27. Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021) [hereinafter Seifter, *Countermajoritarian Legislatures*].

28. *See infra* Part I.B.

29. LEVITSKY & ZIBLATT, *supra* note 1, at 92 ("One of the great ironies of how democracies die is that the very defense of democracy is often used as a pretext for its subversion.").

30. *See* JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS 177 (2020) (discussing the recent rise of the "democracy/republic slogan" and noting that "those who invoke it are not, as a rule, making the reasonable argument that the rights of vulnerable minorities should be protected or that some decisions should require supermajorities"; rather, "[t]hey are arguing that democracy itself is a problem, because it threatens the property and power of powerful minorities").

measures that would harm rather than help minority interests.[31] But democracy is not a river that can float every boat, and this Article takes seriously the risk that muddled dialogue leads to opportunism.[32] The competition to convey ideas to the public, the media, and officials themselves, a task at which the political right has been especially effective in recent decades,[33] is important to any movement to preserve state democracy.

To this end, the Article aims to dispel the insinuation that state majoritarian institutions threaten distinctive harm. The harms associated with majority power—most commonly, harms that subvert political equality—are real. But they are the problems of power, period. They are just as likely to flow from outsized minority rule, at much greater cost to democracy. To cut through the noise, the Article offers a simple normative framework, which it terms *structural tailoring*, to evaluate types of majority constraint.[34] A host of "weak" constraints on state majoritarian institutions may enrich decision-making, but "strong" constraints should be rejected absent adequate

31. *See, e.g.*, Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 862 (2021).

32. This Article is thus rooted in the cross-disciplinary literatures about how framing and rhetoric shape both public opinion and constitutional interpretation. For just a few examples, see DANIEL T. RODGERS, CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE 4–8 (1987); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1419 (2006); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749 (2014); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 702–03 (2009); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 879 (2013); Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. & SOC. SCI. 653, 664–65 (2010). On the recent blurring of democracy discourse in particular, see LEVITSKY & ZIBLATT, *supra* note 1, at 92; HACKER & PIERSON, *supra* note 30.

33. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 2 (2008); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION, at ch. 1 (2015); Greene, *supra* note 32, at 708–14 (explaining the appeal of originalism to popular audiences); *cf.* David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 5 (2019) ("[W]e demonstrate that conservatives in recent Congresses have developed an especially coherent constitutional vocabulary, with which they have come to 'own' not only terms associated with originalism and the Framers but also terms associated with textual provisions such as the First Amendment.").

34. Structural tailoring—the idea that, like rights incursions, structural incursions may raise distinctive normative concerns and thus warrant variegated scrutiny—has broader implications than those I discuss here, as I will address in future work.

justification. With this in mind, the Article identifies three recurring mistakes that state-level changes make. Each would systematically replace majority with minority rule or cause the harms to political equality that they purport to ease. The Article does not purport to perfect the famously "tricky task," as Professor John Hart Ely wrote,[35] of balancing minority and majority power. Still, it is both possible and imperative to identify some actions as out of bounds—to distinguish antidemocratic attacks from salutary reform efforts.

All of this should give us a refreshed lens on where majorities can rule, how democracy might still flourish here, and what we should do now. Pouring energy into state democratic institutions is time well spent today. There is no easy fix, but important interventions are available. The Article focuses on four change-makers who can invest in and reinforce state-level democracy. First, state courts play an important role. Courts can apply the state constitutional democracy principle to limit baseless attacks on state majoritarian institutions, as a few recent decisions illustrate. Second, reformers in state government who have legitimate concerns about direct democracy, gubernatorial power, or elected courts (for example, a legislature that believes the governor went too far in imposing COVID-19-related measures) can proceed incrementally rather than overhauling the institutions, recognizing the important function that majoritarian state institutions serve. Third, organizers can use a vocabulary of democracy—rather than more isolated, case-specific pleas—to frame and mobilize action against state actions that undermine state institutions for antidemocratic purposes. Finally, everyone who values democracy should invest in it offensively in the states, not just defensively, by viewing elections for state majoritarian actors as enormously important, not minor or optional (or uncontested) affairs; by investing in the expertise and capacity of state institutions; and by promoting civic engagement and deliberation on state, not just national, affairs.

The remainder of the Article unfolds in four parts. Part I tells two tales of democratic opportunity, contrasting the obstacles to majority rule at the national level with the meaningful pathways for it in the states. Part II describes the emerging threats to state majoritarian institutions, which are often marketed as good-government reforms. Part III seeks to make sense of these developments through a rough normative framework of structural tailoring. Under the framework's

35. JOHN HART ELY, DEMOCRACY AND DISTRUST 7–8 (1980).

tailoring principle, strong constraints require scrutiny and must stop short of subverting majority rule at an institution-wide level. Many of Part II's developments fail under this framework. Finally, Part IV proposes interventions that can safeguard state majoritarian institutions and, in turn, keep a foot in the closing door of American democracy.

One note before proceeding. Whereas a system that deploys institutional counterweights to protect minority groups against majority rule may well approximate a first-best political order, a system that offers only limited, subnational opportunity to protect majorities from minority rule is almost certainly not. The Article does not suggest that preserving state majoritarian institutions yields an optimal result; the interventions here are more last resort than gold standard. But that makes the problems discussed here all the more urgent.

I. TWO TALES OF DEMOCRATIC OPPORTUNITY

Something is missing in the burgeoning commentary on our nation's democratic headwinds. Scholars have rightly pointed out that the Senate, the Electoral College, and the Supreme Court are skewed against majority rule. But we seldom hear much about the states. Commentators are understandably focused on the largest trees in the forest but are missing the vital undergrowth.

This Part urges zooming out. It invites a reimagination of American democracy as a landscape made up of both federal and state institutions that offer different democratic opportunity. It is true that national institutions are impeding majority rule today, as Part I.A describes below. Determined majorities—that is, those who organize and mobilize to seek political change—can try their best at the national level, and often do. But because of the way that institutional structure interacts with polarization and political geography, they will tend to fail absent supermajority support.

The script is flipped in the states. State constitutions yield three purely majoritarian institutions: elected state executives, elected state courts, and ballot initiatives. State legislatures, for their part, may also (but not always) be majoritarian. None of these institutions will always yield majoritarian *results*. But the constitutional opportunity they offer to determined majorities is qualitatively different from those opportunities at the national level. Determined majorities at the state

level can win. If the question is, Where can majorities rule?, the answer is subnational.

Before proceeding, each component of democratic opportunity warrants explanation. By democratic, I refer to an institution in which popular majorities rule, with individuals participating on equal terms. This definition encompasses three defining pillars of democracy: majority rule, popular sovereignty, and political equality. As Professor Jessica Bulman-Pozen and I have argued elsewhere, these aspects of democracy are both normatively desirable and widely shared,[36] even as democracy is an "exemplary essentially contested concept."[37]

The Article pays special attention to the democratic pillar of majority rule—a basic threshold for democracy that recent developments threaten. Measuring majority rule faces well-known conceptual and practical challenges,[38] but this Article adopts a minimal definition that should hold broad appeal. For this Article's purposes, an institution establishes a threshold of majoritarianism when the candidate or party (or position, for ballot initiatives) with the most voter support prevails.[39] This thin definition may not go far enough. When participation in the political community is restricted or suppressed, we cannot speak meaningfully of rule by the majority.[40] Building more inclusive political communities must therefore be a vital and continuing state project. In addition, defining majoritarianism based on institutional structure is less demanding than seeking

36. *See* Bulman-Pozen & Seifter, *supra* note 31, at 864.

37. *Id.*

38. *See generally, e.g.*, KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3d ed. 2012) (positing the impossibility of aggregating collective preferences while also complying with basic fairness requirements).

39. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS, at ch. 10 (1989) (justifying a majority rule-based definition of democracy); *see also* Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1736–37 ("[M]ost minimally under majority rule, the candidate or party that receives the most votes should win.").

40. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (rev. ed. 2009) (recounting the history of suffrage, voting rights, and ballot access in the United States); GIBSON, *supra* note 26 (undertaking a comparative analysis of subnational authoritarianism, including in the U.S. South); ROBERT MICKEY, PATHS OUT OF DIXIE (2015) (arguing that states in the U.S. South amounted to authoritarian enclaves until the early 1970s and describing their eventual democratization).

congruence[41] or alignment[42] at the level of individual or aggregate policy-making.[43] But the definition at least provides a baseline for assessment—an important starting point given that state constitutions, unlike the federal constitution, "locate the majority of the political community as the principal and normatively superior decisionmaker."[44]

Furthermore, when discussing majority rule, this Article focuses on the political system, and it primarily addresses majority and minority *parties*. A broader and longer-term project might consider effects of institutional structure on other majority and minority populations or interests. But at both the state and national levels, partisanship is the most salient variable in both policy-making and political discourse,[45] and indeed, partisan divisions today often track other divisions.[46] Moreover, scholars have shown that national partisanship affiliations now animate state-level voting[47]—a phenomenon that discourages federalism scholars seeking distinctive state-level political communities but that also renders states a plausible site for the mobilization of national majorities. In some instances, especially in the context of ballot initiatives, the Article also discusses a majority-minority *policy* dynamic, one in which cross-party voters form a majority on a given issue, but elected leaders stymie them or push unpopular policies instead.

And what of opportunity? As I use the term, a democratic opportunity exists when a determined majority has a reasonable chance of prevailing, even if their success is not a foregone conclusion

41. *See* Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 152–53 (2012) (identifying gaps in congruence at the state level).

42. *See* Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287 (2014).

43. On the "trustee" versus "delegate" theories of representation, see, for example, Andrew Rehfeld, *Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy*, 103 AM. POL. SCI. REV. 214, 219 (2009).

44. Bulman-Pozen & Seifter, *supra* note 31, at 899.

45. *See infra* notes 48–51; Gould & Pozen, *supra* note 16, at 67 ("[P]arties are the key institutions that organize political contestation [in the United States].").

46. *See* Gould & Pozen, *supra* note 16, at 67 ("[M]any social identities are now subsumed into party identities, and many demographic and interest groups are now firmly ensconced in either the Democratic or Republican coalition.").

47. *See* DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 36–58 (2018).

and may require threshold changes in rules or circumstances. Thus, democratic opportunity refers to outcomes that are neither a fantasy nor a guarantee. As I explain more below, sometimes an opportunity is absent because it is foreclosed by the constitution's structure; federal judges are not elected, for example. Other times an opportunity is absent due to durable political or social forces. In particular, the nation today is politically divided,[48] highly polarized,[49] ideologically sorted,[50] and unevenly distributed geographically,[51] and that takes certain national political outcomes off the table. Those features seem unlikely to change in the foreseeable future.[52] On the flip side, outcomes are a guarantee when their success is a lock. The point here is not to suggest any such guarantee, but to stress that majorities can prevail in the states—and change can happen—in ways that are structurally barred or politically off the table at the national level.[53]

In turn, as this Part explains, victories for state-level majorities can advance national democracy in two ways: by forestalling or preventing the spread of national democratic decline (the "fingers in the dam" model) and by boosting pro-democratic movements and initiatives to more states and into national focus (the "springboard" model).

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48. *See* LEE, *supra* note 10.

49. For accounts of modern polarization, see, for example, MASON, *supra* note 10; NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA 1–14 (2006) (describing the rise of polarization and its relationship to other economic and social changes).

50. *See generally, e.g.*, ALAN I. ABRAMOWITZ, THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP (2018) (discussing the growing alignment of different groups from dramatic changes since the end of World War II).

51. *See* JONATHAN A. RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 23 (2019).

52. *See, e.g.*, Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 288 (2011) ("[T]he hyperpolarization of the last generation should be understood as the steady state of American democracy, or the manifestation of a more mature American democracy, and hence likely to be enduring.").

53. The concept of opportunity I use here may be fluid over longer time horizons; even durable aspects of politics may eventually change. The opportunities I describe are thus not irreversibly hard-wired into state constitutions. Similarly, the national bars to opportunity caused by polarization, sorting, and political geography could give way. In both cases, opportunity is contingent over the longer-term. Indeed, as I discuss further below, the dynamics of districting and direct democracy looked very different even four decades ago. Still, these features appear stable over the shorter time horizons central to this Article.

A. National Democratic Opportunity (or Not)

In the United States today, majorities face considerable headwinds. "What began as a minor small-state advantage evolved, over time, into a vast overrepresentation of rural states."[54] Today that overrepresentation advantages the Republican Party in all three branches, allowing our elections to "fly in the face of majority rule."[55] Just a brief recap will suffice here.

Conversations regarding majority rule's challenges in the United States often begin with the Senate.[56] "[W]ithout doubt," Professor Lawrence Lessig wrote recently, "the most extreme institution of minoritarian democracy in America today is the United States Senate."[57] The Senate's "unequal representation" is rooted in the Connecticut Compromise—the decision that all states would receive two senators, which gives voters from small states far more voting power.[58] Although state population differences started small,[59] a resident of Wyoming today has around 70 times the voting power of a resident of California, as commentators often note,[60] making the Senate an outlier, both compared to other nations and compared to a baseline of majority rule.[61] Various studies show that a minority of the population can select a Senate majority and that "[t]wo-thirds of all Americans . . . live in the largest 15 states" and are represented by just 30 Senators.[62] The other third of the population elects a

54. Steven Levitsky & Daniel Ziblatt, Opinion, *End Minority Rule*, N.Y. TIMES (Oct. 23, 2020), https://www.nytimes.com/2020/10/23/opinion/sunday/disenfranchisement-democracy-minority-rule.html [https://perma.cc/VAZ6-8QUT].

55. *Id.*

56. *See, e.g.*, FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 2 (1999); Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1984 (2019) ("The United States Senate is radically unrepresentative.").

57. Lessig, *supra* note 6.

58. *See, e.g.*, LEVINSON, *supra* note 14, at 62; ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY 26–27 (2021).

59. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 184 (2016).

60. *E.g.*, LEVINSON, *supra* note 14, at 49–62.

61. DAHL, HOW DEMOCRATIC, *supra* note 14, at 49.

62. David Daley, *The US Senate Is Undemocratic. That's Bleak for Democrats' Midterm Hopes*, GUARDIAN (Nov. 2, 2021, 6:25 AM), https://www.theguardian.com/commentisfree/2021/nov/02/us-senate-undemocratic-democrats [https://perma.cc/QM3A-CHN9]; *cf.* Orts, *supra* note 56, at 1985 (citing studies predicting this by 2040).

supermajority.[63] To paraphrase James Wilson's lament, the Senate prioritizes the interests of "the imaginary beings called states" over each individual's political equality.[64]

Pair that structure with the modern sorting of the political parties, and it becomes a more potent form of minoritarian bias. The Senate's minoritarian structure would be less problematic if the divide between small and large states (and between urban and rural areas) had no predictable relationship to underlying political or partisan interests,[65] if it could be relied upon to rotate power among those interests,[66] or if one party were so dominant that the skew could not lead to minoritarian outcomes.[67] But that is not where we are. Republicans today dominate more small states, while Democrats are concentrated in medium and large states.[68] That is why the 50 Democratic senators in the 117th U.S. Congress "represent 41 million more Americans than the 50 Republicans,"[69] and why, moreover, Republican senators have not represented a national majority since 1996, despite controlling the chamber for roughly 18 years of that period.[70] And, "on average, small states have far fewer minorities and immigrants than does the nation as a whole."[71]

The filibuster intensifies these biases. As political commentator Adam Jentleson chronicles, the filibuster's rise from a delay tactic to a minority veto point now allows tiny minorities to jettison popular legislation.[72] "Over the past few decades," he writes, "changes in the Senate's rules have meant that senators representing as little as 11

63. *See* Daley, *supra* note 62.

64. DAHL, HOW DEMOCRATIC, *supra* note 14, at 52–54.

65. *Cf.* RODDEN, *supra* note 51 (discussing the deep divide between rural and urban voters).

66. *See* DAHL, HOW DEMOCRATIC, *supra* note 14, at 54.

67. *See* Gould & Pozen, *supra* note 16, at 90.

68. *See id.* at 115 ("Today, the most sparsely populated states tend to have Republican majorities, and Republicans are far more likely than Democrats to be in the majority of more than half the states even if they are in the minority nationwide.").

69. Daley, *supra* note 62.

70. Stephen Wolf, *How Minority Rule Plagues Senate: Republicans Last Won More Support than Democrats Two Decades Ago*, DAILY KOS (Feb. 23, 2021, 6:00 AM), https://www.dailykos.com/stories/2021/2/23/2013769/-How-minority-rule-plagues-Senate-Republicans-last-won-more-support-than-Democrats-two-decades-ago [https://perma.cc/9NFU-3P7L].

71. Christopher Z. Mooney, *The U.S. Senate: The Most Unrepresentative Body*, NPR ILL. (Feb. 9, 2021, 2:32 PM), https://www.nprillinois.org/politics/2021-02-09/the-u-s-senate-the-most-unrepresentative-body [https://perma.cc/9FFP-JX6G].

72. *See* JENTLESON, *supra* note 58, at 9–11.

percent of the population" can block legislation.[73] And again, due to political geography, these voting rules are not politically neutral; they tend to disproportionately favor the Republican Party.

The House of Representatives appears at first blush to fare better as a majoritarian institution. But for less obvious reasons, it often does not. The field of political geography teaches that the territorial distribution of parties matters in districted elections.[74] In particular, the use of winner-take-all single-member districts advantages parties that are more efficiently distributed throughout a state and disadvantages parties that are concentrated in urban areas.[75] When you pair that geographic advantage with partisan gerrymandering, you get a House that routinely gives a greater "seats bonus" to the Republican Party.[76] In 1996 and 2012 (and very nearly in 2016), "Republicans even won House majorities despite Democrats winning the House popular vote."[77]

Then there is the president, the official who in legal lore is "the true representative of the American people"[78] as a result of being "the only nationally elected officer under the Constitution."[79] In addition to the logical flaws of this "fable" (that is, comparing the president to individual members of Congress rather than Congress as a whole),[80] it overlooks the bias that the Electoral College bakes in. Because states' Electoral College votes depend on their House and Senate representatives, the Electoral College carries forward, in part, the Senate's small-state skew.[81] This makes possible minoritarian

73. *Id.* at 111.

74. *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 241 (2013).

75. *See* RODDEN, *supra* note 51.

76. *See, e.g.*, Molly E. Reynolds, *Republicans in Congress Got a "Seats Bonus" This Election (Again)*, BROOKINGS: FIXGOV (Nov. 22, 2016), https://www.brookings.edu/blog/fixgov/2016/11/22/gop-seats-bonus-in-congress [https://perma.cc/9T63-A2HL]; David Wasserman, *The Congressional Map Has a Record-Setting Bias Against Democrats*, FIVETHIRTYEIGHT (Aug. 7, 2017), https://fivethirtyeight.com/features/the-congressional-map-is-historically-biased-toward-the-gop [https://perma.cc/C7UB-GHSK].

77. Bronner & Rakich, *supra* note 16.

78. Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1219 (2006) (critiquing this view).

79. William P. Marshall, *Why the Assertion of a "Nationalist" Presidency Does Not Support Claims for Expansive Presidential Power*, 12 U. PA. J. CONST. L. 549, 552 (2010).

80. Nzelibe, *supra* note 78.

81. *See* Gould & Pozen, *supra* note 16, at 116.

outcomes that occur "in the most egregious way"[82]: when the Electoral College winner loses the popular vote, as happened in 2000 and 2016.[83] But it also thwarts majorities in every cycle because "it is only a tiny fraction of American voters who actually matter to the ultimate result."[84] Because this tiny fraction is also unrepresentative of the nation as a whole,[85] this bias in favor of swing-state voters means that a tiny slice of "kingmakers" pick the president.[86] What is more, some scholars argue the Electoral College yields minoritarian policy-making, in which "[p]residents . . . pursue policies that prioritize the needs of some Americans in politically valuable constituencies over others."[87]

Finally, the federal judiciary pairs the biases of the Electoral College and the Senate through the selection process of presidential nomination and Senate consent. Scholars have long debated whether the federal judiciary is countermajoritarian due to its unelected status and life tenure.[88] But the modern era's political developments take the debate to another level. Due to polarization, sorting, and the biases they have wrought, the federal judiciary, and the Supreme Court in

82. Lessig, *supra* note 6.

83. These upside-down results are more likely to favor Republicans. *See generally* Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836–2016*, 14 AM. ECON. J.: APPLIED ECON. 327 (2022) (discussing that the extent of partisan asymmetry has favored Republicans).

84. Lessig, *supra* note 6; *see also* Nate Cohn, *The Electoral College's Real Problem: It's Biased Towards the Big Battlegrounds*, N.Y. TIMES: THE UPSHOT (Mar. 22, 2019), https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html [https://perma.cc/B27E-HPMY] (discussing the Electoral College's bias toward big battlegrounds). The Electoral College is countermajoritarian in one further way, which is that, according to a recent Pew survey, "58% of U.S. adults favored amending the Constitution so the presidential candidate who receives the most popular votes nationwide wins." Drew Desilver, *Biden's Victory Another Example of How Electoral College Wins Are Bigger than Popular Vote Ones*, PEW RSCH. CTR. (Dec. 11, 2020), https://www.pewresearch.org/fact-tank/2020/12/11/bidens-victory-another-example-of-how-electoral-college-wins-are-bigger-than-popular-vote-ones [https://perma.cc/C5Z9-WCYM].

85. *See* Lessig, *supra* note 6.

86. Douglas Kriner & Andrew Reeves, *The Electoral College and Presidential Particularism*, 94 B.U. L. REV. 741, 747 (2014).

87. *Id. See generally* DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT (2015) (theorizing and offering evidence of presidential particularism, in which presidents disproportionately assist their electoral and partisan constituencies).

88. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (2d ed. 1986) (introducing the term "counter-majoritarian difficulty"); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

particular, "has become *particularly* countermajoritarian."[89] As a recent study by legal scholars Joshua Zoffer and David Grewal shows, this has led to a modern phenomenon of minoritarian judges who were selected by a Senate or president (or both) lacking popular-vote support.[90] These minoritarian judges (even superminoritarian judges) are then locked in with life tenure.[91] As polarization and sorting intensify these selection biases for judges, the Court's enormous power becomes more concerning.[92]

This is a dismal state for national democracy. It does not mean that organizing and mobilization are hopeless tasks at the national level. As scholars remind us, it is only through advocacy and often through conflict that the ideas, allegiances, and political orders we regard as fixed can change.[93] Still, preserving and improving democracy is mightily tough going in national institutions. The next Section explains how state institutions might help.

B. State Democratic Opportunity

A determined majority can get much more traction in the states. This Section first briefly profiles three state institutions whose structure and purpose promote majority rule. It then explains how state-level democracy can work to slow or even offset national democratic decline.

1. *Understanding State Institutions*. The democratic opportunity that state institutions offer begins as a function of state constitutional law. Whereas the federal constitution self-consciously stymied popular

89. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 156 (2019).

90. Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 442 (2020).

91. *See id.*

92. For discussion, see generally Nikolas Bowie, Assistant Professor of L., Harv. L. Sch., *Written Statement*, *before the* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf [https://perma.cc/2YQC-ZAJU] (arguing that the Supreme Court has "wielded an antidemocratic influence on American law, one that has undermined federal attempts to eliminate hierarchies of race, wealth, and status").

93. *E.g.*, Chris Maisano, *It Would Be Great If the United States Were Actually a Democracy: An Interview with Aziz Rana*, JACOBIN (Feb. 16, 2021), https://jacobinmag.com/2021/02/us-constitution-interview-aziz-rana [https://perma.cc/MEP9-EXR9].

majorities, state constitutions prioritize them.[94] Indeed, as Professor Jessica Bulman-Pozen and I have argued, the two sets of documents have opposing and complementary concerns when it comes to majority and minority power.[95] State constitutional law has focused on the fear of "minority faction—power wielded by the wealthy or well-connected few—rather than majority faction."[96] The institutions that state founding documents create, for the most part, follow in this mold.

Right out of the gate, any optimistic take on state institutions and democracy must confront the critique that low engagement in state elections diminishes their potential to foster majority rule. If there is low turnout, can we really say that state institutions speak for a relevant majority—here, a majority of eligible voters?[97] I offer a few responses. First, although a deep dive into the empirics is beyond this Article's scope, fears of low turnout or ballot roll-off in state elections may be overstated or at least too generalized.[98] So too may be the presumed effects of low turnout on state policy: the state policy literature finds that state government is responsive to public opinion,[99] even if often

94. *See* Bulman-Pozen & Seifter, *supra* note 31, at 861–62.

95. *See id.* at 861, 863.

96. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? 87, 89 (Elliott Abrams ed., 2002); *see also* Bulman-Pozen & Seifter, *supra* note 31, at 880 (discussing this feature of state constitutionalism).

97. *See generally* SARAH F. ANZIA, TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS (2014) (discussing how interest groups have an outsized effect on the outcomes of low-turnout, off-cycle elections).

98. Regarding turnout, the vast majority of states hold their regular statewide elections concurrently with federal elections, thus blunting the turnout critique. *Id.* at 7 ("[O]nly five states . . . hold some or all of their regular elections in the odd-numbered years: Kentucky, Louisiana, Mississippi, New Jersey, and Virginia. The rest of the states hold elections concurrently with national elections."). This critique may be more apt, however, for those states that hold judicial elections in the spring, especially where there is no major federal primary occurring. Regarding roll-off, the phenomenon in which voters leave down-ballot races blank, the literature suggests, at a minimum, that the extent of the phenomenon likely varies across races, states, and partisan or nonpartisan status. For a discussion of how ballot format impacts roll-off, see Herbert M. Kritzer, *Roll-Off in State Court Elections: The Impact of the Straight-Ticket Voting Option*, 4 J.L. & CTS. 409, 415 (2016).

99. *See* Devin Caughey & Christopher Warshaw, *Policy Preferences and Policy Change: Dynamic Responsiveness in the American States, 1936–2014*, 112 AM. POL. SCI. REV. 249, 250 (2018). For a thought-provoking inquiry into why this may hold true despite voter ignorance, see Chris Tausanovitch, *Why Are Subnational Governments Responsive*?, 81 J. POL. 334, 338–41 (2019).

not congruent with it.[100] But more central to this Article, participation levels are not hard-wired. Turnout fluctuates, and ballot roll-off is likely amenable to election-administration and ballot-design interventions.[101] Unlike partisan polarization, which seems to be the "mature"[102] and unshakable state of our societal fabric for the foreseeable future, civic engagement is contingent. State-level mobilization can and does happen.[103]

I turn now to the democratic opportunity that different state institutions offer. Consider first state governors. Governors today are selected by statewide elections in all 50 states.[104] The biases of the Electoral College, discussed above, do not apply; governors need not focus only on "swing counties" or particular regions. The movement to elected governors was a deliberate effort to produce elected officials that would "resist the entreaties of special interests."[105] And today's model of gubernatorial leadership, in which the governor typically stands as the most powerful and visible leader of the state,[106] can generate real responsiveness to statewide majorities. Most importantly for present purposes, gubernatorial elections are far less susceptible to minoritarian skews. Political geography does not disadvantage majorities, and there are no districts to be gerrymandered or

100. *See* Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012) (finding that although state policy is responsive to public opinion, it often fails to be congruent with public opinion).

101. *See, e.g.*, William Marble, Mail Voting Reduces Ballot Roll-Off: Evidence from Washington State 4 (Dec. 4, 2017) (unpublished manuscript), https://williammarble.co/docs/rolloff_vbm.pdf [https://perma.cc/C23E-UXBS] (finding that roll-off "significantly decreased" in counties that "switch[ed] to all-mail elections").

102. Pildes, *supra* note 52.

103. Another line of skepticism regarding state democratic opportunity might come from the growing literature showing that voters know little about state-specific policy or officials; instead, they rely on national-party proxies. *See* HOPKINS, *supra* note 47. That state of affairs is indeed troubling in many respects, especially for traditional accounts of federalism and of government closer to the people. *See* Schleicher, *supra* note 22, at 768–69. But it is less troubling for this Article's thesis that state institutions may provide national majorities with an opportunity for power.

104. *Governors' Power & Authority*, NAT'L GOVERNOR'S ASS'N, https://www.nga.org/governors/powers-and-authority [https://perma.cc/Q6Y5-GX78].

105. Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1769 (quoting John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 947 (1999)).

106. *See* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 485–87 (2017) [hereinafter Seifter, *Gubernatorial Administration*].

malapportioned. But voter suppression and big money can still distort gubernatorial campaigns, as they do other campaigns.[107] We should not underestimate these factors and the need to attend to them through resistance and reforms. Still, these factors are subconstitutional and changeable. Motivated majorities can win the governor's mansion, without any equivalent of the Senate or Electoral College requiring them to win with supermajority cushions.

State supreme courts often work in a similar fashion. In 38 states, voters participate in elections to select or retain their state high court judges and, in the vast majority, do so without districts.[108] There are, of course, deep literatures debating the advantages and disadvantages of judicial elections. But one thing that cannot generally be argued is that they are skewed minoritarian in the sense that a partisan minority chooses them.[109] And even accepting that judging is not itself a majoritarian task, there are sound reasons that state reformers wanted popular majorities to decide which individuals would fill those roles.[110]

The ballot initiative is the third majoritarian institution in the state trio. Roughly half of the states currently allow voters to make statutory or constitutional law directly.[111] Like elections for governors and most state supreme courts, the vote for or against an initiative operates statewide. It cannot be gerrymandered or fall prey to the biases of

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107. *See, e.g.*, Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 657–58 (describing developments that have imposed burdens on voting while limiting restrictions on money in politics).

108. *See Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., http://judicialselectionmap.brennancenter.org/?court=Supreme [https://perma.cc/6XGS-FJYJ] (showing that 14 states allow voters to decide to retain state supreme court judges originally appointed by the governor, 21 states host either nonpartisan or partisan elections for state supreme court judges, and 3 states employ a hybrid model for retaining judges). According to a 2007 tally by Professor Paul Diller, 8 states use judicial districts (4 in general elections, 4 in retention elections only). Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1162 (2007) [hereinafter Diller, *Intrastate Preemption*]. Diller posits that "a justice's allegiance to any particular geographic area is likely muted by the large size of the district." *Id.*

109. Of course, the extent to which state judiciaries are responsive to the present day will of the people depends on finer details of the courts' structure and selection, including the length of term they serve and the timing of judicial elections. *See* Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1773.

110. *See* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 5–7 (2012) [hereinafter SHUGERMAN, THE PEOPLE'S COURTS] (explaining factors that led states to choose to elect judges, including a desire to preserve judicial independence from partisan politics).

111. *See* Bulman-Pozen & Seifter, *supra* note 31, at 876.

political geography. The exception to this observation arises in the processes for qualifying a proposal for the ballot. As discussed further in Part II, 14 states require a threshold of signatures reflecting support in multiple parts of the state, subject to apportionment limitations, and the attempt to intensify such geographic requirements has become a battleground for democracy.[112]

Perhaps even more so than the other two institutions in the majoritarian trio, ballot initiatives have been strenuously criticized for falling short of their democratic promise. Money plays a major role in many ballot initiative campaigns.[113] Information and deliberation may be low.[114] In some cases, these flaws are overstated—for example, money plays a major role in other statewide campaigns too.[115] In others,

112. *See infra* note 185 and accompanying text.

113. *See* Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1849 (1999) ("With regard to the initial phase of this legislative process—qualification for the ballot and the ability to trigger a popular vote—money is virtually always sufficient for success, and it is becoming a necessary component as well."); DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 5 (2000). In his influential 1978 article on direct democracy, Professor Derrick Bell lamented that "[t]he success or failure of ballot-box legislation, therefore, may depend less on the merits of the issue than on who is financing the campaign." Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 20 (1978).

114. *See* Fred O. Smith, Jr., *Due Process, Republicanism, and Direct Democracy*, 89 N.Y.U. L. REV. 582, 612 (2014).

115. Back-of-the-envelope calculations in initiative states reveal that the costs of initiative campaigns vary widely; compared to a gubernatorial campaign, some initiative campaigns involve far less spending, some involve similar spending, and some involve even more spending. To take recent examples from states discussed in Part II, in Idaho in 2018, the winning gubernatorial candidate raised roughly $3.37 million, *Little, Brad*, OPENSECRETS, https://www.followthemoney.org/entity-details?eid=6576073 [https://perma.cc/44VE-CW8X], while ballot committees spent nearly $13 million (roughly divided between support and opposition) on an unsuccessful initiative to legalize gambling, Contributions to Proposition 001 in Idaho 2018, OPENSECRETS, https://www.followthemoney.org/show-me?dt=1&s=ID&y=2018&y=2018&m-id=1789 [https://perma.cc/USJ5-3D5S], and $1.9 million on the successful initiative to expand Medicaid, Contributions to Proposition 002 in Idaho 2018, OPENSECRETS, https://www.followthemoney.org/show-me?dt=1&s=ID&y=2018&y=2018&m-id=1790 [https://perma.cc/3BWQ-CHND]. In Michigan in the same year, the successful gubernatorial candidate spent $13.3 million, *Whitmer, Gretchen E.*, OPENSECRETS, https://www.followthemoney.org/entity-details?eid=253478 [https://perma.cc/NLM9-XPQY], while committees spent $6.9 million supporting or opposing the successful initiative to legalize marijuana, Contributions to Marijuana Legalization Initiative in Michigan 2018, OPENSECRETS, https://www.followthemoney.org/show-me?dt=1&s=MI&y=2018&y=2018&m-id=1743 [https://perma.cc/HBK8-8C36], and $17 million on the successful redistricting initiative, Contributions to Independent Independent Redistricting Commission Initiative, OPENSECRETS, https://www.followthemoney.org/show-me?dt=1&s=MI&y=2018&y=2018&m-id=1755 [https://perma.cc/RT2W-FUWS].

they are flaws that at least do not systematically undermine majority rule. But again, my main response is that these flaws are not hard-wired ones. Problems related to money, information, or deliberation are subject to influence through regulation, norms, or other subconstitutional practices.[116] Determined majorities that care about expanding the franchise, or about the minimum wage, or about Medicaid coverage can still win ballot initiatives and change the game in their state. They do not need a supermajority cushion or a population that is evenly distributed.

Finally, there are state legislatures. These stand apart from the core trio of state majoritarian institutions because they do use single-member districts—and as a result, it is not unusual for them to be a state's least majoritarian branch and even to produce upside-down outcomes in which the party that wins receives fewer votes overall.[117] Still, state legislatures differ from Congress in that they have no Senate; due to *Reynolds v. Sims*,[118] both chambers must be apportioned.[119] Thus, despite their flaws, state legislatures typically manage to cross a majoritarian threshold. When they do, they too can serve majorities better than the national lawmaking process.

2. *How State Institutions Help: Defense and Diffusion*. If majorities can rule in state institutions, what good can that do? State democratic opportunity encompasses both direct, in-state and indirect, out-of-state benefits. These benefits may flow from offensive or defensive state-level activity.

Start with the direct benefits. State institutions provide opportunities for determined majorities to rule within that state and to

116. *See* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401 (2003) (proposing administrative law approaches to legitimize direct democracy); *see also* JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE 228–35 (2020) (identifying best practices for "well-functioning referendum processes").

117. *See* Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1762–63.

118. Reynolds v. Sims, 377 U.S. 533 (1964).

119. *Id.* at 568. In addition, state legislatures that allow for filibusters seem typically to limit the practice to "actual debate, by actual talking" and to establish majority cloture rules, such that "the state filibuster can remain a bastion for the voice of the minority, while not fundamentally threatening the operation of senate chambers designed to give effect to the majority's will." Kyle Grossman, *The Untold Story of the State Filibuster: The History and Potential of a Neglected Parliamentary Device*, 88 S. CAL. L. REV. 413, 435 (2015) (emphasis removed).

do so now, even as they are shut out from national institutions. This makes it possible to speak of actual rather than hypothetical American democracy. We are not yet in a place where majorities rule nowhere. More concretely, this offers benefits that can loosely be grouped as defensive and offensive.

Defensively, state officials responsive to popular voting may be less likely to subvert democracy altogether. Having majoritarian officials serving in the offices of attorney general, the governor's office, state courts, and in some states, secretary of state, creates some barrier against unpopular antidemocratic movements—or so some recent examples suggest.[120] To be sure, majoritarian officials are not the only types of actors who might resist such incursions; career professionals might too. Nor can majoritarian officials be relied upon to oppose democratic erosion through and through; some will inevitably be on board with antidemocratic efforts. The claim is thus limited and comparative. Still, for as long as antidemocratic efforts are very unpopular, statewide officials who condone such efforts can be replaced by popular majorities at the next election in a way that the president, Supreme Court Justices, or Senate majorities who participate in such efforts cannot.

This defensive role of state-level actors has sometimes been overlooked, but it creates immediate fingers-in-the-dam urgency. Even apart from the pending attacks on these offices detailed in Part II, it is imperative for organizers to prioritize elections for these offices. State judicial elections, for example, have traditionally been "'sleepy,' 'low-key' affairs."[121] Although that dynamic seems to be giving way to "a

120. Examples might include the refusal of Georgia's governor and secretary of state to interfere with election results in the state, *see* Greg Bluestein, *How Brian Kemp Resisted Trump's Pressure To Overturn the Georgia Election Results*, POLITICO (Mar. 19, 2022, 7:00 AM), https://www.politico.com/news/magazine/2022/03/19/brian-kemp-david-perdue-donald-trump-2020-00018601 [https://perma.cc/DS5A-XKAD]; Amy Gardner, *'I Just Want To Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State To Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 9:59 PM), https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html [https://perma.cc/AG4P-NC8E], or Ohio's chief justice rejecting partisan efforts to disregard constitutional fair districting requirements, *see* League of Women Voters of Ohio v. Ohio Redistricting Comm'n, No. 2021-1193, slip op. at 20 (Ohio Mar. 16, 2022) (O'Connor, C.J., concurring), or governors vetoing election subversion bills, *see infra* note 139 and accompanying text.

121. David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 n.3 (2008) (listing many sources using these descriptors).

new era" of higher-profile, more contentious judicial elections,[122] it remains the case that voters may have little information about candidates and that uncontested elections remain; as recently as 2017, a conservative state supreme court justice in the key swing state of Wisconsin ran uncontested.[123] Yet state courts will decide critically important disputes in the coming years regarding elections, public health, criminal justice, and much more. Similarly, some state governors are "a sea wall against a rising Republican tide of . . . far-reaching election laws,"[124] and ballot initiatives are one of the few ways to expand the franchise in many states. The longstanding practice of neglecting state politics could allow the dam to break.

Offensively, the direct benefits of state democratic opportunity allow popular policies to be enacted or protected in a state. These policies may address the democratic process head-on, as exemplified by the states that have used ballot initiatives to expand the franchise or to create independent redistricting commissions,[125] or the state supreme courts that have protected voting rights or rejected partisan gerrymandering.[126] Or they may functionally bolster the democratic

122. *See id.* at 267–68.

123. *See* Marti Mikkelson, *Why No Challenger for Wisconsin Supreme Court Election This Spring?*, WUWM 89.7 FM (Feb. 10, 2017, 12:05 AM), https://www.wuwm.com/politics-government/2017-02-10/why-no-challenger-for-wisconsin-supreme-court-election-this-spring [https://perma.cc/DS62-YKAN]. The justice who ran uncontested, Annette Ziegler, is now in the midst of a ten-year term and is serving as the court's chief justice. Shawn Johnson, *Annette Ziegler Elected Chief Justice of Wisconsin Supreme Court*, WISC. PUB. RADIO (Apr. 14, 2021, 4:10 PM), https://www.wpr.org/annette-ziegler-elected-chief-justice-wisconsin-supreme-court [https://perma.cc/HR7Y-UCLD].

124. *See* Reid J. Epstein & Nick Corasaniti, *Why Democrats See 3 Governor's Races as a Sea Wall for Fair Elections*, N.Y. TIMES (Oct. 14, 2021), https://www.nytimes.com/2021/10/06/us/politics/governor-races-democrats.html [https://perma.cc/U3ZQ-C2JR].

125. *See* Paul A. Diller, *Toward Fairer Representation in State Legislatures*, 33 STAN. L. & POL'Y REV. 135, 166 (2022) (listing states that have adopted districting reform through ballot initiatives). On expansions of the franchise, see, for example, Nicholas Ansel, *Advancing Criminal Reform Through Ballot Initiatives*, 53 ARIZ. ST. L.J. 273 app.B (2021) (listing successful ballot measures in Rhode Island, California, and Florida).

126. *See, e.g.*, League of Women Voters v. Commonwealth, 178 A.3d 737, 821 (Pa. 2018) (holding that redistricting plan violated the Pennsylvania Constitution); Harper v. Hall, 868 S.E.2d 499, 559 (N.C. 2022) (holding that redistricting plan violated the North Carolina Constitution).

process without addressing it expressly, by adopting measures that promote popular power and inclusion.[127]

Then there are the crucial indirect benefits. Democratic opportunity in state institutions gives democracy a chance to spread. The literature on policy diffusion is voluminous, dating back to the 1960s.[128] A few key insights suffice to show the potential. First, a democratic achievement in one state can change the Overton window, or the view among policymakers of what is possible. It can also generate social or professional pressure to conform.[129] Relatedly, a democratic achievement in one state can facilitate learning between states.[130] A state court decision may provide the key vocabulary and legal reasoning for a decision[131]; a state law or ballot initiative may provide a blueprint for what works.[132] Diffusion scholars also indicate that states might adopt a first-mover-state's policies as a form of competition.[133]

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127. *See, e.g.*, Andrias & Sachs, *supra* note 12, at 606, 608 (discussing how states could fund "social-movement organizations").

128. For some helpful orienting works, see ANDREW KARCH, DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES 14 (2007); Charles R. Shipan & Craig Volden, *Policy Diffusion: Seven Lessons for Scholars and Practitioners*, 72 PUB. ADMIN. REV. 788, 793 (2012); Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841–42 (2008) [hereinafter Shipan & Volden, *Mechanisms of Policy Diffusion*]; Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395, 399–400 (1990); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880, 881 (1969); and Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174, 1175 (1973).

129. *See* Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV. 1582, 1607 (2009) (noting "the ways in which behavioral 'scripts' signal prestige and become the model for institutional behavior").

130. *See, e.g.*, Craig Volden, *States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program*, 50 AM. J. POL. SCI. 294, 304 (2006) (noting that individual states' children's health insurance program policies "converge[d] over time toward policies in similar states and in successful states").

131. *See, e.g.*, Shane A. Gleason & Robert M. Howard, *State Supreme Courts and Shared Networking: The Diffusion of Education Policy*, 78 ALB. L. REV. 1485, 1511 (2015) (finding that, within the context of education finance reform, "citations matter—they allow state courts to transmit models of policy change and implementation from one to another").

132. *See, e.g.*, KARCH, *supra* note 128, at 17 (describing extensive mimicry among states on a range of policy issues).

133. *See, e.g.*, Shipan & Volden, *Mechanisms of Policy Diffusion*, *supra* note 128.

To be sure, there are important critical perspectives on state-level policy diffusion. It does not always work,[134] and perhaps the wrong ideas will spread.[135] Indeed, diffusion provides an important explanation for the deluge of antidemocratic laws described in Part II. But it is easy to see how the levers of diffusion could function in aid of democracy and have already started to do so. Scholars have already observed how innovations that facilitate voting or that expand the franchise in one state spread to other states.[136] Other pro-democracy reforms may spread in similar fashion. State court decisions that serve democracy, such as Pennsylvania's rejection of extreme partisan gerrymandering[137] or Idaho's rejection of ballot-initiative obliteration,[138] provide a constitutional roadmap and vocabulary for other states. Gubernatorial vetoes rejecting efforts to install actors who would not uphold legitimate election results can provide a shared social and professional reference point.[139] And at some point, the competition aspect of diffusion could inform decisions of moderate or swing-vote decisionmakers in the states—say, if large companies prefer to locate in democracy-friendly jurisdictions. In all of these ways, state institutions can provide a springboard toward increased enactment of popular pro-democracy positions, as successes in one state snowball—not just to like-minded states controlled by the same political party, but

134. *See* Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1339 (2009).

135. *See* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 707 (2017) (arguing that organized interest groups may have an advantage over diffuse constituents in using information from one jurisdiction to advance their policies elsewhere).

136. *See, e.g.*, Daniel R. Biggers & Michael J. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15 STATE POL. & POL'Y Q. 192, 202–03 (2015); Jereny Mendoza, The Diffusion of Less Restrictive Felon Disenfranchisement Laws in the U.S. 24 (Aug. 25, 2021) (M.A. report, University of Texas at Austin), https://repositories.lib.utexas.edu/bitstream/handle/2152/90804/MENDOZA-MASTE RSREPORT-2021.pdf [https://perma.cc/54EM-WFZR]; *see also* HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 5–6 (2009) (proposing a "Democracy Index" that would, among other benefits, facilitate the dissemination of best practices in election administration).

137. League of Women Voters v. Commonwealth, 178 A.3d 737, 818–19, 821 (Pa. 2018).

138. Reclaim Idaho v. Denney, 497 P.3d 160, 191 (Idaho 2021).

139. *See, e.g.*, VOTING RTS. LAB, A THREAT TO OUR DEMOCRACY: ELECTION SUBVERSION IN THE 2021 LEGISLATIVE SESSION 4, 8 (2021) (describing election-subversion bills that governors in Pennsylvania and Wisconsin vetoed).

also to states in which groundswells of support change or sidestep partisan recalcitrance.

It is worth stressing just how pivotal state and local actors are to both the mechanisms of diffusion and their prospects.[140] When federal pathways are closed or steeply uphill, it is states that provide points of entry for organizers.[141] Reformers in states and localities can then generate the vocabulary, blueprint, and mobilization that will spur copycat efforts in other states.[142] This Article's focus on democratic opportunity thus provides a constitutional and institutional companion to the policy diffusion literature, which emphasizes that policies often move from the bottom up.[143]

Finally, state institutions provide more than just horizontal spread of pro-democratic policy. Because state institutions both formally and informally shape the national government itself and national decision-making, through state administration of elections and through processes such as executive federalism[144] and federal-state consultations,[145] democratically composed state institutions can inject the popular will into national governance.

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140. A related literature explores how state-level actors may spur changes in national partisan positions. *See, e.g.*, ERIC SHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965, at 1 (2016) (describing how realignment of the national political parties "was rooted in state and local politics rather than in Washington, DC"); Daniel Hopkins, Eric Shickler & David L. Azizi, From Many Divides, One? The Polarization and Nationalization of American State Party Platforms, 1918-2017, at 14 (Jan. 12, 2022) (unpublished manuscript), https://ssrn.com/abstract=3772946 [https://perma.cc/XHA2-V4CN] (discussing "the potentially critical role that relatively decentralized activists and state parties can play in generating coalitional change nationwide").

141. *See, e.g.*, KARCH, *supra* note 128, at 15 (noting how states began to develop health care policy against the backdrop of congressional inaction on the topic); *cf.* Paul Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1266–67 (arguing that one reason local governments innovate is because city-level lawmaking is less "sclerotic" and has fewer vetogates than lawmaking at higher levels of government). *See generally* Olatunde C.A. Johnson, *The Local Turn; Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115 (2016) (analyzing civil rights innovations at the subnational level).

142. *See* Johnson, *supra* note 141, at 142–43.

143. *See, e.g.*, Shipan & Volden, *Mechanisms of Policy Diffusion*, *supra* note 128; *see also* Jamila Michener, *Medicaid and the Policy Feedback Foundations of Universal Healthcare*, 685 ANNALS. AM. ACAD. POL. & SOC. SCI. 116, 125 (2019) ("Building political momentum in the states is an offensive strategy for eventual national change.").

144. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 954 (2016).

145. *See* Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 970–71 (2014).

II. RECENT ATTACKS ON STATE MAJORITARIAN INSTITUTIONS

State majoritarian institutions are therefore crucial, but they have recently come under attack. The attacks are principally the work of Republican state legislatures, which have intensified efforts to cement their power.[146] The common features of the attacks reflect coordinated efforts by these legislatures and a private network of collaborators.[147] But it is not only Republican legislatures that have undermined or neglected state-level democracy.[148] Moreover, not all of the conflicts reflect interparty battles; some result from intraparty strife, while others, in the ballot initiative context, are centered in conflicts between legislatures and popular mobilizations.

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146. *See* Charles Homans, *Where Does American Democracy Go from Here?*, N.Y. TIMES MAG. (Mar. 17, 2022), https://www.nytimes.com/interactive/2022/03/17magazine/democracy.html [https://perma.cc/6E44-B7JD] (interviewing a bipartisan group of democracy experts who discussed the presence of antidemocratic forces within the Republican Party).

147. *See* ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION 1–19 (2018). For recognition of this trend in the realm of election administration, see STATES UNITED DEMOCRACY CTR., DEMOCRACY CRISIS IN THE MAKING REPORT UPDATE: 2021 YEAR-END NUMBERS 1 (2021) [hereinafter STATES UNITED REPORT DECEMBER 2021 UPDATE], https://statesuniteddemocracy.org/wp-content/uploads/2021/12/Democracy-Crisis-Report_FINAL-1.pdf [https://perma.cc/B938-PGF6] (identifying "a dangerous trend underway in state legislatures: . . . taking up proposals that would politicize, criminalize, and interfere in election administration"). In the realm of public health, see, for example, NETWORK FOR PUB. HEALTH L. & NAT'L ASS'N CNTY. & CITY HEALTH OFFS., PROPOSED LIMITS ON PUBLIC HEALTH AUTHORITY: DANGEROUS FOR PUBLIC HEALTH (2021), https://www.networkforphl.org/wp-content/uploads/2021/05/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL.pdf [https://perma.cc/JE53-473K]; Christine Vestal, *New State Laws Hamstring Public Health Officials*, PEW RSCH. CTR. (July 29, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/29/new-state-laws-hamstring-public-health-officials [https://perma.cc/WT5T-E4ES]. In the context of ballot initiatives, see *Defend Direct Democracy Campaign*, BALLOT INITIATIVE STRATEGY CTR., https://ballot.org/defend directdemocracy-campaign [https://perma.cc/8UPX-2LE7] (describing "organized, well-funded" efforts "to break down the People's access to the ballot measure process in states with GOP majorities where voters have approved progressive ballot measures").

148. *See* Sean Morales-Doyle & Chisun Lee, *New York's Worst-in-the-Country Voting System*, ATLANTIC (Sept. 13, 2018), https://www.theatlantic.com/ideas/archive/2018/09/new-yorks-worst-in-the-country-voting-system/570223 [https://perma.cc/52MG-6HTT]. In the past few years, New York has enacted new laws that make voting somewhat easier. *See* Amy Sherman, *Ask PolitiFact: Are New York's Voter Laws More Restrictive Than Georgia's?*, POLITIFACT (Apr. 8, 2021), https://www.politifact.com/article/2021/apr/08/ask-politifact-are-new-yorks-voter-laws-more-restr [https://perma.cc/G25M-P6LJ] (quoting attorney Sean Morales-Doyle's statement that "New York has a long history of a not very open democracy, but it is heading in the opposite direction").

As described at the outset, these attacks have either flown under the radar or been considered individually, at least by scholars and in public discussion. This Part presents them as part of a shared undertaking against majoritarian institutions, typically initiated by partisan forces in state legislatures. The attacks fall into three categories: those that transform jurisdiction-wide elections into districted elections, opening the door to skews and manipulation; those that impose burdens on direct democracy; and those that strip power from officials selected through statewide election to partisans or other entities.

A. Districting Everything

One way to transform majoritarian institutions into minoritarian ones is to alter selection methods from jurisdiction-wide selection to districted selection. As discussed above, governors, other state executives, state supreme courts, and ballot initiatives are typically majoritarian institutions in that they are voted upon by the statewide electorate. Switching those elections to districted votes replicates the minoritarian bias already discussed with respect to state legislatures. When it comes to state courts and ballot initiatives, legislative proponents are attempting just that.

To be clear, the discussion that follows is not an argument against any use of districts. Geographically rooted representation has benefits.[149] When the districted body also crosses a majoritarian threshold—or in systems that pair districts with proportional representation or hybrid schemes—districts can be compatible with both majoritarian democracy and, importantly, voice for minority interests.[150] The problem of the moment, however, is state legislative efforts to deploy districts to leverage their minoritarian bias.

149. *See* Benjamin Plener Cover, *Two Party Structural Countermandering*, 107 IOWA L. REV. 63, 76 (2021).

150. *See id.* This is not to say that territorial districts are the best way of achieving voice for minority interests. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1594 (1993) (explaining how courts sought to advance racial-group representation within the districted electoral system we have, but arguing that winner-take-all, territorial districts are not the most effective way to achieve representation).

1. *Judicial Elections*. We can think of the recent developments in judicial districting as "a new kind of gerrymandering."[151] Rather than the more familiar move of manipulating existing district lines, this approach involves "an escalation"[152]: establishing districts in the first place to achieve minoritarian bias. As Professor Jed Shugerman writes in a recent essay, "State supreme courts have become a new battleground of partisan districting."[153] In the two most recent legislative sessions, proposals in roughly six states "would either gerrymander existing courts or create new ones, in response to the perception that current courts are insufficiently supportive of outcomes favored by the legislature."[154] In additional states that already have some form of districts for judicial elections, the redrawing of lines is becoming a new flashpoint for partisan battles.

Take Pennsylvania, a state where "Republicans . . . have historically used gerrymandering to maintain their majority in the legislature, despite Democratic victories in statewide elections."[155] As Professor Jonathan Rodden's work and my own work have shown, the use (and drawing) of districts has allowed Pennsylvania's legislature to veer into minoritarian territory. Adopting judicial districts could achieve the same result in the courts. Given its geography, including "two densely populated Democratic cities and large rural areas," districting "could give outsize representation to sparsely populated places that lean more conservative, particularly if the legislature resorts to a gerrymandering tactic similar to one used in Pennsylvania in 2011."[156]

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151. Nick Corasaniti, *Pennsylvania GOP's Push for More Power over Judiciary Raises Alarms*, N.Y. TIMES (Feb. 15, 2021), https://www.nytimes.com/2021/02/15/us/politics/pennsylvania-republicans.html [https://perma.cc/H9J6-4S7U].

152. *Id.*

153. Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 23 (2022) [hereinafter Shugerman, *Countering Gerrymandered Courts*].

154. Patrick Berry, Alicia Bannon & Douglas Keith, *Legislative Assaults on State Courts – May 2021 Update*, BRENNAN CTR. FOR JUST. (May 19, 2021), https://www.brennancenter.org/our-work/research-reports/legislative-assaults-state-courts-2021#ch2 [https://perma.cc/A59Z-X9DY]. As discussed further below, the states proposing the establishment of districts are Pennsylvania, Montana, and New Mexico; Tennessee and Texas would have also created new courts. *See id.* Efforts in Washington and New Mexico failed. *See* S.J. RES. 8215, 66th Leg., Reg. Sess. (Wash. 2020); Berry et al., *supra* (noting that the New Mexico proposal did not advance).

155. Corasaniti, *supra* note 151.

156. *Id.*

The proposal, a constitutional amendment that has not reached the ballot, would attempt that. It would organize Pennsylvania's trial, appellate, and supreme courts into districts, with district lines drawn by the Republican-controlled legislature.[157] The district lines would both define the electorate for judicial seats and determine eligibility for office; only residents of a district would vote in their district's judicial election, and eligible candidates would be required to reside in that district.

The arguments in favor both echo some of districting's traditional benefits and perform the sleights of hand that make threats to democracy seem like advancements of it. In public statements, Pennsylvania Republicans have articulated that districting would improve representation in the judiciary. They argue that it would "give different regions of Pennsylvania more representation"[158] and, in particular, ameliorate underrepresentation of rural areas.[159] Relatedly, the bill's sponsor, Russ Diamond, told the *New York Times* that "the same statewide consensus [that] goes in making law should come to bear when those statutes are heard" by courts.[160]

The obvious analogies here—and their obvious rejoinders—are to arguments regarding the United States Senate. Its defenders (and the beneficiaries of its lopsided representation) argue the map of the United States should be represented in the Senate; its critics note that the Senate should equally represent people, not soil. So too here, none of the proponents of House Bill 38 argue that judicial districts would advance majority rule or contend with the likelihood that districts drawn by the Republican legislature would favor the Republican Party.

Rather, they emphasize different representative virtues. They argue that elections should not be dominated by just a few regions of

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157. H.B. 38, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021). Although the current bill text is silent on the number of commonwealth and superior court districts, a legislative cosponsor's memorandum states that there would be 9 and 15, respectively. *See* Memorandum from Rep. Russ Diamond, on Regional Appellate Court Districts, Pa. H. of Reps. (Dec. 1, 2020) [hereinafter Diamond Memorandum], https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20210&cosponId=32798 [https://perma.cc/2DXQ-WRN2].

158. Corasaniti, *supra* note 151.

159. Virginia Hinrichs McMichael, *Should Pennsylvania Amend Its Constitution To Elect Appellate Judges by Region?*, LAW.COM: THE LEGAL INTELLIGENCER (Feb. 9, 2021, 9:26 AM), https://www.law.com/thelegalintelligencer/2021/02/09/should-pa-amend-its-constitution-to-elect-appellate-judges-by-region [https://perma.cc/9DHD-8W7V].

160. Corasaniti, *supra* note 151.

the state, even if those regions have most of the people, and they promote the benefit of having a closer connection between a judge and their voters.[161] Diamond's official memorandum on the bill focuses almost exclusively on the residency component (which does not, in theory, require districted *voting*), touting the benefits of "judicial diversity" and having judges hail from more parts of the state.[162]

To be sure, the Pennsylvania effort does have one majoritarian component: it can only become part of the constitution if passed by a majority vote of the state electorate. In Pennsylvania, ballot initiatives usually pass.[163] Voter approval of the measure would muddle the picture of its majoritarian status as a conceptual matter. As a legal matter, it may be that passage by ballot initiative is not sufficient to save a judicial gerrymander. The Supreme Court has reasoned along those lines in its apportionment cases, when it held that an unequal apportionment plan could not be sustained simply because it was adopted by popular referendum.[164] The same conclusion would seem to follow more forcefully under the state constitutional democracy principle.[165]

A similar effort recently played out in Montana. That state now has its first unified party government in over fifteen years, which has prompted a wave of "aggressively conservative measures," including several aimed at the state courts—which "has for years been seen by Montana's hardline conservatives as a left-leaning institution."[166] As

161. For a review of the literature on how districting promotes such benefits, see generally Cover, *supra* note 149.

162. Diamond Memorandum, *supra* note 157; *see also* Kadida Kenner, *Should Pa. Elect Judges Based on Geography? Pro/Con*, PHILA. INQUIRER (Feb. 4, 2021), https://www.inquirer.com/opinion/commentary/appellate-court-elections-pennsylvania-judicial-gerrymandering-20210204.html [https://perma.cc/AQ7T-BVFR] (advocating for judges to be required to reside in the district they serve).

163. *See* Brian X. McCrone, *Pa. Voters Have a Really Hard Time Saying 'No' to Ballot Questions*, NBC PHILA. (May 21, 2021, 7:04 PM), https://www.nbcphiladelphia.com/news/politics/pa-voters-have-a-really-hard-time-saying-no-to-ballot-questions/2821894/?amp=1 [https://perma.cc/SF2K-K76K].

164. Lucas v. Forty-Fourth Gen. Assembly of State of Colo., 377 U.S. 713, 736 (1964) ("An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate . . . .").

165. *See* Bulman-Pozen & Seifter, *supra* note 31.

166. Eric Dietrich, *Republicans Target Alleged Bias in Supreme Court Crisis*, MONT. FREE PRESS (Apr. 16, 2021), https://montanafreepress.org/2021/04/16/republicans-target-alleged-bias-in-supreme-court-crisis [https://perma.cc/U7CP-UFU7].

part of that wave of proposals, a legislative referendum to establish judicial districts was slated to appear on the ballot in November 2022.[167] Had the referendum reached the ballot and passed, each of Montana's seven supreme court justices would have been elected from one of seven districts. The arguments made in favor of and against the proposal tracked those in Pennsylvania. Proponents touted geographical diversity[168] and "help[ing] get our Supreme Court a little more aligned with our electorate."[169] In contrast, critics of the bill, which public records indicate was drafted by a well-established conservative political consultant, argued the move smacked of partisan warfare.[170] In the words of one Democratic former justice of the state supreme court, "I think the Republican Party just thinks that [the Montana Supreme Court] is a little too liberal right now, and they're looking for ways to consolidate a little more power to the conservative base."[171]

Instead, the Montana Supreme Court held the legislative referendum unconstitutional in August 2022.[172] The legislature had

167. The bill originated as House Bill 325 and would have appeared on the ballot as Legislative Referendum 132. *See Montana House Bill 325: Summary*, LEGISCAN, https://legiscan.com/MT/bill/HB325/2021 [https://perma.cc/Q3KG-AJGS]; *Ballot Language for Legislative Referendum No. 132 (LR-132)*, MONT. SEC'Y STATE, https://sosmt.gov/wp-content/uploads/LR-132-Ballot-Statement-Language.pdf [https://perma.cc/44W6-ZEKS]. Another prominent and controversial measure eliminated the state's judicial nominating commission, allowing Republican Governor Greg Gianforte to fill judicial vacancies directly. *See* Keith Schubert, *Gov. Gianforte Signs Bill Giving Himself Power To Fill Judicial Vacancies*, GREAT FALLS TRIB. (Mar. 17, 2021, 10:20 AM), https://www.greatfallstribune.com/story/news/2021/03/17/gianforte-signs-montana-bill-giving-himself-power-fill-judicial-vacancies/4733363001 [https://perma.cc/3U29-UUS3].

168. Keith Schubert, *Bill To Change Supreme Court Races Gets First Hearing in House Judiciary*, DAILY MONTANAN (Feb. 10, 2021, 6:41 PM), https://dailymontanan.com/2021/02/10/bill-to-change-supreme-court-races-gets-first-hearing-in-house-judiciary [https://perma.cc/S6B6-F9T9].

169. Elliott Thornton, *A Court Divided?*, MONT. FREE PRESS (Mar. 26, 2021), https://montanafreepress.org/2021/03/26/a-court-divided-house-bill-325-supreme-cout-election-by-district [https://perma.cc/B8GM-6QE6].

170. *See id.*

171. *Id.*

172. See McDonald v. Jacobsen, 2022 MT 160U, ¶¶ 54–58 (holding placement of ballot initiative unconstitutional); Amy Beth Hanson, *Montana High Court Election Changes Ruled Unconstitutional*, ASSOCIATED PRESS (Mar. 22, 2022), https://apnews.com/article/elections-legislature-montana-constitutions-referendums-86b0bc956a893704e8e05140045f5ae0 [https://perma.cc/3RLW-ME4A] (reporting that a District Court judge found the Montana Legislature's proposed referendum unconstitutional and blocked it).

pressed the referendum despite a binding 2012 Montana Supreme Court decision holding a similar change facially unconstitutional[173]—perhaps a reflection of a litigation choice that may reflect the legislature's extended, rancorous conflict in which it has questioned the legitimacy of the state supreme court.[174] That prior ruling proved dispositive: the court held that it had "already squarely addressed the constitutionality of a legislative referendum replacing statewide elections for Supreme Court seats with district-wide elections"[175] and concluded that the prior ruling was neither distinguishable nor incorrect.[176]

Once again, the proposal had a democratic aspect. Because the legislature chose to enact it via legislative referendum, it would only have become law if passed by a majority of Montana voters. As in Pennsylvania, these measures typically pass, often by impressive margins.[177] Yet the Montana Supreme Court saw the democratic stakes differently: the measure, the court noted, would have "den[ied] Montana voters a say in the identity of six out of the seven individuals" serving on a supreme court with statewide jurisdiction, at odds with "the spirit of protecting the right of all Montanans to vote that animates" relevant provisions of the state constitution.[178]

In other states, judicial districts already exist but are now being leveraged in partisan battle. In the recent past, the drawing of these districts was not obviously freighted with partisanship.[179] Today, however, a failure to draw lines, thus maintaining malapportioned districts, might threaten judicial majoritarianism. Illinois provides an

173. Reichert v. State *ex rel.* McCulloch, 278 P.3d 455, 483 (Mont. 2012).

174. *See* Dietrich, *supra* note 166 (describing conservative lawmakers' efforts to investigate and change the state judiciary).

175. *McDonald*, 2022 MT 160U, ¶ 29.

176. *See id.* ¶¶ 26–53.

177. *See* Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 352 (2010) ("Compared with constitutional amendments, voters show even greater deference to the Legislature in statutory referenda, passing nine (69%) of the 13 legislative referenda since 1972 by 65% for the average successful measure.").

178. *McDonald*, 2022 MT 160U, ¶ 54.

179. *See* Diller, *Intrastate Preemption*, *supra* note 108 (noting that at the state supreme court level, "a justice's allegiance to any particular geographic area is likely muted by the large size of the district as compared to the average state legislative district's size"). More distant history did involve the use of judicial districts for partisan gain. *See* Shugerman, *Countering Gerrymandered Courts*, *supra* note 153; SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 110.

example of this. Since 1964, Illinois used districts that became skewed in favor of Republicans[180]—but because Democrats won those seats anyway, the situation did not breed conflict. In 2020, one Democratic justice lost a retention election, paving the way for the court to flip to Republican control, even in a state that supported Joe Biden 57–40, unless the judicial districts were redrawn.[181] The governor recently signed new maps for the Illinois Supreme Court into law.[182] A three-judge panel rejected constitutional and statutory challenges to the maps.[183]

2. *Ballot Initiatives*. A similar story is playing out with ballot initiatives. State legislatures in numerous states have proposed establishing or intensifying district-based requirements for ballot initiatives. (As I discuss in the next Section, these are of a piece with other efforts to make ballot initiatives less feasible overall.)

By way of background, all states that use the ballot initiative require the collection of some number of signatures in advance. "Some states also include signatures to be gathered from across the state, although some of these requirements have been found to be unconstitutional."[184] As of 2021, "ten states do not have a geographic requirement; 14 states do."[185]

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180. *See* Stephen Wolf, *Illinois' Supreme Court Elections Could Lead to a Decade of GOP Minority Rule Unless Democrats Act*, DAILY KOS (May 20, 2021, 7:00 AM), https://www.dailykos.com/stories/2021/5/20/2017734/-Illinois-Supreme-Court-elections-could-lead-to-a-decade-of-GOP-minority-rule-unless-Democrats-act [https://perma.cc/NYA9-YPRV]. Per one commentator, the districts have "become so badly disproportional that the largest of the single-member districts, the 2nd, is home to more people than the two smallest—the 4th and 5th—combined," which has resulted in benefits for "more rural areas in the southern part of the state at the expense of voters in the Democratic-leaning Chicago suburbs." *Id.*

181. Rick Pearson, *Gov. J.B. Pritzker Signs into Law New Maps for Illinois Legislature, State Supreme Court*, CHI. TRIB. (June 4, 2021, 4:38 PM), https://www.chicagotribune.com/politics/ct-pritzker-signs-illinois-legislative-redistricting-maps-20210604-hyohgbgxgjbnddheirxuhx7u5m-story.html [https://perma.cc/X2JG-2JV3].

182. *See id.*; *Illinois Judicial Redistricting*, ILLINOISCOURTS.GOV, https://www.illinoiscourts.gov/public/illinois-judicial-redistricting [https://perma.cc/29KL-75LZ] ("Effective January 1, 2022, Public Act 102-0011 (Act), will change the judicial district boundaries for the first time since they were established in 1964.").

183. McConchie v. Scholz, 577 F. Supp. 3d 842, 851–52 (N.D. Ill. 2021).

184. *Initiative and Referendum Processes*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2022), https://www.ncsl.org/research/elections-and-campaigns/initiative-and-referendum-processes.aspx [https://perma.cc/34WU-PPPY] (click "Citizen Initiatives"; then click "Signatures").

185. *Id.*

Laws requiring geographic distribution of signatures of course do not offer exactly the same geographic representation advantages associated with legislative districts—they do not cause a legislator to feel more bound to her constituents, and so on.[186] Instead, district-based signature requirements for ballot initiatives, at their best, are rooted in a different state tradition: that of avoiding "local" or "special" legislation. State constitutions generally prohibit such legislation in an effort to ensure that state legislators focus on matters of true public interest.[187] So too with ballot initiatives. Geographic distribution proponents argue that they "prevent[] voter confusion and inefficiency by preventing the ballot from being cluttered with items of primarily local interest, but which would have state-wide impact."[188]

But requiring geographically distributed signature requirements can also burden democracy in two ways. First, some states' signature requirements have perpetrated the same inequality that has long been deemed unconstitutional for legislative districts: they give equal power to geographic units, such as counties, that do not have equal populations.[189] Although these ballot districting cases are not as well-known as legislative analogues like *Reynolds v. Sims*, state and federal courts have generally ruled the same way, invalidating a number of such signature laws under state or federal one-person, one-vote requirements.[190] For example, the Ninth Circuit held that Idaho's

186. *See* Cover, *supra* note 149.

187. On special legislation bans in the states, see Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1209 (1985).

188. Angle v. Miller, 673 F.3d 1122, 1135 (9th Cir. 2012) (quoting the parties' briefing).

189. *See* Gray v. Sanders, 372 U.S. 368, 380–81 (1963) (rejecting Georgia's county-unit system for weighting votes as violative of the U.S. Constitution); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (holding that state legislatures must be apportioned by population).

190. *See* Gallivan v. Walker, 54 P.3d 1069, 1092, 1097 (Utah 2002) (rejecting as unconstitutional a "multi-county signature requirement" for ballot initiatives that "allow[ed] voters in rural counties to wield disproportionate power over the placement of initiatives on the ballot"); Mont. Pub. Int. Rsch. Grp. v. Johnson, 361 F. Supp. 2d 1222, 1230 (D. Mont. 2005) (invalidating Montana's constitutional amendment requiring signatures from 5 percent of electors in at least half of the state's counties); Bernbeck v. Gale, 58 F. Supp. 3d 949, 950 (D. Neb. 2014) (holding that Nebraska's geographic requirement—5 percent of the population from two of its five counties—violated the U.S. Constitution's one-person, one-vote requirement because it gave "more weight to the power of rural votes"), *vacated due to lack of standing*, 829 F.3d 643 (8th Cir. 2016). The Ninth Circuit invalidated a Nevada constitutional provision that required signatures from 10 percent of voters in 13 of Nevada's 17 counties, ACLU of Nev. v. Lomax, 471 F.3d 1010, 1021 (9th Cir. 2006), and a federal district court rejected a revised law requiring signatures from 10 percent of voters in all of the state's counties, Marijuana Pol'y Project v. Miller, 578 F. Supp.

geographic requirement "violate[d] equal protection because the few voters in a sparsely populated county have a power equal to the vastly larger number of voters who reside in a populous county."[191]

In addition to giving outsized influence to rural areas, geographic distribution requirements—and the amped up versions of them passed in recent years—may also impede majority rule by making it harder for measures with majority support to reach the ballot, especially when supporters are numerous but geographically concentrated. Indeed, states have defended distributional requirements (unsuccessfully) on the basis that they *limit* majority rule in the same tradition as the Electoral College or United States Senate.[192] Even when signature rules draw from equipopulous districts to comply with constitutional requirements, requiring buy-in from all or most districts can give veto power to small communities.[193] Perhaps more significantly, strict distributional requirements raise the cost of ballot initiatives. It is expensive to do outreach and obtain signatures throughout all regions of the state. Like other burdens on direct democracy discussed in Part II.B, these strict districting measures may raise the price of access so high that even widely popular measures cannot reach the ballot.

Consider recent developments in Idaho. For most of its history, Idaho had no geographic distribution requirement for initiatives; signatures could come from 10 percent of voters anywhere in the state

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2d 1290, 1307–09 (D. Nev. 2008), but later upheld a revised provision that requires proponents to obtain signatures from 10 percent of voters in each of the state's equipopulous congressional districts, *Angle*, 673 F.3d at 1128; *see also* Semple v. Griswold, 934 F.3d 1134, 1156 (10th Cir. 2019) (upholding that Colorado's constitutional amendment requiring signatures from at least 2 percent of voters in each state senate district on the grounds that the senate districts were roughly equipopulous).

191. Idaho Coal. United for Bears v. Cenarrusa, 342 F.3d 1073, 1078 (9th Cir. 2003).

192. *See id.* (describing Idaho's arguments).

193. When based upon equipopulous districts and low signature thresholds, this would not necessarily track urban-rural or partisan splits, but it would mean that any given community in which there was strong opposition could sink the measure for the rest of the state. The extent of this burden would be interesting to explore. On one hand, signature requirements in the single digits or low double-digits would not appear to produce results as minoritarian as the legislative or judicial districting situations where proponents need to win an unfavorable district outright. On the other hand, the ballot signature context can be a more muscular form of minority veto when all or almost all districts must lend support; then, unlike in a typical legislative or judicial election, any one relatively homogenous county (or small group of counties) can act as a complete veto point.

who voted in the most recent general election.[194] In 2013, however, after a popular referendum vetoed legislation regarding education,[195] the state legislature enacted a law requiring signatures to come from 6 percent of voters in each of at least eighteen of Idaho's 35 senate districts.[196] After voters nonetheless succeeded in expanding Medicaid by ballot initiative, the legislature moved to increase the distributional requirements.[197] The new law required signatures from 6 percent of voters in each of the state's 35 senate districts (and collection within an 18-month period).[198] Critics say the law made it "virtually impossible for grassroots organizations to qualify initiatives and referendums for the ballot."[199] As Part III describes, the Idaho Supreme Court recently struck down the law as a violation of the state's constitutional establishment of direct democracy.

Other states have followed a similar pattern. When initiatives pass or threaten to pass, legislatures have worked to make future initiatives harder to pass, including by ratcheting up distribution requirements.

Missouri, for example, is among a half-dozen states that have used voter referendums to expand Medicaid, "circumventing opposition by state lawmakers or governors by going straight to the ballot box."[200] After voters approved the constitutional amendment, the Missouri legislature refused to allocate additional funding for the expansion of the state's program, and the governor's office refused to implement

194. *See* Rebecca Boone, *Idaho Supreme Court Weighs New Strict Ballot Initiatives Law*, ASSOCIATED PRESS (June 29, 2021), https://apnews.com/article/id-state-wire-idaho-supreme-court-idaho-voting-rights-courts-6bacd760b45af96a5318b0b93d99bc00 [https://perma.cc/DS9G-78HM].

195. *Id.*

196. *See* Isbelle v. Denney, No. 1:19-cv-00093-DCN, 2020 WL 2841886, at *1 (D. Idaho June 1, 2020) (discussing and upholding the amendment to Idaho Code Section 34-1805).

197. *See* Boone, *supra* note 194.

198. *Id.*; IDAHO CODE § 34-1805(2) (2021).

199. *Reclaim Idaho Files Lawsuit To Strike Down Anti-Initiatives Law*, KTVB (May 7, 2021, 4:52 PM), https://www.ktvb.com/article/news/local/capitol-watch/reclaim-idaho-files-lawsuit-to-strike-down-anti-initiatives-law/277-e9351938-6047-43f0-bca7-db3b667df241 [https://perma.cc/G5ZS-HZRR]; Doug Petcash, *Idaho Supreme Court To Hear Arguments on Controversial New Ballot Initiative Law*, KTVB (June 27, 2021, 11:08 AM) https://www.ktvb.com/article/news/local/viewpoint/viewpoint-idaho-supreme-court-ballot-initiative-law/277-711ff1bf-70f5-4d4f-b504-bdcb34e2090b [https://perma.cc/FY6E-YLGU] ("Opponents argue the law makes it virtually impossible to get an initiative on the ballot.").

200. Sarah Kliff, *Missouri's Medicaid Expansion Is on Again*, N.Y. TIMES: THE UPSHOT (July 30, 2021), https://www.nytimes.com/2021/07/23/upshot/missouris-medicaid-expansion-is-on-again.html [https://perma.cc/8EMJ-XDKB].

it.[201] But Missouri's Supreme Court unanimously rejected that recalcitrance. Without mandating future legislative appropriations, the court held that the state was required to begin enrolling newly qualified individuals into the (already funded) program just as it would enroll previously-eligible participants.[202] The governor has agreed to comply, but the legislature is now considering reining in the initiative in other ways, including by increasing distribution "requirements to 10 percent from each congressional district for constitutional amendments and 5 percent for petitions aiming to change state law."[203]

A similar story of ballot initiative success and pro-districting reaction has played out in Michigan. In Michigan in 2018—the same year that ballot initiatives approved an independent legislative redistricting commission, legalized recreational marijuana, and established state constitutional voting rights[204]—the legislature attempted to create a geographically-based burden on future initiatives. Rather than requiring a certain number of signatures from every district, this limit was styled differently. It established a cap of 15 percent on the signatures that could come "from any [one] congressional district."[205] The Michigan Court of Claims and Michigan Court of Appeals rejected this requirement as unconstitutional. The court of appeals concluded that the cap "violate[d] the rights of Michigan electors to participate in the electoral process by potentially excluding some from the petition process."[206] The court reasoned that the state constitution granted voters a self-executing right to participate in the petition process and the legislature lacked the power to burden that right. The court concluded that the 15 percent cap would be a burden because "[i]ts effect would be to unconditionally deny

201. *Id.*; *see also* Brian Hauswirth, *Parson: Missouri Will Follow Judge's Order on Medicaid Expansion*, MISSOURINET (Aug. 11, 2021), https://www.missourinet.com/2021/08/11/parson-missouri-will-follow-judges-order-on-medicaid-expansion-audio [https://perma.cc/V32M-4PEC].

202. Doyle v. Tidball, 625 S.W.3d 459, 467 (Mo. 2021).

203. 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/H2J9-7KY4].

204. *See supra* note 115 and accompanying text.

205. 2018 Mich. Pub. Acts 608 (providing that "[n]ot more than 15% of the signatures to be used to determine the validity of a petition described in this section shall be of registered electors from any [one] congressional district").

206. League of Women Voters of Mich. v. Sec'y of State, 952 N.W.2d 491, 507 (Mich. Ct. App. 2020), *aff'd in part, vacated in part*, 957 N.W.2d 731 (Mich. 2020).

untold numbers of registered voters the right to have their signatures counted" and "[t]hat the process would be more difficult was unrebutted below, where the League of Women Voters filed affidavits with the Court of Claims detailing the myriad increased time and cost burdens imposed by the 15 percent geographic requirement."[207] The Michigan Supreme Court vacated that holding due to standing and mootness issues[208] but recently reached the same conclusion on the merits in a separate case.[209]

B. Other Burdens on Direct Democracy

Direct democracy can be burdened by methods other than geographic requirements or districting. In recent years, state legislatures have employed additional tactics. According to a study by the Ballot Initiative Strategy Center, "146 bills intended to change the ballot measure process" were introduced in the 2021 legislative session.[210] Twenty-four of those bills were signed into law.[211] Legislative and constitutional proposals to burden or constrain ballot initiatives continue in 2022[212]—and seem unlikely to abate.

As with the geographic burdens discussed above, these measures are often presented as good for democracy. In particular, proponents of these new measures argue for more "integrity in the process,"[213] especially in light of "the influence of out-of-state interest groups"[214] in

207. *Id.* at 508–09.

208. *League of Women Voters of Mich.*, 957 N.W.2d at 751.

209. *See* League of Women Voters of Mich. v. Sec'y of State, 975 N.W.2d 840, 854, 858 (Mich. 2022).

210. *See Attacks and Threats*, BALLOT INITIATIVE STRATEGY CTR., https://ballot.org/attacks-threats [https://perma.cc/QD27-ESNA]; *see also* Reid 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/Z9JT-QGLR] ("In three states, Republican lawmakers have asked voters to approve ballot initiatives that in fact limit their own right to bring and pass future ballot initiatives.").

211. *Attacks and Threats*, *supra* note 210.

212. *See id.* (noting, for example, that the Missouri legislature "has introduced nearly two dozen attacks on the initiative process as of March 1, 2022").

213. Crampton & Zhang, *supra* note 203.

214. *Id.*

ballot campaigns, which in turn may not "truly represent the interest of voters."[215]

This line of argument has some basis in reality: ballot initiatives are high-dollar affairs, and someone must fund them. That alone does not necessarily differentiate them from campaigns for elected office, which can also be expensive and funded by dollars that flow in from out of state.[216] But there are examples of campaigns bankrolled by industry groups or national-level organizers that appear to astroturf their way to success.[217] Measures to uphold the "integrity" of ballot initiatives are, in the abstract, a good idea.

Still, it seems unlikely that many of the restrictions imposed match the threat of fraudulent signatures or astroturf campaigns. South Dakota's new laws illustrate this. The proponents who organized the Medicaid initiative in Missouri have qualified Medicaid expansion for the ballot in South Dakota in November 2022[218]; another group proposed an amendment creating an independent redistricting commission, but it will not appear on the ballot.[219] South Dakota law already required initiative proponents to fit all of their signatures onto a single "self-contained sheet of paper printed front and back," supposedly to avoid fraud.[220] That drove proponents to use tiny writing.[221] A new law now requires the font of the petition to be at least 14-point, thus requiring bedsheet-sized pieces of paper.[222] This format is cumbersome and raises the expense and difficulty of a campaign; its

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215. *Id.*

216. *See supra* note 115.

217. For a recent critique in the context of ballot initiatives governing employment designations for gig workers, see Terri Gerstein, *In Massachusetts, A Limit on Gig Companies' Deceptions,* AM. PROSPECT (June 17, 2022), https://prospect.org/justice/in-massachusetts-limit-on-gig-companies-deceptions [https://perma.cc/CCN9-P832] (stating that "[i]n California, gig companies spent over $200 million to blanket the state in pro-Proposition 22 advertising, create astroturf (fake grassroots) groups to show support, and generally tried to fill the airwaves in order to prevent people from understanding what the ballot initiative actually meant").

218. *See Our Ballot Measure Campaigns*, FAIRNESS PROJECT, https://thefairnessproject.org/ballot-measure-campaigns [https://perma.cc/334T-NH5Z]; *see also* Kliff, *supra* note 200.

219. Seth Tupper, *Republican-Backed Bills Complicate Citizen Lawmaking*, S.D. PUB. BROAD. (Mar. 11, 2021), https://www.sdpb.org/blogs/politics-public-policy/republicanbacked-bills-complicate-citizen-lawmaking [https://perma.cc/4HV4-CQP4].

220. S.D. ADMIN. R. 5:02:08:00.01(b) (2019).

221. Tupper, *supra* note 219.

222. S.D. CODIFIED LAWS § 2-1-1.2(1) (2021); *see* Tupper, *supra* note 219 (including an image of such paper).

enhancement of "integrity" seems doubtful. It may instead be a tell that legislators are unsupportive of direct democracy.[223]

Mississippi's new limits on the initiative process sound in a more legalistic register. In 2021, the state's supreme court struck down the initiative process altogether while reviewing an initiative that would have legalized medical marijuana.[224] The state constitution's initiative provision, adopted in 1992, specifies that the requisite signatures for a ballot initiative must come equally from all five of the state's congressional districts.[225] But in the wake of the 2000 census, Mississippi went down to four congressional districts. In a feat of formalism,[226] the court concluded that this rendered the signature collection process, and thus the ballot initiative process, unworkable in the state unless the constitution is amended.[227]

C. Power Stripping

In addition to districting and burdening direct democracy, a third threat to state majoritarian institutions comes from measures that transfer power to more minoritarian institutions—typically, from governors or other elected executive officials to the legislative leadership or its preferred designees. I consider two prominent examples: power-stripping in connection with election administration and pandemic response. Like the other measures discussed here, these

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223. Tupper, *supra* note 219 (quoting a legislator stating during the legislative debate that "[w]e started out as a republic" but that "[s]adly, we're tending in the direction of a democracy. And that democracy was only intended to be going to the polls to vote for your elected representative.").

224. *See* Initiative Measure No. 65: Mayor Butler v. Watson, 338 So. 3d 599, 602, 615 (Miss. 2021).

225. The text:

> An initiative to amend the Constitution may be proposed by a petition signed over a twelve-month period by qualified electors equal in number to at least twelve percent (12%) of the votes for all candidates for Governor in the last gubernatorial election. The 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.

MISS. CONST. § 273(3).

226. For commentary, see Michael C. Dorf, *The Absurd Formalism of the Mississippi Supreme Court*, DORF ON L. (June 8, 2021, 8:55 AM), http://www.dorfonlaw.org/2021/06/the-absurd-formalism-of-mississippi.html [https://perma.cc/VBV7-9MZW].

227. *See Initiative Measure No. 65*, 338 So. 3d at 615 ("[T]he drafters of section 273(3) wrote a ballot-initiative process that cannot work in a world where Mississippi has fewer than five representatives in Congress. To work in today's reality, it will need amending—something that lies beyond the power of the Supreme Court.").

measures have plausible defenses, and their proponents often invoke ideas about democracy.

The normative significance of these power shifts is more complicated than in the previous examples, for a few reasons. First, as I discuss in Part III, not all limitations on executive power raise democratic concerns. Second, these shifts raise a set of concerns beyond democracy. When it comes to election administration and pandemic response, majority rule may not be the most important frame. The greater problem in the examples that follow, and related examples not listed here, may be that legislatures politicized election administration and pandemic response, not that the tasks were shifted away from majoritarian institutions. Indeed, there are persuasive arguments for taking at least some of these matters outside the realm of elected officials.

That said, in some instances discussed below, the shift from majority to minority control of elections and emergency response and the shift toward more partisan election and emergency administration seem to be traveling together.[228] When viewed as part of the larger whole, they fit into a pattern of impeding states' role as safeguards of majority rule. Moreover, the election examples showcase a different type of antimajoritarian behavior: the recruitment of election administrators or officials with stated a willingness to install candidates who received a minority of votes and lost the election. The examples thus underscore that unless governors, state courts, and ballot initiatives remain a "seawall," it will be difficult to assure that these important matters reflect the popular will.[229]

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228. For example, Professor Richard L. Hasen has explained how the threat that voters' actual preferences will not be honored in the 2024 election is tied to the replacement of existing election officials "by those who may not have allegiance to the integrity of the election system." *See* Hasen, *supra* note 8, at 266.

229. It is possible to describe these developments as antidemocratic in other ways. In pandemic response, limitations on the power to respond to public health and other emergencies remove vital state "capacity" that implicates democracy because "around the world, the fortunes of liberal democracy rise and fall with its perceived effectiveness in improving the lives of ordinary people." Brink Lindsey, *State Capacity: What Is It, How We Lost It, and How To Get It Back*, NISKANEN CTR. (Nov. 18, 2021), https://www.niskanencenter.org/state-capacity-what-is-it-how-we-lost-it-and-how-to-get-it-back [https://perma.cc/6GEM-SYX5]. Although both of these lines of argument deserve attention, they are not my focus here.

1. *Election Administration*. In 2021, states enacted myriad changes to their election administration laws. Perhaps the most well-known of these laws apply to the process of voting and pertain to matters such as ballot boxes, voter ID, and the process for distributing ballots. But an important set of laws—resulting from 262 bills introduced as of December 2021, per one study[230]—address who runs elections and who certifies the results.[231] These results have largely shifted authority away from state governors and secretaries of state and to the state legislature or its partisan designees.[232]

In Kansas, two new laws, enacted over gubernatorial veto, change who oversees elections. First, House Bill 2332 removes power from the governor (currently a Democrat) to modify election administration or procedures and also divests the judiciary of "any authority to modify the state election laws."[233] In addition, it forbids the secretary of state from entering into any agreement or consent decree regarding election laws or procedures in state or federal court without "specific approval" from the legislature or legislative coordinating council, both controlled by Republicans.[234] A second bill, House Bill 2183, changes procedures for mail-in voting, including by removing the secretary of state's authority to extend the deadline for the receipt of advance voting

230. *See* STATES UNITED REPORT DECEMBER 2021 UPDATE, *supra* note 147, at 2.

231. *See* Quinn Scanlan, *10 New State Laws Shift Power over Elections to Partisan Entities*, ABC NEWS (Aug. 16, 2021, 2:29 PM), https://abcnews.go.com/Politics/dozen-state-laws-shift-power-elections-partisan-entities/story?id=79408455 [https://perma.cc/2GG2-HAR9] (identifying "at least eight states, including battlegrounds Arizona and Georgia, that have enacted 10 laws so far this year that change election laws by bolstering partisan entities' power over the process or shifting election-related responsibilities from secretaries of state"); STATES UNITED REPORT DECEMBER 2021 UPDATE, *supra* note 147, at 1–2.

232. Nicholas Riccardi, *Slow-Motion Insurrection: How the GOP Seizes Election Power*, ASSOCIATED PRESS (Dec. 30, 2021), https://apnews.com/article/donald-trump-united-states-elections-electoral-college-election-2020-809215812f4bc6e5907573ba98247c0c [https://perma.cc/DYS9-A2AV] ("Trump has been clear about his intentions: He is seeking to oust statewide officials who stood in his way and replace them with allies.").

233. *See* H.B. 2332, 2021–22 Leg., Reg. Sess., 2021 Kan. Sess. Laws 1115–23; KAN. STAT. ANN. § 25-125(b) (2021).

234. KAN. STAT. ANN. § 25-125(c) (2021); *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (June 1, 2022), https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx [https://perma.cc/JW3X-PP5K] (showing Republican control of the Kansas legislature in 2021); *Legislative Coordinating Council,* KAN. STATE LEGISLATURE, http://www.kslegislature.org/li/b2021_22/committees/ctte_lcc_1/ [https://perma.cc/TPE9-HV22] (listing eight committee members, six of whom are Republicans).

ballots.[235] Legislative proponents of the law emphasized the importance that the legislature be the branch that controls elections.[236] Similar laws have passed in Kentucky and Montana. The Montana law forbids a governor from changing election procedures without legislative approval,[237] while Kentucky's Senate Bill 1 (enacted over the governor's veto, despite extensive bipartisan cooperation on election administration more generally[238]) precludes the governor and secretary of state from collaborating in an emergency to revise election requirements without legislative approval.[239]

Or take Georgia. Georgia's razor-thin political margins have dominated national media, as did former President Trump's failed plea to Secretary of State Brad Raffensperger to "find" just over 11,000 votes to flip the election results.[240] The Georgia legislature's response, which altered state elections in a number of ways, included a power-stripping provision.[241] It demotes the secretary of state to an "ex officio" role on the state's Board of Elections, replacing the secretary with a chair to be selected by the General Assembly.[242] This change does not necessarily alter the partisan affiliation of the Board or its

235. H.B. 2183, 2021–22 Leg., Reg. Sess., 2021 Kan. Sess. Laws 1107–14 § 7(b).

236. Katie Bernard, *'Voter Suppression': Kansas Lawmakers Advance Election Law Changes*, KAN. CITY STAR (Apr. 1, 2021, 4:16 PM), https://www.kansascity.com/news/politics-government/election/article250349886.html [https://perma.cc/DL9C-FLY5] (quoting Representative Blake Carpenter's statement that "[d]uring the 2020 election cycle we saw a few issues with the other branches of government altering election laws and, in my opinion, doing so illegally").

237. H.B. 429, 67th Leg., Reg. Sess., 2021 Mont. Laws 1318–19 § 2(4).

238. H.B. 574, 2021 Leg., Reg. Sess., 2021 Ky. Laws 1435–1505; Adam Brewster & Caitlin Huey-Burns, *How GOP-Dominant Kentucky Passed Bipartisan Election Reforms*, CBS NEWS (Mar. 31. 2021, 6:00 AM), https://www.cbsnews.com/news/kentucky-election-reforms-bipartisan [https://perma.cc/8WHE-H2FR].

239. *See* S.B. 1, 2021 Leg., Reg. Sess., 2021 Ky. Laws 18–26; KY. REV. STAT. ANN. § 39A.090(4) (2021); *see After Veto Overrides, Beshear Sues Kentucky Republican Leaders To Maintain Emergency Powers*, WDRB (Dec. 30, 2021), https://www.wdrb.com/news/after-veto-overrides-beshear-sues-kentucky-republican-leaders-to-maintain-emergency-powers/article_5ceb542a-65af-11eb-ac89-5381cd7838ec.html [https://perma.cc/2H7R-VYST].

240. *See* Gardner, *supra* note 120.

241. Zack Beauchamp, *Georgia's Restrictive New Voting Law, Explained*, VOX (Mar. 26, 2021, 2:40 PM), https://www.vox.com/22352112/georgia-voting-sb-202-explained [https://perma.cc/RN6P-2UWZ]; Aaron Blake, *2 Secretaries of State Undercut Trump's Fraud Claims in Key, GOP-Controlled States. Republicans Have Now Voted To Strip Both of Power*, WASH. POST (June 26, 2021, 10:02 AM), https://www.washingtonpost.com/politics/2021/05/27/gops-brazen-move-strip-power-fraud-narrative-busting-secretary-state-again [https://perma.cc/2QNS-ZN54].

242. GA. CODE ANN. § 21-2-30(d) (2021).

leadership, much less portend a subverted election. But it is possible that the Republican candidate who wins statewide in a closely divided state, like Raffensperger, is more moderate than the chair that will be appointed by the legislative majority, who might be a partisan actor willing to meddle in election results. That possibility, at least, seems to be the sort of scenario that has Professor Richard Hasen scared that "[e]lection officials are being put in place who will mess with the count."[243]

Arizona's power-stripping law is different, at least at face value. By transferring power from the secretary of state to the attorney general, it seems to merely transfer power from one majoritarian official to another.[244] Scrutinized more closely, however, the law achieves an effect closer to Georgia's. That is because the change only remains in place until January 2, 2023[245]; both the attorney general and secretary of state are up for reelection in fall 2022. This change, like the others, fits the general mold of the legislature clawing back power from an elected official with whom it disagrees and diverting it to its own partisan agent. Another legislative proposal in the state, not enacted at the time of this writing, would transfer authority over the state's Elections Procedures Manual to a legislative committee rather than the governor and secretary of state.[246]

Again, the argument here is not that majoritarian election administration is necessarily or consistently virtuous, especially when

243. *See* Jane Mayer, *The Big Money Behind the Big Lie*, NEW YORKER (Aug. 2, 2021) https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie [https://perma.cc/25GW-PVUR] (quoting Hasen).

244. *See* Elise Viebeck, *Arizona Poised To Enact New Election Restrictions, Strip Power from Democratic Secretary of State*, WASH. POST (June 25, 2021, 2:47 PM), https://www.washingtonpost.com/politics/arizona-trump-election-voting/2021/06/25/82de055c-d5c5-11eb-a53a-3b5450fdca7a_story.html [https://perma.cc/YWQ7-3R3J]; Ben Giles, *Arizona Republicans Strip Some Election Power from Democratic Secretary of State*, NPR (June 30, 2021, 7:55 PM), https://www.npr.org/2021/06/30/1011154122/arizona-republicans-strip-some-election-power-from-democratic-secretary-of-state [https://perma.cc/D243-M5EL].

245. S.B. 1819, 55th Leg., 1st Reg. Sess. (Ariz. 2021).

246. *See* S.B. 1068, 55th Leg., 1st Reg. Sess. (Ariz. 2021); *see also* STATES UNITED DEMOCRACY CTR., DEMOCRACY CRISIS REPORT UPDATE: NEW DATA AND TRENDS SHOW THE WARNING SIGNS HAVE INTENSIFIED IN THE LAST TWO MONTHS 3 (2021) [hereinafter STATES UNITED REPORT JUNE 2021 UPDATE] (discussing the proposal). Yet another proposed law, House Bill 2800, would mandate a special legislative session after each election, H.B. 2800, 55th Leg., 1st Reg. Sess. (Ariz. 2021), leading to a scenario in which the legislature "potentially overturn[s] the result." STATES UNITED REPORT JUNE 2021 UPDATE, *supra*, at 3.

compared to nonpartisan administration. But majoritarian state o officials provide counterweights against minority rule, and state legislatures are dismantling them in favor of preferred, and potentially partisan, agents.[247]

2. *Emergency and Public Health Powers.* Outside of the elections context, almost all states have proposed laws limiting executive branch power in the wake of states' COVID-19 responses, and more than half of the states have enacted such laws.[248] One recent article captures the phenomenon as "COVID[-19]'s counterpunch": "aggressive efforts by numerous state legislatures to diminish state and local public health emergency powers."[249] The authors trace "[c]onsiderable . . . influence" over the new state laws to draft legislation from the American Legislative Exchange Council.[250]

To be clear, reflecting on the appropriate scope of executive power after a crisis is a good idea.[251] As Professor Lindsay Wiley has written, a "key tension" in public health is "between expertise-driven regulation and democratic governance," and sound policy makes space for both.[252] Invoking Professor Bonnie Honig, Wiley observes "that emergencies do not, and should not, obviate the fact that there is 'no

247. *See* Riccardi, *supra* note 232 (examining the local and national responses to former President Trump's election fraud claims).

248. For tallies, see *Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx#Emergency%20Powers%20Bills [https://perma.cc/4XHH-V4LG] and Sophie Quinton, *Lawmakers Move To Strip Governors' Emergency Powers*, PEW RSCH. CTR. (Jan. 22, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/22/lawmakers-move-to-strip-governors-emergency-powers [https://perma.cc/SYK2-HA8Z]. For context, see *America Debates How Much Power State Governors Should Have*, ECONOMIST (June 19, 2021), https://www.economist.com/united-states/2021/06/17/america-debates-how-much-power-state-governors-should-have [https://perma.cc/49LZ-QCKA].

249. James G. Hodge, Jr. & Jennifer Piatt, *Covid's Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, 36 BYU J. PUB. L. 31, 31 (2022).

250. *See id.* at 38 (citing *Emergency Power Limitation Act*, AM. LEGIS. EXCH. COUNCIL (Jan. 8, 2021), https://www.alec.org/model-policy/emergency-power-limitation-act [https://perma.cc/XJ6R-NJ7U]).

251. *See America Debates How Much Power State Governors Should Have*, *supra* note 248.

252. Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 19 YALE J. HEALTH POL'Y L. & ETHICS 50, 120 (2020).

getting away from the need in a democracy for the people to decide.'"[253]

And some adjustments of emergency power that state legislatures have approved seem like democratically neutral developments, whether or not one may object to them on policy grounds. Several states have imposed a consultation requirement before a governor may declare or continue a state of emergency or impose emergency orders.[254] Others have required documentation of the costs associated with emergency responses.[255] Still others have adjusted the permissible time period for an emergency response or required the legislature to approve extensions once an emergency is declared.[256]

Other state legislative developments, however, seem to close off majority rule in the people's name. While purporting to defend the interests of the people, these laws transfer a core executive function from a popularly elected governor, typically in the form of a publicly supported emergency response, to a different body—often one that is either less majoritarian, has vowed to reject even widely supported emergency responses, or both.

Kentucky has been a hotspot for such efforts. The state legislature there has "reshaped state government during this year's legislative session, limiting [Governor] Andy Beshear's powers while shifting authority to the legislature and state offices currently controlled by Republicans."[257] In connection with the COVID-19 pandemic, the

253. *Id.* at 58 n.19 (quoting BONNIE HONIG, EMERGENCY POLITICS: PARADOX, LAW, DEMOCRACY 3 (2009)).

254. *See, e.g.*, H.B. 1426, 2020 Gen. Assemb., Reg. Sess. (Colo. 2020) (requiring the governor to provide information and answer questions from legislative committees with respect to any current disaster emergency and to give the general assembly notice of promulgation of any executive order in connection with disaster emergency).

255. *See, e.g.*, ALASKA STAT. § 26.23.025 (2022).

256. S.B. 105, Gen. Assemb., Reg. Sess., 2021 N.C. Sess. Laws 180 (allowing the North Carolina Council of State to extend emergency declarations from 30 days to 60, at which time only the legislature may extend declaration by enactment of general law).

257. *See* Ryland Barton, *Kentucky Lawmakers Shift Power Away from Governor*, WFPL (Mar. 31, 2021), https://wfpl.org/kentucky-lawmakers-shift-power-away-from-governor [https://perma.cc/J98H-Z7LB]; Nick Niedzwiadek, *The End of the Imperial Governorship*, POLITICO (Apr. 14, 2021), https://www.politico.com/news/2021/04/14/governors-power-coronavirus-479386 [https://perma.cc/3G7R-9LPA] ("One of the first things on the agenda . . . for Kentucky Republicans was figuring out how to kneecap Democratic Gov. Andy Beshear. They dropped legislation in January that placed new limits on the governor's emergency executive powers, quickly passed the bill, overrode his veto and then fought him in court.").

legislature enacted three statutes,[258] over the governor's veto, that curb gubernatorial power. The three laws ended Beshear's existing COVID-19-related closures and prohibited future ones, instead requiring businesses to comply with the "least restrictive" applicable federal guidelines[259]; putting a 30-day cap on future emergency orders absent legislative extension[260]; and empowering a legislative committee to veto non-emergency administrative regulations, while also limiting the scope, duration, and basis of emergency regulations.[261] These orders were part of a pattern of other legislative divestments of Beshear's power. In other laws in the same session, the legislature shifted power over other matters—enforcing abortion regulations, cancelling state contracts, and spending federal relief funds—from Beshear or Democratic officials reporting to him and placed it within the legislature itself or Republican officials.[262]

The Kentucky example (and others in purple states, such as Pennsylvania and Michigan) reflect predictable interparty tension. But executive power-stripping has also occurred in states controlled by a single party, such as New York and Ohio. Both legislatures limited the governor's authority to act unilaterally in issuing emergency or public health orders.[263] The Ohio law, Senate Bill 22, empowers the legislature or a new, constitutionally dubious, Republican-led Ohio Health Oversight and Advisory Committee to rescind any health order by an executive branch official[264] and precludes local health authorities from

258. H.B. 1, 2021 Leg., Reg. Sess. (Ky. 2021) (permitting schools and businesses to stay open as long as they follow CDC guidance, notwithstanding governor's orders); S.B. 1, 2021 Leg., Reg. Sess. (Ky. 2021) (capping governor's emergency orders at 30 days unless legislature extends them); S.B. 2, 2021 Leg., Reg. Sess. (Ky. 2021) (granting legislature oversight authority over emergency administrative orders, which are also subject to public comment); *see* Barton, *supra* note 257.

259. H.B. 1, 2021 Leg., Reg. Sess. (Ky. 2021).

260. S.B. 1, 2021 Leg., Reg. Sess. (Ky. 2021).

261. S.B. 2, 2021 Leg., Reg. Sess. (Ky. 2021); *see* Cameron v. Beshear, 628 S.W.3d 61, 75 (Ky. 2021) (explaining that "even though a legislative committee may find that a regulation is 'deficient,' the regulation at issue remains in the purview of the executive branch as to what is to become of the 'deficient regulation'").

262. Barton, *supra* note 257.

263. *See* Niedzwiadek, *supra* note 257. In New York, Senate Bill 5357 and Assembly Bill 5967 repealed the emergency power that had been granted to the governor in Senate Bill 7919. The bill also added legislative authority to "terminate . . . a state disaster emergency . . . by concurrent resolution." 18 EXEC. 2-B § 28(5).

264. S.B. 22, 134th Gen. Assemb., Reg. Sess., § 101.36 (Ohio 2021).

issuing health mandates that apply to individuals who have not been diagnosed with a contagious disease.[265] It has left Ohio cities, for example, powerless to require unvaccinated students to wear masks, even when the majority of Americans[266] and Ohioans[267] supported such a measure. In vetoing Senate Bill 22, Republican Governor Mike DeWine said that the bill "jeopardizes the safety of every Ohioan" by stripping public health officials of their "ability to move quickly to protect the public from the most serious emergencies Ohio could face."[268] Supporters of the Ohio law defended it as returning power to the people.[269]

Although I focus here on the direct actions of state legislatures, state courts, too, have participated in shifting executive power to (gerrymandered) state legislatures. While most state courts rejected challenges to governors' initial emergency actions,[270] others invoked novel constitutional or statutory grounds to strike them down. Wisconsin's Supreme Court held that statewide public health orders were rules that required a rulemaking process[271]—a seemingly neutral requirement were it not for a state legislative committee's unusual,

265. *Id.* §§ 3707.11, 3707.54; *see* Jake Zuckerman, *New State Law Blocks Ohio's Largest City from Mask Mandate, Official Says*, OHIO CAP. J. (Aug. 6, 2021, 12:55 AM), https://ohiocapitaljournal.com/2021/08/06/new-state-law-blocks-ohios-largest-county-from-mask-mandate-official-says [https://perma.cc/DW45-JA85].

266. *See, e.g.*, Chris Jackson, Mallory Newall, James Diamond & Jocelyn Duran, *America Remains on Pause as Omicron Continues*, IPSOS (Jan. 25, 2022), https://www.ipsos.com/en-us/news-polls/axios-ipsos-coronavirus-index [https://perma.cc/33GX-J6YA] (finding that 66 percent of Americans oppose state laws that prohibit local governments from creating mask requirements).

267. *See* Mallory Newall & Sara Machi, *Most Ohio Residents Approve of Governor's Job and Support Extensive COVID-19 Regulations*, IPSOS (Oct. 21, 2020), https://www.ipsos.com/en-us/news-polls/spectrumnetworks-statepolling-OH [https://perma.cc/J2VE-63QX] (reporting that 61 percent of Ohioans support mask mandates).

268. Statement of Governor Mike DeWine, Veto Message: Statement of the Reasons for the Veto of Substitute Senate Bill 22, at 1 (Mar. 23, 2021), https://content.govdelivery.com/attachments/OHOOD/2021/03/23/file_attachments/1732100/SB%2022%20Veto%20Message.pdf [https://perma.cc/6W3C-Y4MG].

269. *See, e.g.*, Mike McCarthy & Jarrod Clay, *Ohio Senate, House Override Gov. DeWine's Veto of Health Order Bill*, ABC 6 (Mar. 24, 2021), https://abc6onyourside.com/news/local/ohio-senate-bill-22-override-vote-3-24-21 [https://perma.cc/JK9X-Q7AL] (reporting on statement of Ohio Senator Matt Huffman).

270. *See, e.g.*, Desrosiers v. Governor of Mass., 158 N.E.3d 827, 847 (Mass. 2020).

271. Wis. Legislature v. Palm, 942 N.W.2d 900, 918 (Wis. 2020).

minoritarian veto over rulemaking.[272] Michigan's Supreme Court dusted off the nondelegation doctrine, which had never been used to strike down an entire statute, to invalidate an emergency powers statute that had been on the books for decades.[273]

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Again, not all diminishments of executive power are bad, and election administration and pandemic response need not be majoritarian through and through. But we should at least be mindful of what concentrating legislative power typically does: it moves power away from the official chosen by the entire electorate and towards a body that is more prone to minoritarian bias. In that sense, it fits within the broader trend this Article describes.

III. STRUCTURAL TAILORING AND MAJORITY CONSTRAINT

Parts I and II have shown that state institutions provide opportunities to limit national democratic decline, while recent developments threaten, instead, to accelerate it. One might expect stern condemnation of these attacks, followed by galvanized opposition to them. That has not happened. Instead, these threats to majority rule swirl in the same Janus-faced eddy of democracy discourse more broadly, in which it is uncertain whether majority rule is friend or foe.[274] Democracy is hard to talk about clearly, especially at the sound bite level. And as Part II shows, opportunists can exploit this ambiguity by undermining majority rule under misleading pretenses.

Greater clarity is possible. Although many features of democracy will remain contested, this Part identifies several recurring mistakes, or sleights of hand, that democracy discourse can reject. Each

272. *See* Andrew C. Cook, *Extraordinary Session Laws: New Limits on Governor and Attorney General*, WIS. LAW. (May 17, 2019), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=92&Issue=5&ArticleID=27014 [https://perma.cc/6YMQ-CS42]; Serv. Emps. Int'l Union, Loc. 1 v. Vos, 946 N.W.2d 35, 59 (Wis. 2020) (rejecting a facial challenge to a statutory provision allowing the legislative committee to suspend an administrative rule multiple times, but stating that "there exists at least some required end point after which bicameral passage and presentment to the governor must occur").

273. *In re* Certified Questions from U.S. Dist. Ct., 958 N.W.2d 1, 16–25 (Mich. 2020).

274. *See* Wilentz, *supra* note 17 ("Liberals have been raised on warnings about the tyranny of the majority, and have prided themselves, quite rightly, on their commitment to the protection of minorities.").

overestimates the risks inherent in majority rule and underestimates the risks that spring from minority rule. These ill-conceived proposals would replace majoritarian institutions with full-blown minoritarian ones; impose strong constraints on majority rule without justification other than an ordinary political loss; and cause, rather than solve, key problems associated with majority rule.

Part III.A zooms out and begins with foundational principles: there can be no meaningful democracy without both majority rule and political equality. But there is no necessary tension between the two, contrary to recent rhetoric and age-old worries,. Discrimination against vulnerable groups and entrenchment are two core threats to political equality. Whether majority rule or majority constraint is more likely to produce these harms will always be contingent on underlying social and political factors.

If we cannot simply cast state majoritarian institutions as blanket threats to political equality, how should we evaluate constraints on them? Part III.B introduces the idea of *structural tailoring.* Just as courts impose tiers of scrutiny or other balancing inquiries in the context of rights, institutional designers and reformers may be more or less tolerant of different majoritarian impediments in the domain of structure. A wide array of "weak" constraints might enrich majority rule without harming political equality or democratic principles. But "strong" constraints typically require a political-equality justification, and they fare worst when they create the problems they claim to solve. This basic framework highlights the recurring mistakes that recent state-level reforms make.

Part III.C revisits the recent developments from Part II through this framework. Many of Part II's developments involve a mismatch between problem and remedy. While reforms that durably invert majority rule are virtually never warranted, making ballot initiatives functionally impossible, gerrymandering judicial districts, and stripping (rather than disciplining) executive power in favor of a gerrymandered legislature could do just that. Other proposals, imposing only weak constraints, do not raise red flags on normative democratic analysis, though scholars properly debate them on other important policy grounds.

While the discussion in this Part is necessarily abbreviated, its aim is to impose sufficient discipline to avoid excessive faith in majority rule while also rejecting antidemocratic behavior cloaked in democracy-talk. Many of today's invocations of the "excesses of democracy" are

utterly divorced from the good reasons that do exist for constraining majorities.

A. Why Constrain Majority (or Minority) Power?

I begin this discussion with a widely shared premise, mentioned earlier: there can be no democracy without some form of both majority rule and political equality.[275] Whether one agrees that majority rule is "the truest source of political legitimacy"[276] or merely a formal but insufficient requirement,[277] majority rule is the central pillar of most definitions of democracy, alongside two others: political equality and popular sovereignty.[278]

Some recent proposals, drawing on a long tradition, depict majority rule as naturally at odds with political equality. In arguing that majorities may "trammel the interests of minorities"[279] or act tyrannically,[280] those seeking to transform state majoritarian institutions echo an intellectual thread in U.S. constitutional discourse, from Madison forward, that fears majoritarian excess.[281] Such fears

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275. *See, e.g.*, ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 34 (1956) [hereafter DAHL, PREFACE] ("Running through the whole history of democratic theories is the identification of 'democracy' with political equality, popular sovereignty, and rule by majorities.").

276. Wilentz, *supra* note 17.

277. *See, e.g.*, Bowie, *supra* note 12, at 168–69. I include in this group theorists who would allow minority interests to control or to wield power in some circumstances. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 4–6 (1994); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1863–67 (2019).

278. *See* Bulman-Pozen & Seifter, *supra* note 31, at 860–61, 880 (gathering sources).

279. *See* Reclaim Idaho v. Denney, 497 P.3d 160, 188 (Idaho 2021) (describing arguments of the state legislature in defending a statute burdening the ballot initiative process).

280. *See supra* Part II.C.2 (analyzing opposition to gubernatorial power).

281. Madison's fear of majority faction animated his defense of the structure of an extended republic and the separation of powers. *See* THE FEDERALIST NO. 51 (James Madison); *see also* JACK N. RAKOVE, ORIGINAL MEANINGS 290 (1996) (explaining Madison's view of the need to "defend minorities and individuals against factious popular majorities acting through government"). Praise abounds for the "genius" of this approach, but, as Ely wrote, "it didn't take long to learn that from the standpoint of protecting minorities it was not enough." ELY, *supra* note 35, at 80–81. Other disciplines, too, have explored majority rule's potential harms. For one helpful compilation bridging law, political science, and philosophy, see MAJORITIES AND MINORITIES: NOMOS XXXII, at 24, 32 (John W. Chapman & Alan Wertheimer eds., 1990). Political theorist Philip Pettit, for example, posits that majority rule "may represent the most serious threat of all to the freedom as non-domination of certain individuals." Philip Pettit, *Republican Freedom and Contestatory Democratization*, *in* DEMOCRACY'S VALUE 163, 178 (Ian

tend to stress two harms, each sounding in political inequality. The first is that the majority may discriminate against a vulnerable minority group or interest.[282] The second is that the majority will find a way to entrench its own power, thus cutting off the democratic process.[283] Professor John Hart Ely prominently expounded on both of these problems, antidiscrimination and entrenchment, as justifications for representation-reinforcing judicial review.[284]

My aim here is simply to underscore how contingent the risk is. In state institutions and beyond, we should indeed focus on the goal of political equality.[285] But we should not treat majority rule as its

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Shapiro & Casiano Hacker-Cordón eds., 1999). For Pettit, this threat necessitates a form of "contestatory democracy" in which the minority group has a form of power—weaker than a veto power, but the power to be heard on an impartial basis, through adjudication, consultation, or a similar method. *Id.* at 179–80.

282. Some version of this theme runs through the Supreme Court's equal protection cases, *see, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973), as well as the writings of a wide range of democracy and constitutional scholars, from John Stuart Mill, *see* JOHN STUART MILL, ON LIBERTY 20 (1956) (describing "the tyranny of the majority" as "among the evils against which society requires to be on its guard"), to GUINIER, *supra* note 277, at 9 ("The history of struggle against tyrannical majorities enlightens us to the dangers of winner-take-all collective decision[-]making.").

283. *See, e.g.*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646–51 (1998); *see also* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 406 (2015) (noting that in the field of election law, "scholars have increasingly viewed the entrenchment of incumbent officeholders, political parties, and majority coalitions as the central problem that legal regulation of the political process should be designed to solve").

284. On antidiscrimination, see ELY, *supra* note 35, at 103 (identifying one form of democratic dysfunction as that in which "representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system") and United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that "more exacting judicial scrutiny" may be required for "prejudice against discrete and insular minorities"). On entrenchment, see ELY, *supra* note 35, at 103 (identifying another democratic dysfunction as occurring when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out") and *Carolene Products*, 304 U.S. at 152 n.4 (raising the possibility of more searching scrutiny for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"). *See also* Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1331 (2005) (describing the two rationales of Ely's approach as "anti-entrenchment and . . . antidiscrimination").

285. In advocating political equality as an independent value of democracy, not a mere scaffold of majoritarianism, this account is thus not purely Elysian. Rather, as Professor Jane Schacter has argued, Ely's process theory is most normatively appealing "at a high level of abstraction," in which it stands for the idea that "animus and hierarchy" are at odds with true

necessary antagonist. The threats of discrimination and entrenchment attend the exercise of *power*, not the exercise of *majority* power. Indeed, a different and opposing intellectual tradition shows that the same harms to political equality might as easily occur—and be worse, democratically—when minority interests hold outsized power.[286] At any given time—and especially in our time—outsized minority power may pose an equal or greater risk of discrimination or entrenchment. We should reject a vocabulary that disparages majority rule, or the state institutions that prioritize it, by binding them to political inequality.

1. *Discrimination*. To play out the analysis further, consider first how both majority and minority power are linked to the problem of discrimination, which typically focuses on groups that are sufficiently "politically powerless" that they cannot simply protect their interests in the political process.[287] In a system of effective pluralist competition, the risk would be less concerning: the loser of one round of political competition can "wheel and deal"[288] like everyone else and might well prevail the next time.[289] But as Ely noted and others have since underscored, not all groups participate in this competition on equal terms.[290]

It might be, as the line of thought fearing majority excess emphasizes, that majorities are the ones inflicting discriminatory

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"democratic citizenship." Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1369 (2011) [hereinafter Schacter, *Ely at the Altar*].

286. As Professor Neil Komesar has observed in documenting both "majoritarian bias" and "minoritarian bias," "[a]t various times and by various parties, one or the other of these conceptions has been envisioned as the sole or paramount evil," but "both . . . are viable representations of serious political malfunction." Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 671 (1988).

287. *See Rodriguez*, 411 U.S. at 25; *id.* at 121 (Marshall, J., dissenting). For a theory of what this term means, see Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1545 (2015).

288. ELY, *supra* note 35, at 84.

289. *See, e.g.*, *id.*; ROBERT DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 24 (1967).

290. *See* ELY, *supra* note 35, at 135 (describing literature emphasizing "the undeniable concentration of power, and inequalities among the various competing groups, in American politics").

treatment.[291] Indeed, examples of discrimination by majorities at the national level are all too familiar. From the persecution of Native Americans[292] to the internment of Japanese Americans[293] to the repeated government actions marginalizing Black Americans,[294] our history is replete with examples of majority discrimination against politically disadvantaged groups—instances of oppression that cannot be chalked up to one-offs or to the failure of government to channel majority will.

But discrimination against the politically powerless is not a problem caused by majorities alone. The U.S. government has not refuted the fears of many anti-federalists and others—that the Constitution would do too little to avoid aristocracy[295] and that the new government would stray too far from the will of the people.[296] Both in history and today, many of the nation's most shameful acts were not carried out by numerical majorities.[297] In discussing the atrocities of Jim Crow, for example, "we should not forget that into the late nineteenth century [Black persons] continued to constitute a majority of the population in three southern states and hundreds of [B]lack [B]elt counties, and were not far from majority status in several other southern states."[298] And extensive social science research supports the

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

292. *See generally* CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020) (documenting the forced migration of Native Americans during the 1830s).

293. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 28–29 (1996) (describing the widespread support for the policy of Japanese exclusion and internment).

294. Beyond the atrocities of Jim Crow, discussed below, the federal and state governments have participated in racial discrimination in subtler ways. *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA, at vii–viii (2018).

295. *See* Jean Yarbrough, *Representation and Republicanism: Two Views*, 9 PUBLIUS 77, 77, 85, 88 (1979).

296. To be sure, the anti-federalists did not all speak with one voice. *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 9 (1999).

297. *See* Blackhawk, *supra* note 277, at 1797 n.32 (emphasizing a focus on "minorities who have been historically subordinated, marginalized, and racialized by those in power, even when their numbers don't necessarily place them in the status of a numerical minority").

298. Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 804 (1991); Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66 (2008) ("In the darkest

idea that it is elite or affluent minorities, not majorities, who wield outsized power,[299] to the point that "[a]t every stage of the electoral and governing process, wealthy Americans dominate."[300] Critics warn that "a political system that responds to the policy preferences of wealthy individuals and well-funded interest groups, rather than to those of most voters, is not a democracy."[301]

The majoritarian state institutions that are this Article's focus illustrate the weakness of the link between majority rule and discrimination. To be sure, these institutions may effectuate discrimination. The ballot initiative process has received particular criticism for this. In a well-known article in the 1970s, Professor Derrick Bell identified discrimination as a pathology of direct democracy, using state and local examples from the context of low-income housing.[302] He argued that unlike the legislative process, which imposes the moderating forces of publicity and political compromise, direct lawmaking, completed "in the privacy of the voting booth," lacks "restraint on racial passions" and fosters bias.[303] Other scholars have

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days of Jim Crow, African Americans were a minority nationally, but were a majority in the states where their population was most highly concentrated.").

299. *See, e.g.*, Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985) (arguing that, contra Ely, it is diffuse majorities that are "systematically disadvantaged in a pluralist democracy"). More recently, see, for example, GANESH SITARAMAN, THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA 6 (2019) (describing "nationalist oligarchy"); *see also* K. SABEEL RAHMAN & HOLLIE RUSSON GILMAN, CIVIC POWER: REBUILDING AMERICAN DEMOCRACY IN AN ERA OF CRISIS 5–7 (2020) (describing how the outsized power of business interests and wealthy constituencies threatens democracy).

300. Andrias & Sachs, *supra* note 12, at 562; *see also* RAHMAN & GILMAN, *supra* note 299, at 5 ("An extensive social science literature has in recent years documented more pervasive disparities in how public policy skews toward the preferences of wealthier and more elite constituencies."); *see also* BENJAMIN I. PAGE & MARTIN GILENS, DEMOCRACY IN AMERICA?: WHAT HAS GONE WRONG AND WHAT WE CAN DO ABOUT IT 16 (2017) ("Ordinary citizens have little or no influence on public policy, while affluent and wealthy Americans and organized interest groups—especially business groups—often get their way.").

301. Klarman, *Foreword*, *supra* note 1, at 209.

302. *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.").

303. *Id.* at 14–15 ("Ironically, because it enables the voters' racial beliefs and fears to be recorded and tabulated in their pure form, the referendum has been a most effective facilitator of that bias, discrimination, and prejudice which has marred American democracy from its earliest day.").

echoed Bell's concern for abuses of the initiative process, particularly in the context of measures abridging LGBTQ rights.[304] Some empirical work points in the same direction. Professor Barbara Gamble found, for example, that certain initiatives limiting minority rights passed at higher rates than other initiatives.[305]

But the link is not entirely clear. Professor John Matsusaka has categorized the 2609 initiatives that made the ballot over the last one hundred years and concluded that only 1.8 percent of these proposals would have discriminated against minority populations, and that the vast majority of these either failed at the ballot box or were invalidated by courts.[306] Related, Professor Douglas Reed's theory of popular constitutionalism in the states observes that on divisive issues, mobilizations are often met by countermobilizations in the states, such that neither an initiative nor the ruling of an elected court is the final word.[307] And the fact that most ballot initiatives on any topic either do not pass or are overturned (and many more are diluted)[308] blunts the critique of majority tyranny.[309] For at least some ballot initiative campaigns, a stronger argument against is that they may become a tool of an affluent minority interest that can discriminate against diffuse majorities.[310] Moreover, ballot initiatives may also work to overturn

304. *See* Schacter, *Ely at the Altar*, *supra* note 285, at 1395 ("All in all, direct democracy has been a formidable force in blocking gay rights measures.").

305. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 258 (1997). *But see* Todd Donovan & Shaun Bowler, *Direct Democracy and Minority Rights: An Extension*, 42 AM. J. POL. SCI. 1020, 1022–23 (1998) (describing limitations of Gamble's study and noting the difficulty in discerning whether similar measures would have passed through representative democracy).

306. MATSUSAKA, *supra* note 116, at 209.

307. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 875–76 (1999).

308. ELIZABETH R. GERBER, ARTHUR LUPIA, MATHEW D. MCCUBBINS & D. RODERICK KIEWIET, STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY 4 (2001).

309. *See generally* DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004) (arguing that while most initiatives fail or are judicially rejected, they may play an important role in educating voters on topics like civic engagement).

310. *See* Gerstein, *supra* note 217 (arguing that California's Proposition 22, Cal. Prop. 22 (2021), reflected the influence of wealthy corporations rather than the will of the general public).

discrimination that state legislatures—which may be minoritarian institutions—imposed or failed to address.[311]

The same uncertain link between majoritarian power and discrimination plays out in the context of gubernatorial power. Like executive power more broadly, gubernatorial power receives criticism for fostering discrimination against minority populations.[312] A recurring refrain during the COVID-19 pandemic was that governors were running roughshod over civil liberties, including those of religious groups.[313] Outside the pandemic context, some governors have used their office to discriminate against LGBTQ persons and immigrants.[314] But the opposite dynamic also holds. Other governors expand rights and liberties rather than contract them, emphasizing again that majoritarian institutions might facilitate rather than undermine minority protection.[315] And, again, other examples of discrimination have come from state legislatures, which are sometimes gerrymandered and minoritarian.[316] In short, the behavior and output of institutions depends on political, social, and other contextual factors—not on a straight line between majorities and oppression.

2. *Entrenchment and Other Problems*. The second problem often pinned to majority rule, and thus implicated in critiques of state majoritarian institutions, is entrenchment. This idea, too, has a long and continuing pedigree. Majorities may entrench their own power in

311. *See supra* note 125 (referencing initiatives creating redistricting commissions and expanding voting rights); *see also* MATSUSAKA, *supra* note 116, at 208–10 (analyzing the success of minority-related ballot initiatives over time).

312. *Cf.* David Froomkin & Ian Shapiro, *The New Authoritarianism in Public Choice*, POL. STUD., Aug. 4, 2021, at 16 (pushing back against "the new authoritarians" who favor increased executive power as a solution to the pathologies of legislatures).

313. *See, e.g.*, Frances Stead Sellers & Isaac Stanley-Becker, *As Coronavirus Surges, GOP Lawmakers Are Moving To Limit Public Health Powers*, WASH. POST (July 25, 2021, 6:05 PM), https://www.washingtonpost.com/national/gop-legislatures-health-laws/2021/07/25/2455940c-db54-11eb-8fb8-aea56b785b00_story.html [https://perma.cc/KU5N-C2Y4].

314. *See* Seifter, *Gubernatorial Administration*, *supra* note 106, at 486, 502.

315. *See id.*

316. For example, bills that would discriminate against transgender students have been introduced in Michigan, Wisconsin, and Pennsylvania. *See* S.B. 218, 101st Leg., Reg. Sess. (Mich. 2021); H.B. 972, 2021 Gen. Assemb., Reg. Sess. (Pa. 2021); A.B. 196, 2021–22 Leg., Reg. Sess. (Wis. 2021).

various ways so that democracy will no longer be a fair contest.[317] The majority in power now might thwart the wishes of voters today or in the future in ways that are ultimately both antimajoritarian and unfair.[318] Our long history of egregious malapportionment,[319] addressed in the Supreme Court's reapportionment cases,[320] has given way today to extreme partisan gerrymandering under which voters can scarcely hold legislatures accountable.[321]

At the state level, majoritarian institutions might indeed attempt such entrenchment—and, as I argue below, should be constrained when they try. In some cases, though, these may not truly be majoritarian efforts. Power grabs during lame duck sessions, for example, lack the imprimatur of the just-elected governor; judicial rulings may reflect the views of a court about to change hands; and ballot initiatives might confuse voters rather than empower them. State legislatures, tainted by prior gerrymanders, may not be majoritarian after all.

The same fears of entrenchment apply, even more clearly, when minority interests or parties hold sway. A minority that claims power is even more likely to attempt to cement that power through entrenchment techniques. This is part of the "authoritarian playbook."[322] Once a minority party manages to seize power, its object is to retain it.[323]

Indeed, much of the behavior afoot in the states raises the specter of minoritarian entrenchment. In several of the examples, gerrymandered state legislatures dominated by a minority party seek

317. *See* ELY, *supra* note 35, at 103; United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

318. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997).

319. *See, e.g.*, STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., THE END OF INEQUALITY: ONE PERSON, ONE VOTE AND THE TRANSFORMATION OF AMERICAN POLITICS 34–37 (Ira Katznelson ed., 2008).

320. Karlan, *supra* note 284, at 1333 ("Nothing provides a better model of anti-entrenchment judicial review than the Warren Court's reapportionment cases.").

321. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2509 (2019) (Kagan, J., dissenting).

322. *E.g.*, Klarman, *Foreword*, *supra* note 1, at 11.

323. *See* LEVITSKY & ZIBLATT, *supra* note 1, at 87–88; *see also* James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 432 (2021) (describing democratic backsliding as entailing a party "gradually entrenching itself in power through anti-democratic means").

to undermine the majoritarian status of the governor, the courts, or the ballot initiative. In other examples, an extreme partisan faction seeks to introduce measures that would foreclose a future fair election and install a minoritarian winner.

Finally, beyond the signal harms of discrimination and entrenchment, majority rule may also be flawed in less devastating ways—but these, too, may apply to minority decision-making. Majorities may make poor decisions due to inadequate deliberation or groupthink.[324] They might overlook solutions that would be satisfactory to all.[325] But again, there is no reason to believe, and to my knowledge no suggestion, that simply switching the decision maker from the majority to the minority would solve these problems.

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The lines of argument I have reprised here are clearly not new. But placing them together should go some way toward dispensing with the misleading rhetoric that majority rule, in general or in state institutions, is the core threat to political equality. Depending on the underlying power dynamics and the type of constraint imposed, any given reform might alleviate political inequality or cause it. This ambiguity may generate conflict, but at least it will be conflict on fruitful terms—terms that inquire into context and jettison blanket denouncements of majority or minority power.

B. Tailoring Solutions to Problems

If maligning majority rule across the board will not work, how can we evaluate constraints on it? In the realm of constitutional rights, courts and commentators recognize the importance of distinguishing between those rights that are vital (or "fundamental") and those that are not, including those that matter because of their import to a functional democracy. To my knowledge, we have no similar vocabulary for structure. Perhaps that is because, at the federal level,

324. *See, e.g.*, Cass R. Sunstein, *Group Dynamics*, 12 CARDOZO STUD. L. & LITERATURE 129, 130–34 (2000).

325. *See, e.g.*, PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 211–15 (2012) (discussing circumstances in which modifying simple majority rule by allowing contestation improves decision-making).

most structural features are either unchanging (like the Senate)[326] or nonjusticiable (like partisan gerrymandering).[327] But of course, not all changes to majoritarian institutions impose equivalent burdens on majority rule. What we need is *structural tailoring*: a way of separating problematic incursions from harmless ones.

This framework recognizes that majoritarian institutions need not remain static. Reforms are often salutary—but which reforms, and in what circumstances? To evaluate, it makes sense to consider both the degree of new constraint imposed and the reason for imposing it. A constraint may be "weak" or "strong," a distinction I develop below. The strongest constraints require more compelling justifications. And, in a subset of recurring cases, constraints should fail when they are more likely to cause or exacerbate political inequality than to alleviate it.

As a preliminary manner, all majoritarian institutions already face one constraint that is not in question here: the constraint of state and federal constitutional rights. An overreaching governor or ballot initiative, for example, is already limited by the individual rights and liberties that the state and national constitutions confer. The analysis that follows, then, goes beyond Ely's concern for the intervention of allegedly countermajoritarian courts.[328] Rather, it regards majority constraints as potentially harmful even when they do not manifest as judicially created rights and allows evaluation of the many proposals to further limit state majoritarian institutions through structural change.

Sometimes there will be easy cases. It would be useful progress to agree upon even this set. By way of thought experiment, imagine that a majority party expecting to lose the next election passes a statute providing that the party receiving fewer votes in that election will take control of Congress. Such a scheme plainly flouts the principles of

326. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 719–20 (2011).

327. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).

328. The approach expressed here might still align with Ely's normative underpinnings if one reads his work as requiring "fair majoritarianism" or even a robust version of political equality, rather than mere majority rule. For articulation of these possible readings, see Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 741–42 (2004).

political equality[329] and majority rule.[330] It directly hands power to the electoral loser and gives the minority party outsized power in the political process. It also represents the sort of bald-faced entrenchment that conventional wisdom rejects as unconstitutional.[331] Simply put, replacing majority rule with full-blown minority-party rule is not an acceptable solution in a democracy.[332] Perhaps surprisingly, some recent proposals approach this sort of complete inversion, as I explain in Part III.C.

In most cases, the proposal will not be a complete imposition of minority-party rule. How, then, to evaluate? The degree of the constraint and justification for it should be useful guides.

1. *A Spectrum of Constraints*. Majority constraints vary. It makes sense to imagine them as falling along a spectrum, from weak to strong constraints. Generally speaking, weak constraints are normatively unproblematic and can enrich majority decision-making without undermining democracy, whereas strong constraints require greater scrutiny and justification.

What makes a constraint weak or strong? Three variables, although not exclusive, are telling. A constraint might be outcome-determinative or merely influential. It might be general (spanning subject areas) or specific. And it might be durable (spanning one or more full election cycles) or time-limited (for a single vote or set of votes). The strongest constraints are outcome determinative, general, and long-lasting—like the Congress example above. The weakest constraints are influential, specific, and time limited. Other

329. *See generally* Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 442, 460 (2013) (prioritizing "equal liberty—the equal opportunity to express one's voice in politics, and the equal weight given to that voice in decision[-]making").

330. *See* DAHL, PREFACE, *supra* note 275.

331. The Supreme Court has repeatedly recognized the principle, dating to Blackstone, that "one legislature may not bind the legislative authority of its successors," even as the Court has also recognized limits on that principle. For discussion, see United States v. Winstar Corp., 518 U.S. 839, 872–75 (1996).

332. *See generally* Levitsky et al., *supra* note 9 (describing a democratic crisis caused by entrenched minority rule).

combinations of these variables will fall on other points in the spectrum.[333]

Minimally, we might constrain majority rule by empowering minorities in ways that influence majority decision-making without trumping it. Such "submajority rules," as Professor Adrian Vermeule terms them, permit a numerical minority "the affirmative power to change the status quo,"[334] while stopping short of allowing minorities to bind the public with the force of law. The typical examples here would be procedural, preliminary, or agenda-setting decisions.[335] The concept of influence itself entails a spectrum. A brief or perfunctory consultation is different from the requirement of extended meetings or from a series of merely influential steps that cumulatively ossify a decision-making process. Generally speaking, weak constraints can be conjured and imposed creatively, with attention to the growing literature on ways that affording power, and not just rights, to minority populations may both serve their interests and enrich the ultimate decisions.[336]

Proceeding further along the spectrum, a majority constraint might allow some minority entity to exercise outcome-determinative power, but in an isolated fashion. This resembles the sort of limit imposed by individual rights—which of course would still apply under this analysis—but through structure. The power afforded might be limited to a particular issue. It might provide, for example, that a minority party is authorized to veto certain emergency orders imposed by the executive (as I describe in Part III.C, some recent legislation does this). Or it might be limited over time—as when a minority

333. For an illuminating discussion of how rights and forms of structural power differ along similar variables, see Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1324–49 (2012). While Levinson accurately describes rights as "typically" affording a narrower set of interests with stronger protection, *id.* at 1348–49, and voting power as generally offering broader but less certain protection, *id.* at 1349, the discussion above indicates that this generalization might not always hold: both rights and voting power can be designed to be more or less outcome determinative and more or less broad.

334. Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 74 (2005).

335. *See id. See generally* JENNIFER HAYES CLARK, MINORITY PARTIES IN U.S. LEGISLATURES: CONDITIONS OF INFLUENCE (2015) (studying the influence minority parties wield in the legislative process).

336. *See* Blackhawk, *supra* note 277, at 1863–66; Levinson, *supra* note 333, at 1332–33.

population is authorized to "take turns" making decisions.[337] Again, these possibilities entail spectrums within the spectrum. How expansive is the "specific" issue that the minority may decide—all emergency powers, or just an aspect of them? And how frequently might the minority take a "turn" in governing? The stronger the constraint, the better reason for it there ought to be.

A variation on this theme is what Professor David Fontana terms "government in opposition" rules, in which the party that loses an election exercises some of "the power to govern."[338] This "unnoticed innovation in constitutional form"[339] exists in different versions around the world. For example, losing parties might control the legislature for certain days of the year or chair legislative committees, hold cabinet positions in parliamentary systems, and appoint judges or have special standing in litigation.[340] Advocating more of this approach in the United States, Fontana proposes that during (but only during) unified partisan government, the winning political party should be legally obligated to negotiate with the losing party. In turn, the minority party would control, "at minimum, some significant . . . number of important cabinet positions, chairmanships of important congressional committees, and the ability to nominate a certain number of federal judges."[341]

Finally, the strongest constraints on majority rule would invert it altogether. In addition to the flagrant Congress example introduced at the outset,[342] extremely gerrymandered legislatures arguably fit in this category. An electoral scheme that allows a party to govern despite receiving fewer votes—as has happened numerous times in state

337. *See* GUINIER, *supra* note 277, at 5.

338. David Fontana, *Government in Opposition*, 119 YALE L.J. 548, 556–57 (2009). Fontana defines "[t]he power to govern" as "the capacity to use the sovereign power of the state to order and coerce binding, obligatory endeavors." *Id.* at 556. Examples include "controlling the agenda of a committee or of a legislature, or enacting statutes, or controlling a panel of judges that will issue a binding decision." *Id.* As Fontana notes, the government in opposition model shares some common ground with, but stops short of, political scientist Arend Lijphart's model of "consociational democracy." *Id.* at 565. *See generally* Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207 (1969) (outlining a set of approaches in which groups share power to create stability in fragmented democracies).

339. Fontana, *supra* note 338, at 564.

340. *See id.* at 571–81.

341. *Id.* at 601 (emphasis removed).

342. *See supra* p. 338.

legislatures in the modern era—does not cross the basic threshold of majority rule, however common the practice may become.[343]

2. *Evaluating Justifications*. Under the approach I propose, stronger constraints on majority rule require greater justification, typically one sounding in existing discrimination or entrenchment. This approach obviously leaves room for close cases and debate, as it should, and will not resolve every conflict. But antidemocratic actors have recently offered three types of proposals based on justifications that are mistaken or misleading. Each warrants discussion.

First, as alluded to above, some actors have attempted to leverage a problem, serious or otherwise, as a justification for eliminating majority rule altogether. But creating sustained, institution-wide minority rule is not an acceptable solution, even to actual excesses of a majority. Avoiding the problem of elite minority bias is part of the value of majority rule in the first place.[344] Note that all of the extant majority constraints discussed above stop short of true inversions. Rights afford protection that is decisive, but only on certain topics. Submajority rules, turn-taking, and government-in-opposition rules all allow majorities to wield political power, but not comprehensively or at an institution-wide level. The majority constraints that are normatively attractive do not overturn majority rule.

The second problematic proposal would implement a strong majority constraint based merely on dissatisfaction with a political loss. For example, if a ballot initiative disadvantages a group that is perfectly capable of competing in the political process, a strong, outcome-determinative remedy creates a mismatch. The goal of majority constraint is not to eliminate the phenomenon of politically powerful numerical minorities losing. A powerful minority requires no additional protection from majority rule; it can already compete in the "pluralist bazaar."[345]

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343. *See* Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1755–68.

344. *See* Ian Shapiro, *Three Fallacies Concerning Majorities, Minorities, and Democratic Politics*, *in* MAJORITIES AND MINORITIES: NOMOS XXXII, *supra* note 281, at 79–80.

345. For a discussion of how democratic principles may limit efforts to protect minority interests, see Levinson, *supra* note 333, at 1332–33 ("[T]here may be a fine line between making minorities politically powerful enough to protect their core interests and making them too powerful, putting them in a position to extract more than their fair share or undermining the workability of democratic governance." (emphasis removed)).

Third, purported reformers may propose reforms that they claim would alleviate political equality but that in fact would create it. In these cases, the purported reformer alleges that a majoritarian institution has gone too far in infringing individual liberty or equality. But the proposed reform would shift power to a minority group or party that already wields outsized power and/or away from a majority that already faces a substantial headwind.

This third category of mistaken majority constraint may be the hardest to detect, but certain features may signal its potential presence. In particular, laws or decisions that expand the power of gerrymandered legislatures may be red flags. Similarly, it is worth scrutinizing measures that give a strong veto power to minority political parties in closely divided states. Closely divided states feature distinct power dynamics[346]: both the temptation for power grabs and the stakes for potential entrenchment are higher than in consistently lopsided states.[347] Accordingly, shifting structural power in a closely divided state is likely to give the minority party a greater windfall than in a lopsided state; depending on the reform at issue, such a power shift (such as the ability to appoint judges or control election administration) may give the minority party not just the power to govern temporarily, but a greater likelihood of winning the next election.

C. Classifying the State-Level Attacks

The developments in Part II do not fare well—but do not all fare the same—under the framework sketched above. Moreover, even when developments do not appear problematic individually or in isolation, they may be part of a broader pattern of whittling away that will undermine state democratic opportunity.

Before categorizing the developments, one dilemma warrants attention. If majoritarian institutions are so important, and they have enacted some of Part II's developments, why not let their outputs ride? Or, to approach the problem from the other side, if majoritarian institutions reached the decisions in Part II, why value them so highly?

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346. On the ways that close division shapes politics, see, for example, LEE, *supra* note 10, at 3–5.

347. *See* Gould & Pozen, *supra* note 16, at 89–90 ("Intense competition between the parties encourages the seeking of any possible advantage, including the use of structural biases for purposes of entrenching one's own reforms or disrupting the other side's agenda.").

A partial answer is that *not* all of Part II's developments appear genuinely majoritarian. Some, such as Pennsylvania's judicial districting, are mere proposals (and would bypass the governor). Others, such as the statutes in Ohio and Kentucky, were passed as veto overrides. Still others, such as the recent proposals in Michigan, sidestep the governor's role altogether.

But some proposals, including initiative restrictions in Idaho and elsewhere, have passed through bicameralism and presentment. As to those, democratic opportunity provides a guiding principle. In advocating the protection of democratic opportunity, this Article's position, aligned with the prevailing view in democratic theory, is that even majoritarian institutions must not foreclose or abolish democracy.[348] State majoritarian institutions do not promise wisdom at any given moment, but we count on them to continue to allow majorities to rule.

That brings us to the proposals themselves. First, some proposals resemble the most flagrant problem, that of imposing a full inversion of majority rule. Judicial gerrymandering in Pennsylvania could have that effect or at least seems designed to do so. If successful and if designed like Pennsylvania's gerrymandered legislative districts, it could yield minority-party control of the judiciary.[349] The effect in Montana is more subtle because it does not track party lines (and the state supreme court's elections are nonpartisan), but its effect may be to shift power of the state's high court from a more moderate majority to a less moderate minority within the state.[350]

Other proposals involve a stark mismatch between the extent of the constraint and the given justification, imposing a strong constraint in the absence of a compelling justification or any democratic malfunction. The Idaho ballot initiative restriction is a leading example. There, recall, the signature requirement added to the ballot initiative process would have been the most stringent in the nation, requiring a threshold number of signatures from all of the state's 35

348. For expressions of this view and explorations of its limits, see, for example, Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1408–14 (2007) and Jan-Werner Müller, *Protecting Popular Self-Government from the People? New Normative Perspectives on Militant Democracy*, 19 ANN. REV. POL. SCI. 249, 251–58 (2016).

349. *See supra* note 155 and accompanying text.

350. For background, see John S. Adams, *Emails Uncover Acrimony in GOP*, GREAT FALLS TRIB., Jan. 16, 2013, at A1.

legislative districts.[351] The requirement would have made qualifying an initiative for the ballot exceedingly difficult, if not impossible. As the Idaho Supreme Court put it in striking down the initiative, "[i]f the Legislature's actual goal is to prevent any initiative or referendum from qualifying for the ballot, then this is probably an effective tactic."[352] In supporting the restriction, the state legislature argued that the restriction was needed to avoid majority excess—that it "creates a check on the will of the majority"[353] and "was necessary to prevent the minority from being 'trammeled by the majority.'"[354]

But the mismatch was plain. Making all ballot initiatives impossible or nearly impossible is a very strong form of majority constraint. So is giving any single district complete veto power of an initiative with broad support.[355] These types of constraints ought to have strong justifications, but the legislature identified none, other than the vague notion, described in Part III.A, that majority rule is a threat to minorities.

The Supreme Court's reasoning, although situated in a rights framework, tracked this logic. The Court noted "an unmistakable pattern by the legislature of constricting the people's initiative and referendum powers after they successfully use it."[356] It noted the legislature's argument regarding majorities trammeling minorities and the resonance with Federalist 10. But, the Court observed, the legislature had shown no actual discrimination against any minority interest, past or present:

> In short, they have failed to demonstrate how minority rights have been "trammeled" by the initiative process in Idaho. It is difficult to

351. *See supra* note 196 and accompanying text.

352. Reclaim Idaho v. Denney, 497 P.3d 160, 191 (Idaho 2021).

353. *Id.* at 188 (quoting respondents' brief).

354. *Id.* at 186 (quoting oral argument).

355. As the court put it:

> [T]he Legislature has essentially given every legislative district veto power over qualifying initiatives and referenda for the ballot. While this might theoretically assure that voters with minority interests will have a voice, it will achieve this end at a terrible cost. For example, a lone urban district in Boise could thwart an agricultural initiative with strong statewide support. Likewise, a paid special interest lobby could derail a popular initiative it dislikes by focusing its opposition efforts on a single legislative district with which it shares common interests.

Id. at 190.

356. *Id.* at 186.

> find . . . a realistic threat that the interests of any group of Idaho citizens are currently at risk due to the initiative process previously in effect when (1) so few initiatives or referenda have even qualified for the ballot in the last 109 years, and (2) the legislature still possesses the authority to repeal initiatives once passed, as they have done before. In fact, no actual or perceived threat to minority interests necessitating [Senate Bill] 1110's signature requirement has been identified by the legislature. The most recent examples—the referenda overturning the "Luna Laws" in 2012 and the Medicaid Expansion initiative in 2018—actually may have been examples of the majority of Idaho voters acting in a democratic fashion to *protect* minority interests (educators and the poor) when the Idaho Legislature would not.[357]

Not all limitations on the ballot initiative will fail under this analysis. As earlier discussion indicated, ballot initiatives may well harm minority-group interests,[358] though it is unclear how much greater this risk is compared to ordinary legislation. Still, a range of reforms short of strong constraints could mitigate the risk of harm to vulnerable groups. A few states exclude some civil rights questions from the initiative process altogether.[359] The concern that voters do not understand the initiatives they are voting on could readily support additional attempts at voter education, deliberation-forcing measures, or the requirement of multiple votes.[360]

Finally, the recent limits on the powers of governors and other executive branch actors span the spectrum, both in terms of the strength of the constraint imposed and their normative defensibility. At one end of the spectrum, provisions requiring governors to consult with others or to engage in a notice and comment process before wielding certain emergency powers may be innocuous; these qualify as weak constraints with no necessary democratic harm. At the other end

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357. *Id.* at 187 (emphasis in original).

358. *See supra* notes 302–305 and accompanying text.

359. *See* Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730, 1778–79, 1779 n.301 (2013) (discussing Mississippi and Massachusetts as examples and noting that Mississippi's exclusions could also prevent expansions of civil rights). Mississippi does not have an initiative process at present due to Initiative Measure No. 65: Mayor Butler v. Watson, 338 So. 3d 599 (Miss. 2021).

360. *See* COUNCIL OF STATE GOV'TS, 52 BOOK OF STATES 8 (2020), https://issuu.com/csg.publications/docs/bos_2020_web [https://perma.cc/9V8S-GC27] (showing twelve states that require two rounds of approval for constitutional amendments).

of the spectrum, several of the shifts of election administration away from majoritarian institutions raise serious democratic concern. Not only do many of these transfer power from majoritarian entities to less majoritarian entities, but they do so in ways that seem designed to imperil the ability of voters to select their representatives.[361]

Other gubernatorial constraints must be considered in context. Some shifts will prove unproblematic on democratic grounds because, once examined, they do not entail a strong constraint at all. For example, there is little impact on majority rule if the legislature imposing the constraint is not heavily gerrymandered and/or is part of the same political party as the governor in a state where the party's politics are fairly cohesive and aligned with the electorate. Other shifts will appear neutral but will impose strong constraints in effect. For example, while requiring gubernatorial orders to go through a notice-and-comment process is typically a soft constraint, the Wisconsin decision requiring that step operated as a functional veto due to Republican control of the legislative committee overseeing rulemaking.[362] That sort of strong constraint required a compelling justification under this framework, beyond the blanket recitations of the legislature as the voice of the people. Finally, while this Article's focus is on horizontal allocations of power within state government, measures like Ohio's have implications for democracy at the local level. By imposing strong constraints on local decision-making, such measures preclude the power that decentralization otherwise affords to groups that may be statewide minorities but are local majorities.[363]

Even constraints that appear benign in isolation might be part of a normatively problematic cumulative effect. If states whittle away at majoritarian institutions, even if apparently justified or debatable in the moment, we may wind up with less democratic opportunity and fewer counterweights against national minoritarianism. This caution is admittedly difficult to cash out into a specific prescription. It would be overblown to suggest that, in light of national trends, every state institution must be left in its precise present majoritarian form. But as the next Part argues, state courts, state officials, and state-level

361. *See generally* Hasen, *supra* note 8 (describing potential threats to future U.S. elections).

362. *See* Molly Beck, *Tony Evers' Proposal To Replace Stay-at-Home Order Rejected by GOP Lawmaker with Veto Power*, MILWAUKEE J. SENTINEL (May 17, 2020, 2:10 PM), https://www.jsonline.com/story/news/politics/2020/05/15/tony-evers-proposal-replace-stay-home-order-rejected/5199935002 [https://perma.cc/8DD3-9AVR].

363. *See, e.g.*, Gerken, *Federalism*, *supra* note 24, at 46.

organizers can all put a thumb on the scale in favor of democracy in close cases.

IV. SAVING STATE DEMOCRATIC OPPORTUNITY

This Article has so far argued that states offer distinctive democratic opportunity that federal institutions do not, that state majoritarian institutions are under attack, that many of these attacks are individually questionable, and that the overall pattern of these attacks is very concerning. What can be done?

A. The Democracy Principle in State Courts

State courts will continue to adjudicate a wide range of disputes involving changes to majoritarian institutions. These courts should heed the state constitutional commitment to the democracy principle—that is, to popular rule by the people on equal terms.[364] Although the principle is always necessarily rooted in each state's own founding document and precedents, it is best understood as a shared principle common to state constitutions.[365] Unlike the federal constitution, state constitutions, through their often extensive text, expressly and repeatedly embrace popular sovereignty, majority rule, and popular equality.[366] State constitutional drafters embraced these pillars of democracy self-consciously, often in response to state or federal unresponsiveness and through mass interstate practices of mimicry and "imitative art."[367]

In *The Democracy Principle in State Constitutions*, Professor Jessica Bulman-Pozen and I outline a series of cases in which the democracy principle could provide dispositive guidance: cases involving extreme partisan gerrymandering, lame-duck power grabs, and legislative reversals of ballot initiatives.[368] This Article identifies a new set of disputes in which the democracy principle ought to apply.

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364. *See* Bulman-Pozen & Seifter, *supra* note 31, at 861–62.

365. *See id.* at 908.

366. *See id.* at 908–09.

367. *See id.* at 866 (quoting John Walker Mauer, *State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876*, 68 TEX. L. REV. 1615, 1617 (1990)).

368. *See id.* at 907–32.

The Idaho Supreme Court's decision in *Reclaim Idaho v. Denney*[369] is perhaps the best example of how the principle could apply to antimajoritarian efforts. As Part III details, the Court there began by identifying express commitments to popular majority rule in the state constitution. It then devised a framework for reasoning through whether the state abrogated that commitment, and whether it did so permissibly.[370] Decisions this Article has mentioned from Missouri and Michigan provide glimpses of similar reasoning, underscoring the importance of the state's commitment to democratic principles, and then finding that the state legislature's end-run around them was impermissible.[371] As the hundreds of proposals to limit ballot initiatives make their way to litigation, state high courts would do well to follow Idaho's reasoning.

Imagine a similar case involving a shift from majoritarian (or nonpartisan) to minoritarian partisan election administration, whether through one of the examples described herein or another yet to come. Such a dispute provides rich fodder for democracy-principle reasoning. To be sure, many cases involving administration of elections themselves will proceed in federal court, and some may involve judicial resolution of the "independent state legislature" theory.[372] But state courts are free to specify the powers of their legislatures well before elections occur. It may be that a state constitution's commitment to "free and fair" elections and its provision that "all political power is inherent in the people," for example,[373] tip the balance against a law creating a patently partisan system of election administration—one whose architects have embraced a plan to take elections away from the people themselves.

369. Reclaim Idaho v. Denney, 497 P.3d 160 (Idaho 2021).

370. *See supra* notes 352–357 and accompanying text.

371. *See supra* notes 200–209 and accompanying text.

372. *See* Hasen, *supra* note 8, at 284–87 (describing the legal theory's potential role in election subversion). The Supreme Court has recently granted certiorari in a case that addresses the independent state legislature theory. *See* Moore v. Harper, 868 S.E.2d 499 (N.C. 2022), *cert. granted*, 2022 WL 2347621 (June 30, 2022) (No. 21-1271).

373. *See* Bulman-Pozen & Seifter, *supra* note 31, at 869–70 (collecting state constitutional provisions expressing these commitments).

B. State Reformers and Organizers

Just as important as how courts ultimately adjudicate conflicts over the diminishment of state majoritarian institutions is the way that we talk about these incursions. An extensive interdisciplinary literature emphasizes the importance of language and framing to public opinion[374] and of public opinion and social movements to the actions of political and judicial officers.[375] A frame provides "a central organizing idea . . . for making sense of relevant events, suggesting what is at issue."[376] Attacks on state majoritarian institutions belong within the frame of democracy—and specifically, as part of the problem of subverting democracy. The failure of commentators and reformers to consistently utilize this broader frame and identify state institutions as counterweights against national democratic decline is a missed opportunity to increase the likelihood of mobilization and eventual reform.

Consider three ways that advocacy organizations, reformers, or commentators might frame a statute or proposition that would substantially curtail the ballot initiative process. One simply states, without broader context, that the law would change the number or distribution of signature requirements for a ballot initiative; this offers no particular "cultural resonance."[377] Another—the more effective frame used by proponents of these changes—pitches the law as one

374. *See* William A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, 95 AM. J. SOCIO. 1, 3 (1989) (noting the dialectic relationship between media discourse and public opinion); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 626 (2000) (summarizing studies on media framing); ERVING GOFFMAN, FRAME ANALYSIS 8–16 (1974); *see also, e.g.*, RODGERS, *supra* note 32, at 3–16 (exploring the political use of and conflict over certain keywords); Ken I. Kersch, *The Talking Cure: How Constitutional Argument Drives Constitutional Development*, 94 B.U. L. REV. 1083, 1088 (2014) ("Political entrepreneurs and leaders, moreover, can use political and constitutional ideas discursively in popular, movement, group, and party politics as a vehicle for constitutional renovation and transformation.").

375. For examples, see Siegel, *supra* note 32, at 1323 ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding—a dynamic that guides officials interpreting the open-textured language of the Constitution's rights guarantees.") and Guinier & Torres, *supra* note 32, at 2803 ("[W]e contend that democratic societies are organized to produce a variety of authoritative interpretive communities.").

376. Gamson & Modigliani, *supra* note 374.

377. *See id.* at 5 (noting that "[n]ot all symbols are equally potent" and that some framing efforts "have a natural advantage because their ideas and language resonate with larger cultural themes").

that makes the ballot process more fair, more representative of the state as a whole, or more protective of minority rights. A third and preferable approach would point out that burdens on the initiative are part of a broader attack on democratic opportunity. Without any notes in this third register, it is hard to see why anyone beyond insiders would get exercised about the change or why the proponents would feel any need to change course.[378]

Who can participate in this reframing? Speaking about state majoritarian institutions as central to American democracy is an important task for state officials themselves.[379] Many officials in state government may genuinely want to resolve flaws in judicial elections, the ballot initiative process, or gubernatorial power. These institutions, after all, are not perfect. But these reformers should keep in mind states' crucial role in democratic opportunity. When considering, for example, how to address low levels of voter information in ballot campaigns or a particular overreach by a governor, state officials should reach for reforms that are incremental, not complete overhauls or eliminations. And when faced with proposals that would transform a majoritarian state institution into one that no longer fits that bill, state officials in opposition should use the language of democracy, not just object to the proposal's details.

Organizers outside of state government, too, should take part. The threat to state-level democracy warrants more attention, with new vocabulary and priorities for organizers. It is true that organizations have recently turned more attention to safeguarding state-level democracy, especially on the specific issue of fair elections.[380] But that turn follows a longer-term, organized effort to gerrymander state legislatures and, more recently, to undermine state institutions in the ways described in this Article. And most of the focus in democracy organizing remains at the federal level.[381] There remain myriad

378. *See* Maisano, *supra* note 93 ("[F]ailing to address the undemocratic terms of the constitutional order actually spurs the authoritarian tendencies of the Right . . . .").

379. *See, e.g.*, Gamson & Modigliani, *supra* note 374, at 7 (stating that "on most issues, public officials are often important sponsors" of an effective message).

380. *See supra* notes 1–8 and accompanying text.

381. To take just one example, former government official Miles Taylor's new group, Renew America, recently stated that they are "active in congressional races but do[] not have enough resources to compete in the state contests that often determine election procedures." David Leonhardt, *America's Anti-Democratic Movement*, N.Y. TIMES (Dec. 13, 2021), https://www.ny

pressing issues in the states that receive attention only in a passing news story, if that.

Finally, using the frame of state democracy might inspire reforms to protect state democratic opportunity by strengthening the integrity and competence of state institutions. State legislatures have potential to be, as the Supreme Court once imagined, "the fountainhead of representative government in this country."[382] Yet a confluence of problems has undermined their democratic potential: extreme partisan gerrymandering,[383] resource limitations (including part-time roles and low pay),[384] and a skewed civil society ecosystem that has given an outsized role to groups such as the American Legislative Exchange Council.[385] These developments help to explain why state legislatures have proposed many of the most problematic changes this Article describes. Reformers taking a longer-range view would do well to focus on democratizing state legislatures.

CONCLUSION

This Article offers a theoretical account of majority rule in the states—and a normative call to salvage it. State institutions deserve our attention. These institutions are imperfect, but they tend to privilege majority rule in a way our national institutions do not. With majority rule in peril, we should think of states as counterweights to minority rule and as outlets for majorities to gain footholds as national-level opportunities wane. It is possible to do this without losing sight of majority rule's important limiting principles, including the imperative for political equality in a democracy. In an era in which our national institutions are prone to minority rule, the erosion of our state institutions is too important to ignore.

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times.com/2021/12/13/briefing/anti-democratic-movement-us-politics.html [https://perma.cc/DWG5-TZJH].

382. Reynolds v. Sims, 377 U.S. 533, 564 (1964).

383. *See* Seifter, *Countermajoritarian Legislatures*, *supra* note 27, at 1735–36.

384. *See Full- and Part-time Legislatures*, NAT'L CONF. OF STATE LEGISLATURES (July 28, 2021), https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx [https://perma.cc/ZD2J-BR7F].

385. HERTEL-FERNANDEZ, *supra* note 147, at 209–10.