STATE CONSTITUTIONAL AMENDMENTS AND INDIVIDUAL RIGHTS IN THE TWENTY-FIRST CENTURY

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Protecting rights is generally viewed as the responsibility of the U.S. Supreme Court and seen as taking place primarily through decisions interpreting the U.S. Constitution. Scholars have occasionally taken note of the role of Congress in deliberating about rights by passing laws giving effect to constitutional provisions or responding to judicial construction of statutes.[1] Also at times scholars have taken note of occasions when the federal constitutional amendment process has served as a vehicle for securing rights, such as through the passage of the Bill of Rights and the Civil War Amendments.[2] But the rigidity of the Article V amendment process ensures that amendments are enacted infrequently, such that deliberation about rights, at least at the federal level, takes place primarily in Supreme Court decisions and only rarely through passage of constitutional amendments.[3]

The renaissance of state court interpretation of state constitutions in the 1970s led scholars to broaden their studies to attend not only to the federal level but also to the state level, and to

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[1] *See, e.g.*, CONGRESS AND THE CONSTITUTION 8 (Neal Devins & Keith E. Whittington eds., 2005); LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 2 (2002); REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 1 (2006).

[2] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 311–401 (2005) (discussing a recent treatment of reliance on the Article V amendment process to secure rights on these occasions); *see also* MARY FRANCES BERRY, WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION 1 (1986) (discussing the most recent occasion where an amendment to secure rights was proposed by Congress but was not ratified).

[3] *See* RICHARD B. BERNSTEIN & JEROME AGEL, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?, at xii (1993) (discussing leading treatments of the rigidity of the Article V federal amendment process and the various amendments that have been enacted); *see also* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995, at x (1996) (same).

view state courts as well as federal courts as agents of rights protection. Encouraged by Supreme Court Justice William Brennan's 1977 call for state courts to rediscover state bills of rights,[4] state judges turned more frequently to interpret state constitutions in order to secure more protection of rights than is guaranteed by Supreme Court rulings.[5] As a consequence, the last four decades have brought an outpouring of scholarship focused on state court rulings regarding individual rights.[6]

In contrast with the situation at the federal level, however, the flexibility of state constitutions affords ample opportunity for state constitutional amendment processes, alongside state judicial processes, to serve as forums for deliberating about rights. The U.S. Constitution can only be amended with approval of two-thirds of both houses of Congress or upon a petition for a convention by two-thirds of state legislatures and, in either case, upon ratification by three-fourths of the states.[7] Although state constitutions vary in the difficulty of their amendment procedures, no constitution is more difficult to amend than the U.S. Constitution. Many states permit amendments to be proposed by a bare legislative majority, although some require approval by a three-fifths or two-thirds supermajority, and some require approval in consecutive legislative sessions.[8] All but a handful of states permit ratification of amendments by a bare popular majority.[9] Slightly over one-third of the states also provide for citizen-initiated amendments.[10] In part as a consequence, the U.S. Constitution has been amended twenty-seven times, whereas state constitutions have been revised and amended periodically so that as of 2012, the fifty current state constitutions have been amended 7378 times, for an average of about 147 amendments per state.[11]

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

[5] Robert F. Williams, *Rights*, *in* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME 3: THE AGENDA OF STATE CONSTITUTIONAL REFORM 8 (G. Alan Tarr & Robert F. Williams eds., 2006).

[6] For the leading casebook examining this outpouring of scholarship, see ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (4th ed. 2006) (compiling numerous scholarly articles and books pertaining to state constitutions).

[7] U.S. CONST. art. V.

[8] *See* John Dinan, *State Constitutional Developments in 2011*, *in* 44 THE BOOK OF THE STATES 13 tbl.1.2 (2012) [hereinafter Dinan, *State Constitutional Developments in 2011*] (detailing these procedures for each state).

[9] *Id.*

[10] *Id.* at 15 tbl.1.3.

[11] I calculated these statistics from data presented in *id.* at 11 tbl.1.1.

Scholars have paid some attention to the reliance on state constitutional amendment processes to determine the scope and limits of individual rights. In the early 1980s, after amendments were approved in Florida and California in response to expansive state court interpretations of criminal procedure rights,[12] Donald Wilkes and James Fischer highlighted the ways state amendment processes can be used to restrict rights.[13]

In the late 1980s, Janice May, a long-time chronicler of state constitutional developments for *The Book of the States*, conducted a comprehensive review of rights-related amendments enacted in the decade-and-a-half from 1970 to 1985.[14] She found that "the bill of rights is the target of fewer changes than the other substantive provisions [of state constitutions, and as a result] state bills of rights have not been changed a great deal [during this period]."[15]

Regarding the general effect of rights-related amendments during this time period, May concluded "that the scales are tipped toward restriction rather than expansion."[16] Along these lines, she noted that some rights-restrictive amendments were passed for the purpose of "overturning court rulings, [while others] struck down any attempt to develop a body of law independent of the U.S. Constitution."[17] At the same time, she stressed that "while it is true that a large number of proposals were restrictive, . . . a new role involving the expansion of rights is also apparent [in that m]ost of the new rights adopted at the polling place . . . are neither expressly protected by the U.S. Constitution nor fully protected by the federal courts."[18] Finally, May concluded "[t]he net result is a bifurcation of new roles for state constitutions: one that tends to reduce rights in criminal justice and one that tends to expand rights in such matters as anti-discrimination, privacy, environmental protection, and the right-to-know."[19]

In the decades since May's analysis, scholars have taken particular note of the reliance on state constitutional amendments

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[12] CAL. CONST. art. I, § 28(d) (amended 1982); FLA. CONST. art. I, § 12 (amended 1982).

[13] *See* James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 47 (1983); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984).

[14] Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 163 (1987).

[15] *Id.* at 171.

[16] *Id.* at 174.

[17] *Id.* at 176.

[18] *Id.* at 178.

[19] *Id.* at 179.

to constrain expansive state court decisions. Kenneth Miller demonstrated in a recent book that state court decisions interpreting state bills of rights have in several instances been followed by court-overturning constitutional amendments, most notably in California in 2008 when Proposition 8, a citizen-initiated amendment, overturned a state supreme court decision legalizing same-sex marriage.[20] Other scholars have noted (and at times criticized) various court-preempting amendments that have been enacted in order to prevent issuance of rights-expansive state court rulings, as seen especially with passage of many amendments intended to forestall state court legalization of same-sex marriage.[21] Still other scholars have taken note of recent rights-expanding amendments intended to provide more protection for certain rights than the Supreme Court has guaranteed, especially regarding the eminent domain power.[22]

Despite these welcome analyses of various particular amendments bearing on individual rights, we do not yet have a comprehensive study of the full range of recent rights-related amendments of the sort May provided several decades ago. In this article, I conduct such an analysis for the period from 2000 to 2012, paying particular attention to elements of continuity and change between the late twentieth century and early twenty-first century.

I draw four main conclusions about the ways state amendment processes have served as a forum for deliberating about rights in the twenty-first century. First, a sizable number of rights-related amendments were enacted from 2000 to 2012. To be sure, in the first several years of the new century, rights-related amendments were passed infrequently, as was typical of prior decades when such amendments were relatively scarce. But during the entirety of the period from 2000 to 2012, rights-related amendments were the second most prevalent type of state constitutional amendment, surpassed only by finance and taxation amendments.[23]

Second, as in prior years, twenty-first century rights-related amendments have frequently constrained expansive state court

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[20] KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 3–13 (2009).

[21] *See, e.g.*, J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 568–70 (2006).

[22] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2143–49 (2008) (discussing legislative state law reforms enacted by popular referendum).

[23] *See infra* Part I.

rulings. However, in contrast with earlier periods when rights-restrictive amendments generally targeted criminal procedure rulings, recent amendments have often targeted state court decisions regarding other rights. There is, to be sure, some continuity over time, in that amendments targeting criminal procedure and death penalty rulings continue to be enacted in the twenty-first century. But the recent period has more often featured amendments restricting state court rulings regarding abortion and especially same-sex marriage. At times, these court-constraining amendments have overturned expansive state court rulings. At other times they have preempted state courts from issuing rulings that would expand rights.[24]

Third, again continuing a pattern seen in prior years, recent rights-related amendments have in a number of instances expanded rights beyond federal constitutional guarantees. However, in contrast with earlier periods when such amendments generally expanded anti-discrimination and privacy rights, recent amendments have focused on protecting a range of other rights.[25] At times in recent years, amendments have been enacted in response to Supreme Court rulings seen as providing inadequate protection for rights, as with limitations on the eminent domain power. At other times, amendments have been enacted to protect rights with no counterpart in the federal Constitution or Supreme Court case-law, such as regarding victims' rights and hunting and fishing rights.

Finally, in a development that is in one respect continuous with prior decades and in another respect has little precedent, recent rights-related amendments have been proposed and occasionally enacted to facilitate challenges to congressional statutes or Supreme Court precedents.[26] At times, as with proposed "personhood" measures defining a fetus as a person, these amendments have been proposed with the intent of creating conflicts between state constitutional provisions and Supreme Court precedents for the purpose of generating cases that might give the current Court an occasion to reverse or modify earlier rulings. There is some precedent for these sorts of amendments intended to present the Supreme Court with the occasion to reconsider prior

[24] *See infra* Part II.
[25] *See infra* Part III.
[26] *See infra* Part IV.

rulings. But there is little precedent for another set of recent rights-related amendments intended to create conflicts between state constitutional provisions and congressional statutes, such as the 2010 federal health reform law,[27] and thereby aid lawsuits designed to challenge their legitimacy.

I. THE PREVALENCE OF RIGHTS-RELATED AMENDMENTS

The most striking feature of rights-related amendment activity in the twenty-first century is that rights-related amendments are considered and enacted more often than in prior decades. In particular, when we consider the frequency of rights-related amendments compared with various other amendments, it becomes clear that rights amendments comprise a substantial portion of overall amendment activity; this stands in stark contrast to the relative scarcity of rights amendments in the final decades of the twentieth century.

Based on her review of rights-related amendments from 1970 to 1985, Janice May concluded that "[c]ompared with other articles of state constitutions, the bill of rights is the target of fewer changes than the other substantive provisions."[28] She went on to write that "[t]he relatively small number of proposals reinforces the observation . . . that state bills of rights have not been changed a great deal."[29] As an indication of the infrequency of rights-related amendments during this period, May calculated the total number of amendments proposed and adopted during this period by subject matter.[30] Focusing on statewide amendments (and thereby excluding local amendments occasionally allowed in southern states), May considered the number of amendments adopted in each of the following subject areas: legislative branch, executive branch, judicial branch, suffrage and elections, state and local debt, finance and taxation, state functions, local government, constitutional amendment and revision, and the bill of rights.[31] According to the data for the years 1970 through 1985, fewer amendments were passed during this period regarding bills of rights than regarding any other category, except for constitutional amendment and

[27] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2572 (2012) (ruling on the constitutionality of the Affordable Care Act).

[28] May, *supra* note 14, at 171.

[29] *Id.*

[30] *Id.* at 172 tbl.2.

[31] *Id.*

revision mechanisms.[32] To be specific, rights-related amendments were the ninth most prevalent type of amendment enacted during this period, falling behind each the following types of amendments (listed in order of declining frequency): finance and taxation, state functions, legislative branch, judicial branch, executive branch, state and local debt, suffrage and elections, and local government.[33]

The relative infrequency of rights-related amendments generally continued in the decade-and-a-half after the end-point of May's study in 1985; however, amendments were somewhat more likely to target bill of rights provisions in the latter part of this 1986 through 1999 period.[34] From 1986 to 1987, rights-related amendments were the seventh most prevalent type of enacted amendment.[35] But from 1988 to 1989,[36] 1990 to 1991,[37] 1992 to 1993,[38] and 1994 to 1995,[39] rights-related amendments were either the third or fourth most prevalent type of amendment.[40] Then, from 1996 to 1997[41] and 1998 to 1999,[42] rights-related amendments were the second most prevalent type of amendment, surpassed only by finance and taxation amendments.[43] In short, by the latter part of the 1986 through 1999 period, rights-related amendments began to be featured more frequently than in the prior decade-and-a-half, and during the entirety of the 1986 through 1999 period, rights-related amendments were the third most prevalent type of amendment.[44]

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[32] *Id.* May also included two other categories: "[m]iscellaneous" amendments, a catch-all for amendments not falling in any particular category, and "[g]eneral revision," referring to wholesale reform of state constitutions rather than piecemeal amendments. *Id.* The number of miscellaneous amendments and general revisions also fell below the number of rights-related amendments during this period. *Id.*

[33] *Id.* The number of enacted amendments from 1970 to 1985 for each of these categories was as follows: finance and taxation (321); state functions (184); legislative branch (172); judicial branch (161); executive branch (141); state and local debt (108); suffrage and elections (104); local government (92); and bill of rights (90). *Id.*

[34] *See* COUNCIL OF STATE GOV'TS, 33 THE BOOK OF THE STATES 11 tbl.1.7 (2000) [hereinafter THE BOOK OF THE STATES 2000].

[35] Janice C. May, *State Constitutions and Constitutional Revision, 1990–91*, *in* 29 THE BOOK OF THE STATES 6 tbl.B (1992).

[36] *Id.*

[37] *Id.*

[38] THE BOOK OF THE STATES 2000, *supra* note 34, at 11 tbl.1.7.

[39] *Id.*

[40] *See id.*; May, *supra* note 35, at 6 tbl.B.

[41] THE BOOK OF THE STATES 2000, *supra* note 34, at 11 tbl.1.7.

[42] *Id.*

[43] *See id.*

[44] Rights-related amendments accounted for 119 amendments enacted from 1986 to 1999, ranking behind finance amendments (234) and legislative branch amendments (191), and ranking ahead of state functions amendments (108), judicial branch amendments (97),

The surge of rights-related amendments in the late 1990s accelerated in the 2000s, albeit with a brief hiatus in the first several years of the new century.[45] From 2000 to 2001, rights-related amendments were only the ninth most prevalent type of amendment,[46] in what May described as "[a]n unusual development" and the lowest rate of rights-related amendment activity in thirty years.[47] Then from 2002 to 2003, rights-related amendments were the fifth most prevalent type of amendment.[48] However, in each subsequent period—2004 to 2005,[49] 2006 to 2007,[50] 2008 to 2009,[51] 2010 to 2011,[52] and 2012[53]—rights-related amendments were passed more frequently than all other types of amendments except for finance and taxation measures, and this is also the case when considering the entire 2000 through 2012 period.[54]

To summarize, the dominant trend in recent decades is toward more frequent passage of rights-related amendments. In the 1970s and 1980s, state bills of rights were the target of fewer amendments than virtually all other state constitutional articles.[55] By the late 1990s, bills of rights were targeted as frequently as a number of other articles of state constitutions.[56] And by the 2000s, bills of

executive branch amendments (86), suffrage and elections amendments (53), local government amendments (52), and debt amendments (32). *Id.* The calculations are taken from the data presented in THE BOOK OF THE STATES 2000, *supra* note 34, at 11 tbl.1.7 and May, *supra* note 35, at 6 tbl.B.

[45] *See* John Dinan, *State Constitutional Developments in 2005*, *in* 38 THE BOOK OF THE STATES 3, 5 tbl.B (2006) [hereinafter Dinan, *State Constitutional Developments in 2005*]; Janice C. May, *State Constitutions and Constitutional Revision, 2000–2001*, *in* 34 THE BOOK OF THE STATES 3, 5 tbl.B (2002).

[46] Dinan, *State Constitutional Developments in 2005*, *supra* note 45, at 5 tbl.B.

[47] May, *supra* note 35, at 5.

[48] Dinan, *State Constitutional Developments in 2005*, *supra* note 45, at 5 tbl.B.

[49] *Id.*

[50] Dinan, *State Constitutional Developments in 2011*, *supra* note 8, at 6 tbl.B.

[51] *Id.*

[52] *Id.*

[53] John Dinan, *State Constitutional Developments in 2012*, *in* 45 THE BOOK OF THE STATES 3, 5 tbl.B (2013) [hereinafter Dinan, *State Constitutional Developments in 2012*].

[54] All told, ninety-two rights amendments were enacted from 2000 to 2012, ranking behind only taxation and finance amendments (209), and ranking ahead of legislative branch amendments (77), state functions amendments (59), debt amendments (47), suffrage and elections amendments (40), judicial branch amendments (39), executive branch amendments (29), and local government amendments (18). The calculations are taken from data presented in Dinan, *State Constitutional Developments in 2011*, *supra* note 8, at 6 tbl.B, Dinan, *State Constitutional Developments in 2005*, *supra* note 45, at 5 tbl.B, and Dinan, *State Constitutional Developments in 2012*, *supra* note 53, at 5 tbl.B.

[55] May, *supra* note 14, at 171.

[56] *See* THE BOOK OF THE STATES 2000, *supra* note 34, at 11 tbl.1.7.

rights were targeted more often than any other state constitutional article, except the finance and taxation article.[57]

II. AMENDMENTS CONSTRAINING STATE COURTS FROM ISSUING EXPANSIVE RIGHTS RULINGS

A number of twenty-first century rights amendments seek to constrain state courts from issuing expansive rulings, in a development that in one respect demonstrates continuity with prior decades but in another respect represents a change in the focus of these amendments.[58] In one sense, passage of court-constraining rights amendments is in keeping with a longstanding tradition at the state level, dating back not only to the late twentieth century,[59] but also to the early twentieth century.[60] As in past years, twenty-first century court-constraining amendments have been passed at times to overturn state court decisions expanding the scope of individual rights[61] and at other times to preempt state courts from issuing rights-expansive rulings.[62]

In other respects, the subject matter of recent court-constraining amendments represents somewhat of a departure from prior eras. Janice May found in her study covering the 1970s and early 1980s that court-constraining amendments generally targeted criminal procedure and death penalty rulings, albeit with some attention to busing decisions.[63] In keeping with this pattern, the twenty-first century has featured several amendments targeting criminal procedure and death penalty rulings.[64] However, it is notable that recent court-constraining amendments have targeted a broader range of rulings in areas including tort law, abortion, and same-sex marriage.[65]

A. Amendments Overturning State Court Rulings

The rigidity of the federal amendment process, together with a

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[57] *See* Dinan, *State Constitutional Developments in 2005*, *supra* note 45, at 5 tbl.B.

[58] *See infra* Part II.A.

[59] John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1000–19 (2007) [hereinafter Dinan, *Foreword*].

[60] *Id.* at 989–1000.

[61] *See infra* Part II.A.

[62] *See infra* Part II.B.

[63] May, *supra* note 14, at 174–76.

[64] Dinan, *Foreword*, *supra* note 59, at 1006–09, 1011–16.

[65] *See infra* Part II.

general reluctance to amend the U.S. Constitution, have limited the number of federal amendments that have overturned U.S. Supreme Court rulings.[66] Of the twenty-seven federal amendments, only four—the Eleventh, Fourteenth, Sixteenth, and Twenty-Sixth—were passed for the purpose of overturning a prior Court ruling; only one of these—the Fourteenth Amendment—was clearly a rights-related amendment as opposed to a structural or suffrage amendment.[67] However, the flexibility of state amendment processes, along with more acceptance of court-curbing amendments at the state level,[68] means that state amendment processes have, on a number of occasions, been a vehicle for overturning state court decisions regarding the extent and limitation of rights.[69]

1. Criminal Procedure

As in prior decades, several twenty-first century amendments have dealt with criminal procedure guarantees. It is worth noting, before surveying these court-overturning amendments regarding criminal procedure, that not all amendments dealing with criminal procedure rights during this period were intended to target state court rulings. In fact, most criminal procedure amendments during this period were not prompted by state court decisions invalidating legislative acts or practices; rather, they were proposed for the purpose of updating longstanding guarantees or responding to developments outside the courts.

Focusing briefly on these updating amendments, several were passed to change the size or limit the use of juries, or adjust the situations when bail may be denied to criminal defendants, in keeping with developments noted by May in her earlier study.[70] Regarding juries, an amendment approved in Texas in 2003 authorized juries of six persons for misdemeanor cases in district court.[71] Meanwhile, through amendments approved in 2006 and 2010, Maryland voters stipulated that jury trials would only be guaranteed in civil cases when the amount in controversy exceeded

[66] *See* Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20–27 (detailing the reasons for such reluctance at the federal level).

[67] Dinan, *Foreword*, *supra* note 59, at 983–84.

[68] *See id.* at 1021–24.

[69] *See id.* at 1000–02.

[70] *See* May, *supra* note 14, at 172.

[71] TEX. CONST. art. V, § 13 (amended 2003).

$10,000[72] and then increased that amount to $15,000.[73]

As for bail limits, Texas voters in 2005 approved an amendment permitting judges to deny bail to individuals who are charged with a felony and violate the conditions of their release before their case goes to trial.[74] In 2002, Arizona passed an amendment authorizing denial of bail for individuals charged with certain sex offenses.[75] An amendment passed in Washington in 2010 allows denial of bail to individuals charged with an offense that carries a maximum sentence of life in prison.[76] Finally in 2006, in an election where Arizona voters approved several amendments targeting illegal immigrants, including one that prohibits awarding punitive damages to illegal immigrants,[77] an Arizona amendment authorized judges to deny bail to illegal immigrants charged with serious felony offenses.[78]

If these bail and jury amendments were passed in response to developments other than state court decisions, other criminal procedure amendments targeted state court rulings and therefore can be categorized as court-constraining amendments. Most of these recent amendments have targeted state court rulings regarding prosecution of sex offenses, especially involving child victims.[79] In Pennsylvania, voters passed a 2003 amendment in response to a 1991 state supreme court ruling interpreting a state constitutional clause guaranteeing defendants the right to meet witnesses "face to face."[80] Based on its reading of this constitutional provision, the state court held that child victims of sex abuse could not give closed circuit testimony regarding their abuse.[81] The purpose of the 2003 Pennsylvania amendment was to replace this "face to face" language with a requirement that defendants be able to "be confronted" by witnesses against them.[82] Combined with another amendment passed the same year authorizing the legislature to allow children to provide testimony by alternative

[72] Act of May 2, 2006, ch. 422, Md. Laws 422 (amending MD. CONST. Declaration of Rights, art. 5.23).

[73] MD. CONST. Declaration of Rights, art. 5.23 (amended 2010).

[74] TEX. CONST. art. I, § 11b (amended 2005).

[75] ARIZ. CONST. art. II, § 22 (amended 2002).

[76] WASH. CONST. art. I, § 20 (amended 2010).

[77] ARIZ. CONST. art. II, § 35 (amended 2006).

[78] ARIZ. CONST. art. II, § 22 (amended 2006).

[79] The following discussion draws on Dinan, *Foreword*, *supra* note 59, at 1012–13.

[80] PA. CONST. art. I, § 9 (amended 2003).

[81] Commonwealth v. Ludwig, 594 A.2d 281, 281–82 (Pa. 1991).

[82] PA. CONST. art. I, § 9 (amended 2003).

means other than being physically present in the courtroom,[83] Pennsylvania voters thereby used the constitutional amendment process to insulate such testimonial arrangements from state court invalidation.[84]

Between 2004 and 2006, Hawaii voters approved three amendments overturning a series of state court rulings that were all handed down in 2003 regarding prosecution and punishment of sex offenses. In one ruling, the Hawaii Supreme Court relied on various provisions of the state bill of rights to limit the scope of a state-established sex-offender registry.[85] A 2004 amendment effectively overturned this decision by authorizing the legislature to create a sex-offender registry and giving legislators broad discretion in designing and maintaining the registry.[86] In a separate ruling, the Hawaii Supreme Court held that a defendant in a child sex-abuse case could ask questions at trial about communications between the victim and his school counselor.[87] In response, voters in 2004 approved an amendment authorizing the legislature to deem such privileged communications inadmissible.[88] In a final ruling, the court struck down a state law permitting jurors to find a defendant guilty of continuous sex crimes against a child as long as jurors were convinced that three separate offenses had taken place, even if they might not reach agreement on the specific details of the three offenses.[89] In 2006—after an initial 2004 court-overturning amendment was invalidated[90]—voters eventually approved an amendment effectively overturning this ruling by authorizing the legislature to define what constitutes a continuous sexual assault crime against minors younger than fourteen.[91]

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[83] PA. CONST. art. V, § 10(c) (amended 2003).

[84] In fact, passage of these 2003 amendments represented the second effort to respond to the state court's 1991 ruling. A 1995 amendment sought to accomplish the same goal, but it was invalidated by the state supreme court in a 1999 ruling on the grounds that it dealt with two separate subjects and thereby ran afoul of the single-subject rule for constitutional amendments. Bergdoll v. Kane, 731 A.2d 1261, 1263, 1269–70 (Pa. 1999).

[85] *See* State v. Chun, 76 P.3d 935, 942 (Haw. 2003).

[86] HAW. CONST. art. I, § 24 (amended 2004).

[87] State v. Peseti, 65 P.3d 119, 130 (Haw. 2003).

[88] HAW. CONST. art. I, § 14 (amended 2004).

[89] State v. Rabago, 81 P.3d 1151, 1168–69 (Haw. 2003).

[90] Taomae v. Lingle, 118 P.3d 1188, 1191–93 (Haw. 2005).

[91] HAW. CONST. art. I, § 25 (amended 2006).

2. Tort Law

One amendment approved in Texas in 2003 effectively overturned a state supreme court ruling disallowing limits on damages in tort suits.[92] State supreme courts around the country have on various occasions relied on state bills of rights to invalidate statutes capping non-economic damages awards in tort suits.[93] These state court rulings have at times prompted legislators to propose constitutional amendments insulating such legislation from state court invalidation.[94] In proposing such an amendment in 2003, Texas legislators were responding to a 1988 Texas Supreme Court ruling relying on the "open courts" provision of the state bill of rights to invalidate a provision in a 1977 tort reform statute capping non-economic damages at $500,000.[95] The Texas amendment authorized the legislature to impose a cap on non-economic damages in medical malpractice suits; it further specified that the legislature by a three-fifths vote could impose caps on non-economic damages in other tort suits.[96] In narrowly approving this amendment in 2003, Texas voters effectively insulated from state court reversal a $750,000 cap on non-economic damages in medical malpractice suits enacted by the legislature earlier that year.[97]

3. Abortion

In the decades since *Roe v. Wade*[98] held that the federal constitution bars legislatures from banning abortions prior to fetal viability or imposing an undue burden on the availability of post-viability abortions,[99] some state supreme courts have interpreted their state bill of rights as imposing additional limitations on

[92] TEX. CONST. art. III, § 66(c) (amended 2006).

[93] *See* Michael S. Kenitz, *Wisconsin's Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on "Tort Reform"*, 89 MARQ. L. REV. 601, 609–10, 613, 615 (2006) (discussing cases in Wisconsin, Texas, and Illinois where state supreme courts have invalidated statutes capping non-economic damage awards in tort suits because such statutes violated provisions of the states' constitutions).

[94] *See id.* at 614 (noting that the passage of Proposition 12 in Texas made caps on non-economic damages constitutional).

[95] Lucas v. United States, 757 S.W.2d 687, 688–92 (Tex. 1988).

[96] TEX. CONST. art. III, § 66(c), (e) (amended 2003). *See* Janice C. May, *State Constitutional Developments in 2003*, *in* 36 THE BOOK OF THE STATES 7 (2004).

[97] Ralph Blumenthal, *Malpractice Suits Capped At $750,000 In Texas Vote*, N.Y. TIMES, Sept. 15, 2003, at A12.

[98] Roe v. Wade, 410 U.S. 113 (1973).

[99] *Id.* at 164–65.

legislative regulation of abortion, beyond what is required by the Supreme Court's interpretation of the federal Constitution.[100] In response, several state constitutional amendments have been proposed and occasionally enacted for the purpose of overturning these expansive state court rulings.[101]

Most notably,[102] Florida voters approved a 2004 amendment effectively overturning a Florida Supreme Court ruling issued the year before that invoked the state constitutional privacy guarantee to invalidate a 1999 statute requiring parental notification before a minor could obtain an abortion.[103] This 2004 amendment stipulates in part: "Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy."[104]

B. Court-preempting Amendments

At times, state constitutional amendments preempt rights-expansive state court rulings that have not actually been issued.[105] To be sure, some amendments straddle the two categories of court-overturning amendments and court-preempting amendments, in that they are intended in one respect to overturn an expansive state court ruling but are also designed to prevent a future state court from issuing similar interpretations of a state bill of rights

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[100] *See generally* PAUL BENJAMIN LINTON, ABORTION UNDER STATE CONSTITUTIONS: A STATE-BY-STATE ANALYSIS (2d. ed. 2012) (providing a state-by-state analysis of the issue of abortion as a state constitutional right); Kenneth P. Miller, State Constitutions and the Politics of Rights 14, 16 (2012) (on file with author).

[101] Miller, *supra* note 100, at 24–25.

[102] In 2012, Florida voters considered but rejected another amendment intended in part to authorize the legislature to enact a parental consent requirement for minors seeking an abortion, in an effort to overturn a 1989 Florida Supreme Court ruling disallowing such a requirement. *In re* T.W., 551 So. 2d 1186, 1188, 1196 (Fla. 1989). This wide-ranging 2012 amendment, which would have barred public funding of abortion, also would have stipulated more generally "that the Florida Constitution may not be interpreted to create broader rights to [an] abortion than those provided by the U. S. Constitution." Miller, *supra* note 100, at 25–26; FLA. DIV. OF ELECTIONS, PROPOSED CONSTITUTIONAL AMENDMENTS TO BE VOTED ON NOVEMBER 6, 2012, at 22 (2012), *available at* http://election.dos.state.fl.us/publications/pdf/2012/2012_Constitutional_Amendments_English_9-28-12.pdf.

[103] N. Fla. Women's Health & Counseling Servs. v. Florida, 866 So. 2d 612, 615, 636, 640 (Fla. 2003).

[104] FLA. CONST. art. X, § 22 (amended 2004).

[105] *See, e.g.*, Dinan, *Foreword*, *supra* note 59, at 1001, 1003–04 (discussing a 1972 Wisconsin amendment that sought to prevent court review of a law allowing school children to leave class for religious studies).

provision.[106] But in most instances it is possible to distinguish rather clearly between an amendment overturning a prior state court interpretation of the bill of rights and an amendment preventing a future state court from invalidating a law or practice.[107]

Court-preempting amendments are generally proposed in order to insulate certain laws or practices from future state court invalidation.[108] At times, these amendments are enacted out of a concern that judges in a given state have shown an inclination in prior rulings to issue expansive interpretations of a given bill of rights provision.[109] More commonly, they are proposed because judges in *other* states have shown a propensity to interpret state bills of rights to invalidate similar laws or practices.[110] In the early twentieth century, amendments of this sort were proposed in order to insulate labor reforms such as maximum-hour statutes, minimum-wage standards, and workers' compensation programs from state court invalidation.[111] Although court-preempting amendments were passed infrequently during much of the rest of the twentieth century, they have undergone a renaissance in the twenty-first century, primarily for the purpose of preventing state courts from legalizing same-sex marriage.[112]

1. Death Penalty

Although amendments were occasionally enacted in the late twentieth century for the purpose of *overturning* state court decisions limiting the use of the death penalty—including in California, Massachusetts, Oregon, and New Jersey[113]—the only twenty-first century death-penalty amendment was enacted in

[106] *See, e.g.*, *id.* at 1004 (discussing the amendments of Wisconsin in 1972 as both an attempt to overturn the court decision and to prevent future review of an amendment).

[107] *See id.* at 1003–04 (distinguishing court-preempting measures from those aimed to overturn court decisions).

[108] *See, e.g.*, *id.* at 1008–09 (discussing preemption of judicial interference with death penalty laws in Florida).

[109] *Id.* at 1000–01 (discussing the judicial push to expand civil rights during the 1960s).

[110] *See, e.g.*, *id.* at 989–90 (inferring that court decisions in other states had paved the way for judicial interpretation in opposition to legislative acts). For example, the Progressive-Era courts pushed to limit the rights of workers in various states, setting off a chain reaction of similar rulings throughout a number of states. *Id.*

[111] *See generally id.* at 989–1000 (discussing court interference with legislative attempts to reform the workplace).

[112] *Id.* at 1018–19.

[113] *Id.* at 1006–09.

Florida to *prevent* a state court from invalidating the death penalty.[114] In particular, this Florida amendment sought to insulate from state court invalidation a statute providing for lethal injection as the means of execution.[115] Out of a concern that the Florida Supreme Court might strike down this statute on state constitutional grounds,[116] an amendment was enacted in 2002 stipulating that:

> The death penalty is an authorized punishment for capital crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution.[117]

2. Same-sex Marriage

Court-preempting amendments have been enacted most frequently for the purpose of preventing state courts from legalizing same-sex marriage. All told, of the thirty-one states enacting amendments preventing legalization of same-sex marriage (and in some cases civil unions), twenty-nine of these were enacted between 2000 and 2012.[118] All but one of these amendments, a citizen-initiated amendment approved by California voters in November 2008 in response to a May 2008 state court decision legalizing same-sex marriage,[119] were enacted to preempt state courts from expanding rights of same-sex couples.[120]

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[114] *Id.* at 1008.

[115] *Id.* at 1009.

[116] *Id.* An earlier amendment enacted in 1998 for the purpose of insulating the death penalty from state court invalidation was struck down by the Florida Supreme Court on the grounds that the ballot language was misleading. Armstrong v. Harris, 773 So. 2d 7, 10, 22 (Fla. 2000).

[117] FLA. CONST. art. I, § 17 (amended 2002).

[118] Dinan, *Foreword*, *supra* note 59, at 1017–19; Lawrence Friedman, *The Once and Future Constitutional Law: On* The Law of American State Constitutions, 74 ALB. L. REV. 1671, 1678–79 (2011); Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES, May 9, 2012, at A15.

[119] Friedman, *supra* note 118, at 1679; Adam Nagourney, *Court Strikes Down Ban on Gay Marriage in California*, N.Y. TIMES, Feb. 8, 2012, at A1.

[120] Dinan, *Foreword*, *supra* note 59, at 1019.

In 1998, voters in Hawaii and Alaska were the first to approve amendments preempting state supreme courts from legalizing same-sex marriage, at a time when courts in those two states appeared poised to issue decisions requiring recognition of same-sex marriage.[121] After the Hawaii Supreme Court issued a 1993 decision casting doubt on the legitimacy of the state's policy of denying marriage to same-sex couples,[122] and a state circuit court judge ruled in 1996 that the policy could not withstand judicial scrutiny,[123] the state legislature approved and voters ratified an amendment reserving to the legislature the power to define marriage, thereby preventing the state supreme court from issuing a final ruling legalizing same-sex marriage.[124] Meanwhile, in Alaska, after a state superior court judge in 1997 declined to dismiss a challenge to the state's policy of denying marriage licenses to same-sex couples,[125] the legislature proposed and voters approved an amendment prohibiting legislative or judicial recognition of same-sex marriage.[126]

These Hawaii and Alaska amendments were followed by twenty-nine other amendments approved between 2000 and 2012.[127] Two of these amendments—Nebraska in 2000[128] and Nevada in 2002[129]—were approved after the issuance of a 1999 Vermont Supreme Court decision requiring legalization of same-sex civil unions but not same-sex marriages.[130] Most of the other amendments were enacted in the aftermath of rulings of the Massachusetts Supreme Judicial Court in 2003 and 2004 requiring legalization of same-sex marriage.[131] Thirteen states adopted amendments in 2004 for the purpose of preempting similar state court rulings,[132] followed by two states in 2005,[133] and eight states

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[121] *Id.* at 1017.

[122] Baehr v. Lewin, 852 P.2d 44, 54, 56–57 (Haw. 1993).

[123] Baehr v. Miike, 910 P.2d 112, 114, 116 (Haw. 1996).

[124] HAW. CONST. art. I, § 23 (amended 1998).

[125] Dinan, *Foreword*, *supra* note 59, at 1018.

[126] ALASKA CONST. art. 1, § 25 (amended 1999).

[127] Only two such amendments have been defeated at the polls. A proposed Arizona amendment was rejected in 2006, but a revised version of this amendment was resubmitted and approved in 2008. Additionally, a proposed Minnesota amendment was defeated by voters in 2012. Dinan, *State Constitutional Developments in 2012*, *supra* note 53, at 6–7.

[128] NEB. CONST. art. I, § 29 (amended 2000).

[129] NEV. CONST. art. I, § 21 (amended 2002).

[130] Baker v. State, 744 A.2d 864 (Vt. 1999).

[131] Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004); Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 948 (Mass. 2003).

[132] ARK. CONST. amend. 83, § 1 (amended 2004); GA. CONST. art. I, § 4, ¶ 1 (amended 2004);

in 2006.[134] Then, in 2008, after the California Supreme Court[135] and Connecticut Supreme Court[136] issued decisions legalizing same-sex marriage, three more states adopted same-sex marriage amendments, including the lone court-overturning amendment in California.[137] In 2012, several years after the Iowa Supreme Court's issuance of the most recent same-sex marriage legalization decision in 2009,[138] one more state—North Carolina—approved an amendment seeking to preempt a similar state court ruling.[139]

III. AMENDMENTS EXPANDING RIGHTS BEYOND FEDERAL CONSTITUTIONAL GUARANTEES

Although much scholarly attention focuses on amendments *limiting* state court expansion of rights, less attention has been paid to amendments *securing* protection of rights beyond federal constitutional guarantees. The traditional scholarly focus on courts as agents of rights expansion, along with state constitutional scholars' predominant focus since the 1970s on state courts playing a key role in expanding rights beyond federal guarantees, has resulted in scholars giving insufficient attention to the various occasions when state amendment processes have been vehicles for expanding rights.[140]

In this context, it was significant that Janice May took note in her review of state amendment activity from 1970 to 1985 of what she termed "a new role involving the expansion of rights."[141] As May

KY. CONST., § 233A (amended 2004); LA. CONST. art. XII, § 15 (amended 2004); MICH. CONST. art. I, § 25 (amended 2004); MISS. CONST. art. XIV, § 263-A (amended 2004); MO. CONST. art. I, § 33 (amended 2004); MONT. CONST. art. XIII, § 7 (amended 2004); N.D. CONST. art. XI, § 28 (amended 2004); OHIO CONST. art. XV, § 11 (amended 2004); OKLA. CONST. art. II, § 35 (amended 2004); OR. CONST. art. XV, § 5a (amended 2004); UTAH CONST. art. I, § 29 (amended 2004).

133 KAN. CONST. art. XV, § 16 (amended 2005); TEX. CONST. art. I, § 32 (amended 2005).

134 ALA. CONST. art. I, § 36.03 (amended 2006); COLO. CONST. art. II, § 31 (amended 2006); IDAHO CONST. art. III, § 28 (amended 2006); S.C. CONST. art. XVII, § 15 (amended 2006); S.D. CONST. art. XXI, § 9 (amended 2006); TENN. CONST. art. XI, § 18 (amended 2006); VA. CONST. art. I, § 15-A (amended 2006); WIS. CONST. art. XIII, § 13 (amended 2006).

135 *In re* Marriage Cases, 183 P.3d 384, 452 (2008).

136 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008).

137 ARIZ. CONST. art. XXX, § 1 (amended 2008); CAL. CONST. art. I, § 7.5 (amended 2008); FLA. CONST. art. I, § 27 (amended 2008).

138 Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009).

139 N.C. CONST. art. XIV, § 6 (amended 2012).

140 For an exception to this dominant trend in the state constitutional law literature, see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 12–13 (1998) (discussing several state constitutional amendments expanding rights).

141 May, *supra* note 14, at 178.

reported, amendments were adopted during this period to expand privacy guarantees, disability rights, non-discrimination on the basis of sex, and environmental rights, as well as to secure the right-to-know, right to bear arms, and victims' rights.[142]

Twenty-first century amendment activity generally represents a continuation of this pattern, albeit with a focus on protecting a different and broader range of rights. Recent amendments have occasionally provided greater protection for the right-to-know, the right to bear arms, and victims' rights, as in prior decades.[143] But recent amendments have also expanded rights in a new set of areas, most notably regarding property rights and hunting and fishing rights.[144]

Recent rights-expansive amendments take several forms. In one set of cases, the Supreme Court has issued rulings explicitly declining to interpret federal constitutional provisions in an expansive fashion; in response, amendments have secured these rights at the state level.[145]

In another set of cases, where the Supreme Court has not yet had occasion to interpret federal constitutional provisions in a certain context, amendments have altered the language of state constitutional provisions to render them distinct from similar federal provisions.[146] In still other cases, amendments have recognized state constitutional rights with no counterpart in the federal constitution.[147]

A. Amendments Expanding Rights Beyond U.S. Supreme Court Interpretations of the Federal Constitution

From the 1970s onward, it was not uncommon to encounter cases where the Supreme Court explicitly declined to interpret federal constitutional provisions in an expansive fashion and state supreme courts responded by invoking similar state constitutional provisions to provide the desired relief. For instance, although the Supreme Court rejected the invitation to interpret the federal Constitution as guaranteeing equality of per-pupil funding across school districts, a number of state courts turned to state bills of rights to recognize

[142] See *id.* at 174, 178.
[143] See *infra* Parts III.B.1, C.1, C.2.
[144] See *infra* Parts III.A.1, C.3.
[145] See *infra* Part III.A.
[146] *See infra* Part III.B.
[147] *See infra* Part III.C.

such a right.[148] Likewise, when the Supreme Court declined to interpret the search-and-seizure guarantee of the federal Bill of Rights to render inadmissible evidence obtained by police acting in good faith, several state courts chose to read similar provisions in their state bill of rights as declaring such evidence inadmissible regardless of whether police acted in good faith.[149] In short, in the late twentieth century, state court decisions were frequently the vehicle for responding to Supreme Court rulings seen as providing insufficiently expansive interpretations of federal constitutional rights.

A review of twenty-first century amendment activity makes clear, however, that state constitutional amendments are another vehicle, aside from state court decisions, for responding to Supreme Court decisions declining to engage in expansive interpretation of federal constitutional rights provisions.[150] This is most evident in the many amendments enacted in response to the Supreme Court's 2005 *Kelo v. City of New London*[151] decision regarding the eminent domain power.[152] This is also evident in the passage of a handful of amendments responding to the Supreme Court's 2003 ruling in *Grutter v. Bollinger*[153] regarding consideration of race in university admissions processes.[154]

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[148] *See generally* John Dinan, *School Finance Litigation: The Third Wave Recedes*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96–98 (Joshua M. Dunn and Martin R. West eds., 2009) (explaining that school finance litigation stalled at the federal level when the Supreme Court rejected a case that would have resulted in equal funding for every student in the nation, which still did not prevent states from taking individual action to recognize equal funding through their respective constitutions).

[149] *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 160 (2009) (discussing a similar decision by the Illinois Supreme Court); Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 806–07 (2011) (discussing a case where the New Hampshire Supreme Court declined to adopt the good-faith exception to the exclusionary rule).

[150] *See* John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1012–15 (2011) [*hereinafter* Dinan, *State Constitutional Amendment Processes*].

[151] Kelo v. City of New London, 545 U.S. 469 (2005).

[152] *See* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1014–15; *see also infra* Part III.A.1 (discussing the changes made at the state level regarding eminent domain law in response to the *Kelo* decision).

[153] Grutter v. Bollinger, 539 U.S. 306 (2003).

[154] *See* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1017; *see also infra* Part III.A.2 (discussing the changes made at a state level regarding affirmative action in response to the *Grutter* decision).

1. Eminent Domain

Eleven states enacted amendments between 2006 and 2012 preventing use of the eminent domain power to condemn private property for economic development purposes, in response to the Supreme Court's 2005 *Kelo* decision declining to interpret the federal Constitution to bar such condemnations.[155] The question before the Supreme Court in *Kelo* was whether the Takings Clause of the federal Constitution should be interpreted as preventing a local government from invoking its eminent domain power to condemn private property to facilitate a development plan expected to generate added tax revenue.[156] In particular, the Court had to consider whether such a taking of private property constituted "public use," in which case it would be permissible, or whether such a taking fell outside of the "public use" language of the Fifth Amendment.[157] The Court held by a five-to-four margin that such a taking could be considered a public use and therefore was permissible under the federal Constitution.[158] However, the Justices made clear that state governments were free to reach a different conclusion and erect higher barriers to such takings.[159]

States generally responded to this ruling by erecting higher barriers to taking land for economic development purposes, but they did so through various means. Many states enacted statutes to prohibit takings for this purpose.[160] Meanwhile, several state supreme courts interpreted their state bill of rights as prohibiting takings of this sort.[161] Most importantly for present purposes, voters in eleven states approved significant constitutional amendments to this end. Seven states approved amendments in 2006,[162] followed by Nevada in 2008,[163] Texas in 2009,[164] Mississippi

[155] *See* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1013–15.
[156] *See Kelo*, 545 U.S. at 472.
[157] U.S. CONST. amend. V; *see Kelo*, 545 U.S. at 472, 477.
[158] *See Kelo*, 545 U.S. at 484, 489–90, 494.
[159] *See id.* at 489.
[160] Somin, *supra* note 22, at 2120.
[161] *See* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1013–14; *see also id.* at 1014 n.38 (discussing the rulings issued by the Ohio and Oklahoma Supreme Courts along these same lines).
[162] FLA. CONST. art. X, § 6 (amended 2006); GA. CONST. art. IX, § 2 (amended 2006); LA. CONST. art. I, § 4(B) (amended 2006); MICH. CONST. art. X, § 2 (amended 2006); N.H. CONST. pt. 1, art. 12-A (amended 2006); N.D. CONST. art. I, § 16 (amended 2006); S.C. CONST. art. I, sec. XIII (amended 2006).
[163] NEV. CONST. art. I, § 22 (amended 2008).
[164] TEX. CONST. art. I, § 17 (amended 2009).

in 2011,[165] and Virginia in 2012.[166]

2. Affirmative Action

Four states enacted constitutional amendments between 2006 and 2012 barring consideration of race in public hiring, contracting, and university admissions, in response to the Supreme Court's *Grutter* decision in 2003 declining to interpret the federal Equal Protection Clause as barring such practices.[167] In approving these amendments, voters were in one sense following a path taken by voters in California who approved a similar amendment in 1996,[168] nearly two decades after the Supreme Court ruled in *Regents of the University of California v. Bakke*[169] that the federal Constitution did not bar public universities from considering race in their admissions processes, as long as it was done in a narrowly tailored fashion for the purpose of producing a diverse student body.[170] It was only after the Court reaffirmed this holding a quarter of a century later that other states enacted similar amendments.[171] In the years following the *Grutter* decision, Michigan voters approved an amendment in 2006,[172] as did voters in Nebraska in 2008,[173] Arizona in 2010,[174] and Oklahoma in 2012.[175]

B. Amendments Expanding Rights Beyond Guarantees in the Federal Constitution

State constitutions frequently contain provisions identical to, or basically tracking, federal provisions with only slight variations.[176] Several twenty-first century amendments were enacted to bring state constitutional provisions in line with federal provisions. For instance, in 2003 Delaware added a free speech clause to its

[165] MISS. CONST. art. III, § 17 (amended 2011).
[166] VA. CONST. art. I, § 11 (amended 2012).
[167] Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).
[168] CAL. CONST. art. I, § 31 (amended 1996).
[169] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[170] *Id.* at 320.
[171] *See Grutter*, 539 U.S. at 343–44.
[172] MICH. CONST. art. I, § 26 (amended 2006).
[173] NEB. CONST. art. I, § 30 (amended 2008).
[174] ARIZ. CONST. art. II, § 36 (amended 2010).
[175] OKLA. CONST. art. II, § 36A (amended 2012).
[176] *See, e.g.*, HAW. CONST. art. I, § 4 (regarding freedom of religion, speech, press, and assembly); HAW. CONST. art. I, § 17 (regarding right to keep and bear arms).

longstanding free press guarantee.[177] Meanwhile, Alabama voters in 2000 approved an amendment eliminating an archaic and unenforceable provision barring recognition of interracial marriages.[178] Neither of these amendments sought to expand rights beyond federal constitutional guarantees.

In several other instances, twenty-first century amendments were enacted for the purpose of expanding rights beyond textual provisions in the federal Bill of Rights.[179] In passing amendments regarding the right to bear arms and free exercise of religion, states were generally acting in line with developments in recent decades, given that states had repeatedly adjusted the language of these particular state constitutional provisions in prior years.[180]

1. Right to Bear Arms

State right to bear arms guarantees have been a perennial target of state constitutional amendments through the years. In her study of amendment activity from 1970 to 1985, May identified six amendments that made adjustments in right to bear arms provisions.[181] From 1986 to 1998 another eight amendments were enacted along these lines.[182] At times, as in West Virginia in 1986,[183] Delaware in 1987,[184] Nebraska in 1988,[185] and Wisconsin in 1998,[186] these amendments added a right to bear arms clause to the state constitution for the first time and, in doing so, adopted language that was distinct from the federal guarantee.[187] At other times, as in New Mexico in 1986,[188] Maine in 1987,[189] Florida in 1990,[190] and Alaska in 1994,[191] amendments adjusted existing

[177] DEL. CONST. art. I, § 5 (amended 2003).
[178] ALA. CONST. art. IV, § 102 (repealed by amend. 667).
[179] *See infra* Parts III.B.1, III.B.2.
[180] *See infra* Parts III.B.1, III.B.2.
[181] May, *supra* note 14, at 173.
[182] *See* Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 216–17 (2006).
[183] W. VA. CONST. art. III, § 22 (amended 1986).
[184] DEL. CONST. art. I, § 20 (amended 1987).
[185] NEB. CONST. art. I, § 1 (amended 1988).
[186] WIS. CONST. art. I, § 25 (amended 1998).
[187] *Compare, e.g.*, *id.* ("The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."), *with* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").
[188] N.M. CONST. art. II, § 6 (amended 1986).
[189] ME. CONST. art. I, § 16 (amended 1987).
[190] FLA. CONST. art. I, § 8 (amended 1990).

language in state right to bear arms clauses, generally by making it clear that the relevant clauses guarantee an individual rather than a collective right.[192] For instance, a 1987 Maine amendment deleted qualifying language to the effect that the right was linked to "the common defence [sic]."[193] The amended version of the provision simply states: "Every citizen has a right to keep and bear arms and this right shall never be questioned."[194]

In the twenty-first century, voters in both Kansas and Louisiana approved amendments adjusting right to bear arms provisions.[195] Consistent with prior amendments stipulating that the right is an individual rather than a collective guarantee and applies to personal defense as well as common defense, a Kansas amendment passed in 2010 eliminated existing language stating that "[t]he people have the right to bear arms for their defense and security."[196] The revised language guarantees that "[a] person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose . . . ."[197] Meanwhile, a 2012 Louisiana amendment goes even further in declaring: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny."[198]

2. Free Exercise of Religion

Religion clauses were also a frequent subject of amendment activity in the late twentieth century, with amendments occasionally providing more detailed protection of religious free exercise than is guaranteed in the First Amendment of the U.S. Constitution.[199] Of particular note was the 1998 Alabama Religious Freedom Amendment, enacted in response to the Supreme Court's

[191] ALASKA CONST. art. I, § 19 (amended 1994).

[192] *See e.g.*, Volokh, *supra* note 182, at 200 (comparing the New Mexico constitutional amendments to the state right to bear arms).

[193] *Id.* at 216 (quoting ME. CONST. art. I, § 16 (amended 1987)).

[194] ME. CONST. art. I, § 16 (amended 1987).

[195] *See* 2009 Kan. Sess. Laws 1640.

[196] *Id*.

[197] KAN. CONST. Bill of Rights § 4 (amended 2009).

[198] LA. CONST. art. I, § 11 (amended 2012).

[199] *Compare, e.g.*, W. VA. CONST. art. III, § 15a (amended 1984) (providing for silent prayer in public schools), *with* U.S. CONST. amend. I, cl. 1–2 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."). *See also* May, *supra* note 14, at 173.

decision in *Employment Division v. Smith*,[200] which held that the federal Free Exercise Clause does not require generally applicable laws that burden the free exercise of religion to meet a compelling governmental interest test.[201] Congress tried to respond to this decision in 1993 by enacting the Religious Freedom Restoration Act (RFRA),[202] which required state governments to meet a compelling interest test.[203] But in *City of Boerne v. Flores*,[204] the Supreme Court determined that RFRA could not be enforced against state governments.[205] In response, the Alabama legislature proposed and voters ratified a 1998 amendment requiring application of the compelling interest test.[206]

One twenty-first century amendment can be seen as following this late-twentieth century trend, a 2012 Missouri amendment adding a lengthy section to the state religious liberty guarantee.[207] Motivated in part by a concern as expressed by the Executive Director of the Missouri Catholic Conference that "it ought to be that the First Amendment is sufficient, but problems have cropped up here and there,"[208] the amendment specifies a number of ways that the Missouri Constitution should be understood as providing more specific guarantees of the right to pray than are found in the U.S. Constitution.[209]

The amendment provides in part that the state "shall ensure that any person shall have the right to pray individually or corporately in a private or public setting so long as such prayer does not result in disturbance of the peace or disruption of a public meeting or assembly."[210] Furthermore, it provides that "citizens as well as

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[200] Emp't Div. v. Smith, 494 U.S. 872 (1990).

[201] *Id.* at 885. For Alabama's response in the form of a state constitutional amendment, see ALA. CONST. amend. DCXXII (amended 1998).

[202] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

[203] 42 U.S.C. § 2000bb-1(b) (2006).

[204] City of Boerne v. Flores, 521 U.S. 507 (1997).

[205] *Id.* at 533–34, 536.

[206] ALA. CONST. amend. DCXXII (amended 1998).

[207] In June 2012, North Dakota voters rejected a religious freedom restoration amendment that was similar to the 1998 Alabama amendment. Dinan, *State Constitutional Developments in 2012*, *supra* note 53, at 7.

[208] Tim Townsend, *Missouri's Proposed Amendment 2 on Prayer Gets Mixed Reviews*, ST. LOUIS POST-DISPATCH, July 30, 2012, *available at* http://www.stltoday.com/lifestyles/faith-and-values/missouri-s-proposed-amendment-on-prayer-gets-mixed-reviews/article_8b188463-9973-532c-92d9-223235cad84a.html (quoting Mike Hoey, Executive Director of the Missouri Catholic Conference).

[209] MO. CONST. art. 1, § 5 (amended 2012).

[210] *Id.*

elected officials and employees of the state of Missouri and its political subdivisions shall have the right to pray on government premises and public property so long as such prayers abide within the same parameters placed upon any other free speech under similar circumstances."[211] As for state and local governments, the amendment provides that "the General Assembly and the governing bodies of political subdivisions may extend to ministers, clergypersons, and other individuals the privilege to offer invocations or other prayers at meetings or sessions of the General Assembly or governing bodies."[212] Additionally, "students may express their beliefs about religion in written and oral assignments free from discrimination based on the religious content of their work [and shall not be] compelled to perform or participate in academic assignments or educational presentations that violate his or her religious beliefs."[213] Finally:

> [The state] shall ensure public school students their right to free exercise of religious expression without interference, as long as such prayer or other expression is private and voluntary, whether individually or corporately, and in a manner that is not disruptive and as long as such prayers or expressions abide within the same parameters placed upon any other free speech under similar circumstances.[214]

C. Amendments Securing Rights with No Counterpart in the Federal Constitution

Although most rights-related amendment activity revolves around state bills of rights provisions with some counterpart in the federal Bill of Rights, some amendments deal with rights that are not found in the text of the federal Constitution and that have generally not been the subject of U.S. Supreme Court decision-making.[215] State constitutions have long contained guarantees of rights with no counterpart in the federal Constitution or U.S. Supreme Court interpretation of federal constitutional provisions. The late twentieth century brought the passage of several of these sorts of amendments. For instance, a number of amendments

[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *See* TARR, *supra* note 140, at 12–13.

secured the right to a clean and healthful environment.[216] Other amendments guaranteed a right of access to government information.[217] Still other amendments protected the rights of crime victims.[218]

In a second set of cases, state constitutions were amended in the latter part of the twentieth century to secure rights that are not explicitly protected in the U.S. Constitution but have come to be protected through U.S. Supreme Court interpretation of federal constitutional provisions. For instance, many state constitutional amendments guarantee the right to privacy[219] or bar discrimination on the basis of sex,[220] both of which have come to be protected at the federal level through Supreme Court decisions even though they are not found in the explicit text of the Constitution.

Passage of these sorts of rights-expansive amendments has continued into the twenty-first century, generally focusing on protecting rights with no counterpart either in the Constitution or in Supreme Court decisions interpreting federal constitutional provisions. In some cases, voters in the twenty-first century followed recent patterns in enacting right-to-know amendments and victims' rights amendments.[221] But a notable development during this period is a surge in amendments guaranteeing the right to hunt and fish.[222]

1. Right to Know

Following in the path of several late-twentieth century amendments guaranteeing a right of public access to government information and proceedings, California voters approved a wide-ranging amendment in 2004 protecting citizens' right-to-know in various forms.[223] A key provision of this 2004 amendment declares: "[t]he people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall

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[216] Barton H. Thompson Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L. J. 863, 871–72 (1996).

[217] May, *supra* note 14, at 173–74. *See also* discussion *infra* Part III.C.1

[218] Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1465 (2010).

[219] TARR, *supra* note 140, at 13.

[220] *Id.* at 13 n.29.

[221] *See infra* Part III.C.1, C.2.

[222] *See infra* Part III.C.3.

[223] *See* CAL. CONST. art. I, § 3(b) (amended 2004).

be open to public scrutiny."[224]

2. Victims' Rights

More than thirty states have adopted amendments protecting the rights of victims of crime, with most of these amendments passing during the late twentieth century.[225] Among other things, these amendments require that victims receive adequate notice of judicial proceedings regarding individuals accused or convicted of committing crimes against them.[226] Some stipulate that victims must be allowed to be present and occasionally be permitted to testify at these proceedings.[227] Some amendments require that appropriate restitution be provided to crime victims.[228]

No states adopted victims' rights provisions for the first time during the twenty-first century, but voters in three states approved amendments modifying existing clauses to provide added protection for crime victims. In 2008, Oregon voters approved two amendments giving victims the ability to enforce existing rights by asserting claims in various judicial proceedings or requesting the assistance of a district attorney in asserting rights in these proceedings.[229] Also in 2008, California voters approved an amendment known as Marsy's Law, adding several guarantees to the existing victims' rights provision.[230] In part, the amendment expanded existing victim notification requirements.[231] In addition, in a provision later invalidated by a federal district court judge in 2012,[232] the amendment altered the procedures and considerations governing the granting and revocation of parole.[233] Finally, Arizona voters in 2012 approved an amendment stipulating that "a crime victim is not subject to a claim for damages by a person who is

[224] *Id.*

[225] SARAH BROWN HAMMOND, VICTIMS' RIGHTS LAWS IN THE STATES 17–18 (2006).

[226] *Id.* at 17.

[227] *Id.*

[228] *Id.*

[229] OR. CONST. art. I, § 42–43 (amended 2008).

[230] CAL. CONST. art. I, § 28 (amended 2008).

[231] *Id. See also* Press Release, Office of Victim & Survivor Rights & Servs., Cal. Dep't Correction & Rehabilitation, Victim's Bill of Rights 2009: Marsy's Law (2009), *available at* http://www.cdcr.ca.gov/victim_services/marsys_law.html.

[232] Valdivia v. Brown, No. CIV. S-94-671, slip op. at 9, 26 (E.D.Cal. Jan. 24, 2012).

[233] *See generally Criminal Justice System, Victims' Rights, Parole: Constitutional Amendment and Statute*, CAL. LEGIS. ANALYST'S OFFICE (July 17, 2008), http://www.lao.ca.gov/ballot/2008/9_11_2008.aspx (describing in full the changes made resulting from the 2008 amendment).

harmed" during the course of committing or attempting to commit a felony.[234]

3. Right to Hunt and Fish

Vermont was the first state to guarantee and retain a right to hunt and fish, when its inaugural 1777 Constitution guaranteed that "[t]he inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed [sic], and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly."[235] It was another two centuries before states began adopting provisions guaranteeing hunting and fishing rights on a widespread basis.[236] But voters approved such amendments in Alabama in 1996[237] and Minnesota in 1998,[238] so that three state constitutions included such provisions by the close of the twentieth century.[239]

The twenty-first century brought a surge of hunting and fishing rights amendments. North Dakota and Virginia adopted such measures in 2000,[240] followed by Wisconsin in 2003,[241] Louisiana and Montana in 2004,[242] Georgia in 2006,[243] Oklahoma in 2008,[244] Arkansas, South Carolina, and Tennessee in 2010,[245] and Idaho, Kentucky, Nebraska, and Wyoming in 2012.[246] All told, fourteen

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[234] ARIZ. CONST. art. II, § 31 (amended 2012). This 2012 amendment also modified article XVIII, section 6.

[235] VT. CONST. ch. II, § 67. The Pennsylvania Constitution of 1776 was the first to include a right to hunt and fish, but this provision was eliminated when the constitution was revised in 1790. Jeffrey Omar Usman, *The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 77 (2009).

[236] Usman, *supra* note 235, at 77–78, 80 (showing that except for several early-twentieth century amendments regarding either hunting or fishing rights, but not both, there was little state constitutional amendment activity regarding protection of both hunting and fishing rights until the mid-1990s).

[237] ALA. CONST. art. I, § 36.02 (amended 1996).

[238] MINN. CONST. art XIII, § 12 (amended 1998).

[239] Douglas Shinkle, *State Constitutional Right to Hunt and Fish*, NAT'L CONF. OF ST. LEGISLATURES (Dec. 2012), http://www.ncsl.org/issues-research/env-res/state-constitutional-right-to-hunt-and-fish.aspx.

[240] N.D. CONST. art. XI, § 27 (amended 2000); VA. CONST. art. XI, § 4 (amended 2000).

[241] WIS. CONST. art. I, § 26 (amended 2003).

[242] LA. CONST. art. I, § 27 (amended 2004); MONT. CONST. art. IX, § 7 (amended 2004).

[243] GA. CONST. art. I, § 1, para. XXVIII (amended 2006).

[244] OKLA. CONST. art. II, § 36 (amended 2008).

[245] ARK. CONST. amend. 88, § 1 (amended 2010); S.C. CONST. art. I, § 25 (amended 2010); TENN. CONST. art. XI, § 13 (amended 2010).

[246] IDAHO CONST. art. I, § 23 (amended 2012); KY. CONST. §255A (amended 2012); NEB.

states adopted hunting and fishing rights amendments between 2000 and 2012.[247]

To be sure, not all of these amendments have been inserted into state bills of rights. For instance, in Virginia in 2000 an amendment was added to the Conservation Article and states in part: "The people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law."[248] But in other states, as in South Carolina in 2010, the right to hunt and fish has been placed in the bill of rights alongside other longstanding rights provisions.[249] The South Carolina amendment provides, in part: "The citizens of this State have the right to hunt, fish, and harvest wildlife traditionally pursued, subject to laws and regulations promoting sound wildlife conservation and management as prescribed by the General Assembly."[250]

IV. AMENDMENTS CHALLENGING CONGRESSIONAL STATUTES OR U.S. SUPREME COURT DECISIONS

State constitutional amendments can be directed at the U.S. Supreme Court in the sense of providing greater protection for rights than the Court has guaranteed.[251] But amendments can also be directed at the Supreme Court in the very different sense of generating conflicts between state constitutional provisions and Supreme Court precedents or congressional statutes, for the purpose of enabling Supreme Court review of the validity of prior rulings or congressional statutes.[252] The final decades of the twentieth century brought the enactment of several amendments that conflicted with federal court precedents insofar as they barred consideration of race in school assignment policies in response to federal court decisions requiring adoption of busing plans to bring

CONST. art. XV, § 25 (amended 2012); WYO. CONST. art. I, § 38 (amended 2012).

[247] Only one of these amendments was defeated at the polls: an Arizona measure rejected in 2010. *See* John Dinan, *State Constitutional Developments in 2010*, *in* THE BOOK OF THE STATES 7 (2011).

[248] VA. CONST. art. XI, § 4 (amended 2000).

[249] S.C. CONST. art. I, § 25 (amended 2010).

[250] *Id.*

[251] *See, e.g.*, Dinan, *Foreword*, *supra* note 59, at 1000–01 (noting state constitutional provisions were interpreted to afford higher levels of protection in the areas of civil rights and liberties than the Supreme Court allows).

[252] *See* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1022.

about integration of the schools.[253] But there is no indication that any amendments were enacted in the late twentieth century for the purpose of generating a conflict between such amendments and congressional statutes in order to present the Supreme Court with a suitable opportunity to review and invalidate the congressional law.

In the twenty-first century, amendments of both sorts have been proposed, with increasing frequency in recent years.[254] Several amendments have been proposed with an eye toward generating conflicts with Supreme Court precedents, as is the intent of several proposed but not yet enacted anti-abortion measures.[255] Additionally, in a development that has no precedent in prior decades, amendments have been proposed and enacted for the purpose of generating conflicts with congressional statutes, as is the case with several health care freedom amendments as well as assorted amendments guaranteeing the right to a secret ballot in union elections.[256]

A. Amendments Challenging U.S. Supreme Court Precedent

Although the Supremacy Clause of the U.S. Constitution makes clear that state laws and constitutional provisions are necessarily trumped by contrary federal laws, constitutional provisions, and court decisions, passage of state laws and constitutional amendments that conflict with federal court precedents can play a role in generating cases that present the Supreme Court with an opportunity to reconsider prior rulings.[257] The leading example from the late twentieth century is in regard to abortion rights. On various occasions in the 1980s, in the aftermath of Supreme Court decisions in *Akron v. Akron Center for Reproductive Health, Inc.*[258] and *Thornburgh v. American College of Obstetricians and*

[253] *See* Dinan, *Foreword*, *supra* note 59, at 1005–06 (discussing a 1974 Colorado amendment and a 1978 Massachusetts amendment along these lines). A similar amendment was enacted in California in 1979 but was directed to the state supreme court rather than the federal judiciary. *Id.* at 1006.

[254] *See generally* Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1022–25 (discussing examples of areas states have used amendments to generate conflicts with statutes and precedent). *See also infra* Parts IV.A–IV.B.

[255] *See infra* Part IV.A.

[256] *See infra* Part IV.B.

[257] *See, e.g.*, Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1024 (noting some states would enact measures through statutes and amendments intending to push the Supreme Court to reconsider its decisions in the area of abortion).

[258] City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1983).

Gynecologists,[259] states enacted statutes containing informed consent and waiting period requirements, with the intent of generating cases to give the Supreme Court an opportunity to reconsider prior rulings casting doubt on the legitimacy of these particular restrictions on abortion availability.[260] And in several instances, these state laws achieved their aims, in that a reconstituted Supreme Court was led in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[261] to overturn prior rulings and allow passage of these state restrictions.[262]

What is notable about twenty-first century developments is the increased consideration given to proposing state constitutional amendments for the purpose of generating conflicts with Supreme Court precedents regarding abortion rights and generating an opportunity for the Court to reconsider prior rulings.[263] Although none have been enacted to date, three amendments were proposed between 2008 and 2011 with the intent of creating conflicts with longstanding Supreme Court precedents prohibiting states from outlawing pre-viability abortions.[264] Proceeding in each case through the constitutional initiative process, supporters placed "personhood" amendments on the ballot in Colorado in 2008 and 2010 and in Mississippi in 2011.[265] Although varying in their wording, they generally declared that personhood begins at the moment of fertilization, for the ostensible purpose of setting up a conflict with the Supreme Court's holding in *Roe v. Wade*.[266] This would thereby generate an opportunity for a reconstituted Court to reconsider and possibly reverse *Roe* and return to the states the question of whether to bar pre-viability abortions.[267]

B. Amendments Challenging Congressional Statutes

In a twenty-first century development with scant precedent in prior decades, a number of amendments have been enacted for the purpose of generating conflicts with proposed or enacted

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[259] Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986).
[260] Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1023.
[261] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
[262] *Id.* at 882.
[263] Dinan, *State Constitutional Developments in 2011*, *supra* note 8, at 5–7.
[264] *Id.*
[265] *Id.* at 5.
[266] *See* Roe v. Wade, 410 U.S. 113, 166–67 (1973).
[267] *See id.*

congressional statutes, thereby presenting the Supreme Court with a suitable opportunity to review them.[268] The intent of passing these amendments is presumably to assist opponents of a congressional statute by helping to generate a case that might be deemed justiciable by the Supreme Court and possibly lead the Justices to declare the statute invalid.[269] Although state constitutional amendments are no more effective for this purpose than state statutes, on a number of occasions between 2010 and 2012 constitutional amendment processes have been the vehicles of choice for opponents of congressional statutes seeking to secure their invalidation.[270]

1. Secret Ballot in Union Elections

In anticipation of congressional passage of the Employee Free Choice Act (EFCA), which was debated in 2009 and 2010 but never enacted, voters in five states approved amendments designed to facilitate legal challenges to such a law had it been enacted.[271] In particular, these amendments target provisions in the proposed EFCA liberalizing use of a card-check procedure in union-organizing elections and limiting reliance on secret balloting in these elections.[272] The wording of these Save Our Secret Ballot amendments varies, but the general intent is to guarantee that the right of individuals to a secret ballot applies not only in elections for federal and state offices but also in elections for determining union representation.[273] As the South Carolina constitutional provision approved in 2010 declares: "The fundamental right of an individual to vote by secret ballot is guaranteed for a designation, a selection, or an authorization for employee representation by a labor organization."[274] In 2010, voters approved such amendments not only in South Carolina, but also in Arizona, South Dakota, and Utah.[275] This was followed by passage of a similar amendment in Alabama in 2012.[276]

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[268] Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1025–32.
[269] *See id.* at 1025.
[270] *Id.* at 1026–27, 1030, 1031–32.
[271] *Id.* at 1031–32.
[272] *Id.*
[273] *Id.* at 1031.
[274] S.C. CONST. art. II, § 12 (amended 2010).
[275] Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1031.
[276] Dinan, *State Constitutional Developments in 2012*, *supra* note 53, at 8 (noting passage of Alabama amendment regarding right to cast a secret ballot in union elections).

2. Health Insurance Mandates

In response to congressional passage of the Patient Protection and Affordable Care Act of 2010 (ACA), several states enacted constitutional amendments prohibiting enforcement of health insurance mandates, in part for the purpose of generating a conflict with the law's insurance mandate provision, in order to facilitate legal challenges to its constitutionality.[277] Voters in Arizona and Oklahoma approved such amendments in 2010,[278] followed by Ohio in 2011,[279] and then Alabama and Wyoming in 2012.[280] As the Oklahoma amendment declares, in part, in a provision added to the state bill of rights: "A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system."[281]

These amendments were part of a multi-pronged strategy employed by ACA opponents, along with the passage of similarly framed statutes in other states and the filing of federal lawsuits eventually joined by attorney generals or, in some cases, governors of twenty-eight states.[282] In several initial rulings by federal district judges, passage of state acts in conflict with the ACA was held to be an important prerequisite to deeming the challenges justiciable.[283] However, in the end, passage of these amendments can be considered superfluous from the standpoint of efforts to challenge the ACA. For one thing, these state health care freedom amendments—as they were dubbed by supporters—were no more effective than similarly framed state statutes for the purpose of generating a justiciable case and presenting federal courts with an opportunity to review the ACA.[284] Moreover, in ultimately ruling in *National Federation of Independent Business v. Sebelius*[285] that challenges to the ACA's individual mandate provision could be

[277] Dinan, *State Constitutional Developments in 2011*, *supra* note 8, at 6.

[278] *Id.*

[279] *Id.*

[280] Dinan, *State Constitutional Developments in 2012*, *supra* note 53, at 8 (noting passage of Alabama and Wyoming amendments prohibiting imposition of health insurance mandates).

[281] OKLA. CONST. art. II, § 37 (amended 2010).

[282] Brian Fraga, *Moot Point: Voters Reject Obamacare*, NAT'L CATH. REG. (Nov. 12, 2012, 6:11 PM), http://www.ncregister.com/site/article/moot-point-voters-reject-obamacare1.

[283] Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256, 1272 (N.D.Fla. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 771–72 (E.D.Va. 2010).

[284] Dinan, *State Constitutional Amendment Processes*, *supra* note 150, at 1030.

[285] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

deemed justiciable but were in the end without merit, the Supreme Court did not view passage of state health care freedom acts, whether on a statutory or constitutional basis, as essential for deeming these challenges justiciable.[286]

CONCLUSION

The relative flexibility of state amendment processes, in contrast with the rigidity of the federal amendment process, has a number of well-documented implications. One consequence is that experimentation with alternative institutional arrangements is more extensive at the state level.[287] Whereas relatively few federal constitutional amendments have made important changes in institutional design, the flexibility of state constitutions has permitted experimentation with a unicameral legislature, a plural executive, various means of electing judges, and assorted direct democratic devices.[288] Another consequence is that political changes at the state level often take place through constitutional channels rather than through statutes, executive acts, and informal understandings, as is generally the case at the federal level.[289]

My purpose has been to call attention to another consequence of the relative flexibility of state constitutions. Although at the federal level the scope and limits of individual rights are generally resolved in the judiciary, at the state level constitutional amendment processes are prominent forums for deliberating about rights. The main lesson to be drawn from this analysis is that insofar as scholarly analyses of rights protection are influenced by prevailing practices at the federal level, where judicial decisions are the locus of rights protection, there is a risk of failing to appreciate the frequency with which constitutional amendment processes serve as a vehicle for determining the boundaries of rights in the states.

Along with trying to redirect state constitutional scholarship away from a preoccupation with court decisions and toward a broader focus on amendment processes as vehicles for constitutional change, I have also drawn several particular lessons about the twenty-first century rights-related amendments, especially in

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[286] *Id.* at 2582–84.

[287] JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 3 (2006).

[288] John J. Dinan, *State Constitutions and American Political Development*, *in* CONSTITUTIONAL DYNAMICS IN FEDERAL SYSTEMS: SUB-NATIONAL PERSPECTIVES 43, 49 (Michael Burgess & G. Alan Tarr eds., 2012).

[289] *Id.* at 53–55.

regard to their frequency and purpose. Regarding their frequency, rights-related amendments are enacted more often in the twenty-first century than in the late twentieth century. After a period in the 1970s and 1980s when such amendments were relatively rare, and a period in the 1990s when they were enacted somewhat more frequently, rights-related amendments in the 2000s account for the second-highest category of amendments.

Regarding the purpose of these amendments, rights-related amendments are directed only in part toward constraining expansive state court rulings. To be sure, a number of rights-related amendments between 2000 and 2012 overturned or preempted expansive state court rulings, in keeping with late-twentieth century patterns of such court-constraining amendments, albeit in a new range of areas such as same-sex marriage. But this does not exhaust the purposes to which state amendment processes have been put regarding individual rights. Twenty-first century amendments have also expanded rights beyond guarantees in the U.S. Constitution or Supreme Court interpretations of federal provisions, such as regarding private property rights and hunting and fishing rights. Additionally, in a development with little precedent in prior decades, amendments have been proposed and in some cases enacted in the twenty-first century to generate conflicts with and thereby facilitate legal challenges to federal court precedents and congressional statutes, whether regarding abortion, health care, or union organizing.