
De-judicialization Strategies

Emily Zackin & Mila Versteeg

ABSTRACT. Constitutions have long been understood to empower courts. We argue, however, that constitutions can also be used to de-judicialize politics. We focus on the de-judicialization strategy of adding detailed provisions to U.S. state constitutions, and demonstrate that it has been employed throughout U.S. history and is still in use today.

INTRODUCTION

It has been widely documented that, around the world, political questions are increasingly decided in and by courts.¹ This phenomenon is often described as “judicialization,” and those studying the phenomenon have observed that constitutional design is one driver of judicialization. When constitutions come to include a wide range of topics, this expanded range of policy issues then falls within the purview of the judiciary.² Constitutional scholars have also

-
1. See Torbjörn Vallinder, *The Judicialization of Politics – A World-Wide Phenomenon: Introduction*, 15 INT’L POL. SCI. REV. 91, 94 (1994) (explaining that the “role of the courts and the judges has clearly and considerably expanded” in “many democratic countries”); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 3 (2001) (describing how, as constitutional “case law has expanded in scope and content, once relatively autonomous legal domains (such as penal, administrative, and contract law) have been gradually but meaningfully placed under the tutelage and supervision of constitutional judges”); Björn Dressel, *The Judicialization of Politics in Asia: Towards a Framework of Analysis*, in *THE JUDICIALIZATION OF POLITICS IN ASIA* 1, 1 (Björn Dressel ed., 2012) (“Courts and the judiciary have become highly visible in the Asian political landscape.”).
 2. See, e.g., Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91, 103-04 (2000); Tamir Moustafa, *The Judicialization of Religion*, 52 L. & SOC’Y REV. 685, 686 (2018); Octavio L. Motta Ferraz, *Brazil: Health Inequalities, Rights, and Courts: The Social Impact of the Judicialization of Health*, in *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* 76, 78-79 (Alicia Ely Yamin & Siri Gloppen eds., 2011).

interrogated the normative desirability of judicializing politics, with many expressing concerns about it.³

The process of judicialization is real and important, and so are the normative issues it presents. But in this Essay, we focus on its mirror image. Rather than emphasizing the way that constitutions can be used to empower courts to make policy choices, we argue that they can also be used to *limit* courts' role in policy-making. That is, political actors can design constitutions to reduce judicial discretion as they interpret constitutions, and thereby reduce their influence over the outcome. We illustrate this point by exploring constitutional politics in the U.S. states, since state constitutions have long been deployed to *de-judicialize* politics.

We define “de-judicialization,” broadly, as a reduction in the influence of courts over the outcome of policy choices. De-judicialization can take many forms. Political actors sometimes attempt to limit the power of the judiciary over policy questions through jurisdiction stripping — formally removing a policy area from the courts' purview.⁴ Others have attempted to constrain the judiciary's influence through court packing, or the institution of judicial elections.⁵ Our focus here, however, is on one particular de-judicialization strategy — the enumeration of detailed, rule-like provisions in the text of a constitution.⁶ This strategy, we argue, has been employed at the state level, where political actors have long used constitutions not only to empower courts, but also to limit the judiciary's role in shaping policy outcomes.⁷

We argue that this strategy is currently being employed in the battle for abortion rights. As *Dobbs v. Jackson Women's Health Organization*⁸ pushed abortion rights back to the state level, much debate has been focused on whether state

-
3. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 23–24 (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247–48 (2004).
 4. See Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 *AM. J. POL. SCI.* 971, 972 (2009).
 5. For example, in antebellum Kentucky, the legislature created an entirely new court over a particularly heated policy battle. Emily Zackin, *Kentucky's Constitutional Crisis and the Many Meanings of Judicial Independence*, 58 *STUD. L. POL. & SOC'Y* 73, 78–80 (2012).
 6. In developing this idea, we build on our own prior work. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 *U. CHI. L. REV.* 1641, 1679–80 (2014) [hereinafter Versteeg & Zackin, *American Constitutional Exceptionalism Revisited*]; Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 *AM. POL. SCI. REV.* 657, 664 (2016) [hereinafter Versteeg & Zackin, *Constitutions Unentrenched*].
 7. The strategy has also been employed in other countries. See Versteeg & Zackin, *Constitutions Unentrenched*, *supra* note 6, at 657.
 8. 142 S. Ct. 2228 (2022).

constitutions' equal-protection clauses and privacy protections include a right to an abortion. But courts have not been particularly reliable partners in finding abortion protections in such provisions, with some changing tracks as court composition changes. Considering that abortion rights enjoy majority support in most of the country,⁹ more abortion-rights advocates could consider mobilizing for detailed state constitutional amendments that grant specific abortion rights. By placing specific policies directly in constitutions, such amendments have the potential to take big policy questions out of the hands of state courts and legislatures.

In what follows, we will first theorize the phenomenon of de-judicialization through constitutional detail. We next offer three examples of the attempt to de-judicialize through constitutionalization: (i) labor rights, (ii) debtor rights, and (iii) abortion rights. We then describe other potential areas for de-judicialization—criminal debt and climate change—and finally, conclude by reflecting upon the conservative legacy of both de-judicialization and federalism.

I. DE-JUDICIALIZATION THROUGH CONSTITUTIONAL DETAIL

There are good reasons to associate constitutionalization with judicialization. Research on constitution making has demonstrated that empowering courts is often in the interest of political elites. Elites who are about to lose electoral power can preserve their policy preferences by enshrining them into a constitution itself. This ensures the continued implementation of their political agenda by the judiciary, even after these elites lose electoral political power.¹⁰ Much of this research originates in the comparative context, but scholars have demonstrated a similar phenomenon within the United States. Jennifer Nedelsky has argued, for example, that the Framers of the U.S. Constitution included property rights precisely to remove distributional questions from the political agenda.¹¹ Similarly,

9. *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion> [https://perma.cc/QM2R-XZVD] (reviewing polling data and documenting that public opinion on abortion has “remained relatively stable over the past several years” with currently sixty-one percent of Americans saying that “abortion should be legal in all or most cases” and thirty-seven percent saying it “should be illegal in all or most cases”).

10. Comparative constitutional scholarship demonstrates that constitutions are often drafted with the goal of handing political choices to courts, expanding the judiciary's role in politics. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 43-44 (2005); *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* (Alan Angell, Line Schjolden & Rachel Sieder eds., 2005).

11. See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1994) (placing the protection of property at the center of U.S. constitutionalism and political institutions).

Keith E. Whittington has demonstrated that, in order to advance their own political agendas, presidents and other political leaders have deferred to the Supreme Court as the final arbiter over constitutional questions.¹² Mark A. Graber and George I. Lovell have likewise documented how governing coalitions use courts to decide cross-cutting questions.¹³ Taken together, these studies demonstrate that those in positions of political power often strive to judicialize political questions, often by placing those matters in constitutions, or by describing them as lying outside the realm of normal, electoral politics, or both.

However, it is important to recognize that constitutions can also be deployed for the opposite purpose. Just as a constitution can expand the judiciary's role in deciding particular policy questions, so too can it reduce that role. One strategy to de-judicialize constitutional politics is to place substantial detail in the constitution itself. Consider the U.S. Constitution. Its text contains few clear rules, and many rather broad standards. This lack of specificity has meant that those applying the constitutional text to specific policy questions must offer answers that draw, in part, from sources outside the text itself. In moving from the broad principles stated in the text to determinations about the constitutionality of particular policies, judges have to exercise substantial discretion.¹⁴ We are all familiar with this dynamic from observing the U.S. Supreme Court as it interprets the Constitution. The text does not specify, for instance, whether a right to "due process" includes a right to intimate privacy, and whether the right to intimate privacy, in turn, includes the right to an abortion.¹⁵ Likewise, it is far from clear, based on the text of the Constitution alone, whether the prohibition of "abridging the freedom of speech" protects people's right to insult a police officer, dance naked, or burn an American flag.¹⁶ Within such a system – in which judges interpret broadly phrased provisions – it is easy to see how constitutionalizing a question would empower the courts to decide its answer. But things do not have to be this way.

-
12. See generally KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007) (arguing that democratically elected leaders have encouraged judicial supremacy).
 13. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUDS. AM. POL. DEV.* 35, 37 (1993); GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 3 (2003).
 14. Mila Versteeg & Emily Zackin, *Limiting Judicial Discretion*, in *COMPARATIVE JUDICIAL REVIEW* 290, 294-96 (Erin F. Delaney & Rosalind Dixon eds., 2018) (discussing how the specificity of constitutional provisions can limit judicial discretion, among other consequences).
 15. Cf. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 593-95 (6th ed. 2019) (discussing the controversy as to whether the Due Process Clause, as written, supports rights under substantive due process).
 16. See, e.g., KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 29-31, 50-51, 109-10 (1995).

By expanding our view of U.S. constitutionalism to include state constitutions, we come to see that constitutions can also be used to de-judicialize political questions – that is, to minimize the judiciary’s power over the answers. When constitutions contain highly specific provisions, they may limit, rather than expand, the judiciary’s capacity to shape public policy. What is more, when these detailed provisions are amended frequently, these changing details can minimize the need for ongoing judicial determinations in the development of evolving public policies. Unlike the federal document, state constitutions have proven both detailed and flexible over time. The average state constitution is amended every three years.¹⁷ This flexibility has allowed state constitutions to be vehicles for de-judicializing projects. By adding detailed policy statements to state constitutions, and then continuously tinkering with them, critics of courts have used state constitutions to push courts to the margins of particular policy battles.

To be sure, no matter how specific they are, constitutional provisions will remain open to competing interpretations.¹⁸ H.L.A. Hart’s description of the sign “no vehicles in the park” is one of the most famous examples of this jurisprudential phenomenon.¹⁹ Hart conjectured that the meaning of this statement would be clear in most circumstances. A truck or car driver noticing the sign will likely turn their vehicle around. But outside of what Hart called the “core” of the rule, there is also a “debatable fringe”²⁰ or a “penumbra.”²¹ Is a stroller a vehicle, for instance, and if not, what makes it different from a truck or a car?²²

Constitutional provisions, likewise, have a clear core and a debatable fringe. But how many political choices will fall within the clear core or within the debatable penumbra will likely depend, at least in large part, on the provision itself. For instance, when a constitution contains a rule that a president shall serve no more than two four-year terms, much of its application will fall within the clear

17. Versteeg & Zackin, *American Constitutional Exceptionalism Revisited*, *supra* note 6, at 1674 (“On average, across all states, the annual revision rate is 0.35, meaning that states have revised their constitutions roughly every three years.”).

18. Rosalind Dixon, *Constitutional Drafting and Distrust*, 13 INT’L J. CONST. L. 819, 833-37 (2015) (arguing that specific constitutional constraints can only ever be partial and will always leave courts with some degree of discretion).

19. FREDRICK SCHAUER, *THINKING LIKE A LAWYER* 19 (2009).

20. *Id.* at 19-20 (describing the “debatable fringe”).

21. See Tom Ginsburg & Mila Versteeg, *Are Constitutional Texts so Indeterminate that We Cannot Interpret Them?*, in *ESSAYS IN THE HONOR OF MARK TUSHNET* (Vicki Jackson & Madhav Khosla eds., forthcoming 2024) (on file with authors).

22. See SCHAUER, *supra* note 19, at 19.

core.²³ Even here, of course, there is a debatable fringe,²⁴ but the fringe is surely smaller than that surrounding a less specific provision, like the U.S. Constitution's Due Process Clause. A court asked to interpret whether a third consecutive presidential term is constitutional will likely have little choice but to conclude it is not.²⁵ When we describe highly detailed constitutional provisions as “de-judicializing,” we do not mean that courts will never make choices about the meaning of these texts. Our claim is more modest: highly specific constitutional texts can remove particular policy questions from the debatable fringe, and therefore constrain the judiciary's ability to offer its own answers to these particular questions.

When conceiving of de-judicialization in this way, we should distinguish between two related but distinct scenarios that involve different actors at the helm of de-judicialization efforts. The first is that of popular majorities reining in those who interpret and apply a constitution. Popular majorities are necessary to ratify the work of a constitutional convention,²⁶ as well as amendments that are passed through popular initiative.²⁷ The second scenario is that in which a

-
23. See Mila Versteeg, Timothy Horley, Anne Meng, Mauricio Guim & Marilyn Guirguis, *The Law and Politics of Presidential Term Limit Evasion*, 120 COLUM. L. REV. 173, 186-88 (2020) (discussing how constitutional term limits are a “bright-line” constitutional rule).
 24. For instance, Akhil Reed Amar has argued that a President could be in power for sixteen years if they were to alternate in power with the Vice President. Professor Amar's argument is that the President – without violating the Twenty-Second Amendment – could resign (or transfer power under the Twenty-Fifth Amendment) prior to the end of his first term, be appointed as Vice President, win re-election as Vice President, switch back to the presidency, and subsequently be re-elected as President – all while maintaining the ability to seek re-election again as Vice President. Akhil Reed Amar, *Clinton-Obama, Obama-Clinton: How They Could Run Together and Take Turns Being President*, SLATE (Mar. 21, 2008, 6:45 PM), <https://slate.com/news-and-politics/2008/03/how-clinton-and-obama-could-run-together-and-take-turns-being-president.html> [<https://perma.cc/3LL4-LCC4>].
 25. On the other hand, some courts in Latin America have interpreted their constitutions to allow the president to run for additional terms notwithstanding clear limits. See Versteeg et al., *supra* note 23, at 231-32.
 26. See Emmanuel Joseph Sieyès, *What Is the Third Estate?*, in POLITICAL WRITINGS 92, 139 (Michael Sonenscher ed., trans., 2003) (1789) (“Extraordinary representatives have whatever new powers it pleases the Nation to give them. Since a great nation cannot in real terms assemble every time that extraordinary circumstances may require, it has, on such occasions, to entrust the necessary powers to extraordinary representatives . . . [T]hey have been put in the place of the Nation itself as if it was it that was settling the constitution.”). See generally THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin & Neil Walker eds., 2007) (collecting scholarship examining “the paradox of constitutionalism” – the fact that, though the people are sovereign, the power they possess can only be exercised through established constitutional forms).
 27. See Initiative and Referendum Processes, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes> [<https://perma.cc/4TBK-DTH5>]. It has been widely documented that this process can be

supermajority of the legislature is in charge when amending the constitution through the ordinary amendment process.²⁸

We would expect the first scenario to be more conducive to progressive de-judicialization efforts than the second.²⁹ One of the defenses of the initiative and referendum processes is that legislative policymaking may be at odds with the majority's will. In contemporary politics, gerrymandered districts render many state legislatures out of step with majoritarian preferences, typically making them more conservative than a state's population.³⁰ In such states, we might expect progressive de-judicializing projects to fare better when they are conducted outside, rather than through, legislatures. Indeed, the concern that legislatures were corrupt and unresponsive was one of the main reasons state constitutional drafters first adopted the initiative and referendum.³¹ Of course, direct democracy itself has received serious criticism for serving wealthy interests rather than democratic majorities, but it does provide an opportunity for majorities to both circumvent legislatures and control courts.³²

II. DE-JUDICIALIZATION IN ACTION: LABOR, DEBT RELIEF, AND ABORTION

We have described a strategy of de-judicialization where drafters provide courts highly detailed constitutional instructions. In this Part, we offer three examples of political campaigns to reduce the influence of courts through

used by popular majorities to bypass political elites. See Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J.F. 203-06 (2023).

28. In most state constitutions, constitutional amendments – other than those passed through the popular initiative – are initiated by the legislature. To pass, a proposed amendment typically needs more than sixty percent of the legislature to vote in favor. See Versteeg & Zackin, *American Constitutional Exceptionalism Revisited*, *supra* note 6, at 1671 nn.134-36, which reports that, as of 2014, twenty-two state constitutions allow amendments to be initiated by a sixty-seven percent legislative vote, nine require sixty percent of the vote, and twelve require fifty percent of the vote, whereas thirteen state constitutions require amendments to be passed by two subsequent legislatures. All state constitutions but one require all amendments to be ratified by popular referendum.
29. See Versteeg & Zackin, *Constitutions Unentrenched*, *supra* note 6, at 664 (“[S]tate constitutional drafters also redesigned constitutions to be more flexible so that they could better serve as vehicles of democratic control over courts and legislatures.”).
30. See, e.g., JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 4-5 (2022) (arguing that increased power in the hands of state governments leads to democratic backsliding, in part because of gerrymandering).
31. AMY BRIDGES, DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES 133 (2015).
32. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 285 (2022) (describing “the constitutional opportunity [institutions like ballot initiatives] offer to determined majorities”).

constitutional detail. They demonstrate that drafting a specific constitutional provision to de-judicialize a policy question can be used both to respond to individual unpopular rulings³³ and to preempt or replace entire legal doctrines.

A. *Labor at the Turn of the Twentieth Century*

Labor protections at the turn of the twentieth century offer one of the clearest examples of amending state constitutions to de-judicialize a policy controversy.³⁴ In the last decades of the nineteenth century and the early decades of the twentieth, courts were a famous thorn in the side of labor unions. Courts viewed labor organizing with suspicion and invalidated many protective labor statutes as violations of the constitutional guarantee of liberty of contract. As American Federation of Labor founder Samuel Gompers declared, “[t]he power of the courts to pass upon [the] constitutionality of law so complicate[d] reform by legislation as to seriously restrict the effectiveness of that method.”³⁵ Labor leaders reacted in part by bargaining directly with their employers.³⁶ However, they also responded to the hostile judiciary by adding protective and specific labor provisions directly to state constitutions. Many of these provisions were added through constitutional conventions, and labor leaders often lobbied these conventions directly or even attempted to have delegates selected from among their own ranks.³⁷

These provisions were deliberately crafted to ensure that courts could not overturn the policies labor organizations sought to advance. Thus, rather than enshrining broad guarantees of labor rights, the proponents and authors of these provisions included highly specific policies, like minimum wages and maximum working hours, in their proposals. Detailed labor provisions were added to state constitutions across the late-nineteenth and early-twentieth centuries, though the Progressive Era saw the most coordinated attempts to establish de-judicializing provisions related to hours, wages, working conditions, and workmen’s compensation. One primary purpose of these changes was to ensure that courts would no longer have sufficient interpretive discretion to overturn protective labor statutes. The New York State Constitution, for instance, was amended in

33. John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 986 (2007).

34. This Section draws on EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* 106-45 (2013).

35. William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1135 (1989) (third alteration in original).

36. See *id.* at 1148-89.

37. See ZACKIN, *supra* note 34, at 120-21.

1914 to read, “Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws . . . for the payment . . . of compensation for injuries to employees”³⁸ By 1940, fourteen states had constitutionalized the regulation of working hours, nine had constitutionalized workmen’s compensation, and seven had constitutionalized the question of the minimum wage.³⁹

Advocates of these provisions explained that they would ensure courts could not invalidate similar legislation. In at least six instances, these labor-related provisions were added in direct response to an existing state high-court decision, designed precisely to overturn it.⁴⁰ In other cases, the goal was to preempt an unfavorable ruling, de-judicializing a particular labor regulation before a court could weigh in on its constitutionality. The Montana Federation of Labor, for instance, was explicit about this purpose when it lobbied to include the eight-hour workday in Montana’s state constitution, explaining that many pieces of maximum-hours legislation were in danger at the hands of the judiciary unless the constitution was amended to protect them. The organization argued, “[L]aws that have been passed by the Legislature are subject to challenge by the courts as to their constitutionality Usually, the courts function in the interests of the corporations; so does the Legislature.”⁴¹ Even legislatures themselves sometimes used this strategy of constitutionalizing a policy in order to shield it from judicial nullification. In Progressive Era Vermont, for instance, members of the state legislature hoped to prevent a conflict over the constitutionality of a workmen’s compensation statute by first passing a constitutional amendment on the subject in 1914. Only after this amendment was ratified, in 1915, did the legislature pass a workmen’s compensation law.⁴²

Of course, state labor law had to survive challenge on federal constitutional grounds as well, and in the 1905 case of *Lochner v. New York*, the Supreme Court famously invalidated a maximum-hours law as a violation of the Fourteenth Amendment’s Due Process Clause.⁴³ Though the entire period has come to be known as the “Lochner Era,” the Court actually upheld a great deal of protective labor legislation. Between 1897 and 1937, forty-three Supreme Court rulings rejected substantive-due-process objections to employment regulations, while

38. N.Y. CONST. of 1894, art. 1, § 19 (amended in 1914).

39. ZACKIN, *supra* note 34, at 111.

40. *Id.* at 127-28.

41. *Sabotage Workers*, MONT. LAB. NEWS, Oct. 29, 1936, at 1.

42. See WINSTON ALLEN FLINT, THE PROGRESSIVE MOVEMENT IN VERMONT 87-90 (1941).

43. See *Lochner v. New York*, 198 U.S. 45, 56-57 (1905).

declaring employment regulations unconstitutional in only twelve.⁴⁴ Meanwhile, state supreme courts were a separate and perhaps even more serious threat to protective labor law. Even if state constitutional change could do nothing to alter the federal constitutional threat, it could certainly keep state courts from invalidating these statutes. Advocates of protective labor laws therefore not only required legislative action, but also pursued state constitutional amendments to reduce the judiciary's influence over it.

B. *Debt Relief Across the Nineteenth Century*

While labor regulation is probably the clearest example of de-judicialization through constitutionalization, debt relief may be the oldest.⁴⁵ Just as state law once regulated the relationship between employer and employee, so did it govern the relationship between borrower and lender, especially when a borrower found that he could not pay his debts. Because private debts were enforced in state and county court, these courts were often the targets of debtors' anger and protest. In Western Massachusetts, Daniel Shays famously led an armed rebellion of debtors who marched on courthouses to prevent them from operating.⁴⁶ Throughout the late-eighteenth century and well into the nineteenth, debtors' advocates also attempted to sideline courts through less violent means.

The practice of imprisoning debtors was an early target of such de-judicializing efforts. The American colonies adopted the British practice of providing security to creditors by allowing debtors to be arrested and imprisoned even before a judgment had been issued against them, though there had not yet been any adjudication of the validity of a debt. This practice persisted after the Revolution, and creditors, who needed only to make a sworn statement to have a debtor imprisoned, employed it to coerce repayment.⁴⁷ In addition to this intermediate, or *mesne*, process for detaining a debtor, creditors could also seek a postjudgment writ requiring the sheriff to imprison a debtor until he had satisfied the judgment.⁴⁸ Imprisoned debtors were often confined in overcrowded,

44. MICHAEL J. PHILLIPS, *THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S*, at 57 (2001).

45. For a broader discussion of debtors' influence on constitutions, see generally EMILY ZACKIN & CHLOE THURSTON, *THE POLITICAL DEVELOPMENT OF AMERICAN DEBT RELIEF* (forthcoming 2024).

46. See Paul M. Thompson, *The Reaction to Shays' Rebellion*, 4 *MASS. LEGAL HIST.* 37, 45 (1998).

47. See Nino C. Monea, *A Constitutional History of Debtors' Prisons*, 14 *DREXEL L. REV.* 1, 8, 37 (2022).

48. *Id.* at 8.

filthy conditions, lacking access to adequate food or clean water.⁴⁹ Early in the nation's history, constitutional drafters, often assembled in constitutional conventions, attempted to alter this practice by explicitly specifying limits in state constitutions.

Pennsylvania was the first state to constitutionalize limits on imprisonment for debt by clarifying the conditions under which imprisonment would be impermissible. The Constitution of Pennsylvania of 1776 read, "The person of a debtor, where there is not a strong presumption of fraud, shall not be continued in prison, after delivering up, *bona fide*, all his estate real and personal, for the use of his creditors, in such manner as shall be hereafter regulated by law."⁵⁰ North Carolina adopted an identical provision that same year.⁵¹ These were the first in what would come to be a long line of constitutional provisions drafted to curb imprisonment for debt. Beginning with the fourteenth state, Vermont, every new state constitution included a provision about debtors' prisons.⁵²

These provisions became ever more specific with time. The Jacksonian Era contained a great deal of constitutional drafting (and redrafting) by constitutional conventions as well as an energetic social movement, which mobilized working-class, antiaristocratic sentiment through mass petition drives, to abolish debtors' prisons.⁵³ This movement was accompanied by a flurry of new constitutional provisions outlining specific limitations on imprisonment for debt. Like their eighteenth-century predecessors, these provisions forbade imprisonment only after a debtor had delivered up his entire estate.⁵⁴ In 1844, however, New Jersey became the first state to abandon this requirement, and the following year, Texas became the first state to ban all imprisonment for debt.⁵⁵ By the time southern states were readmitted to the Union after the Civil War, the constitutions of three-quarters of the states included a provision restricting the

49. See PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY*, 1607-1900, at 106, 120 (1999) (describing the condition of debtors' prisons in New York).

50. PA. CONST. of 1776, art. 2, § 28.

51. Monea, *supra* note 47, at 24-25.

52. *Id.* at 26.

53. DANIEL CARPENTER, *DEMOCRACY BY PETITION: POPULAR POLITICS IN TRANSFORMATION*, 1790-1870, at 271-75 (2021).

54. See *supra* notes 50-52.

55. Monea, *supra* note 47, at 44-45.

imprisonment of debtors.⁵⁶ Forty-one state constitutions currently limit or entirely prohibit imprisonment for debt.⁵⁷

It is important to note that, unlike those related to labor, these constitutional provisions were not responses to a fear that similar legislation would be overturned by courts. Though courts were generally perceived to be hostile to debtors (especially when compared to juries),⁵⁸ the most direct targets of these constitutional changes were elements of the common law itself. Like legislation on this question, these constitutional provisions were designed to displace judicially enforced common law, thereby de-judicializing the question of whether, and under what circumstances, debtors could be kept in prison. State legislatures had long freed debtors from prison on a case-by-case basis, in response to individual relief petitions, but constitutional provisions were intended to ensure that general rules, rather than ad hoc relief measures, would be enacted.⁵⁹ Some critics considered the addition of state constitutional provisions about the imprisonment of insolvent debtors to be inappropriate, the kind of specific policy choice that was best left to legislatures.⁶⁰ Debtor-related constitutional provisions, however, had the virtue of not only changing the site of a political controversy from courts to legislatures, but also requiring that legislatures take action. In this sense, these provisions were designed as popular mandates for both courts and legislatures.⁶¹

56. *Id.* at 49.

57. See Appendix: *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. F. 153 (2015), <https://harvardlawreview.org/2015/11/state-bans-on-debtors-prisons-and-criminal-justice-debt-appendix> [<https://perma.cc/L58V-FP4C>].

58. See Monea, *supra* note 47, at 20.

59. The Minutes of the Constitutional Convention of 1776 stated:

The frequent interpositions of the legislature in behalf of particular persons, held in execution for debt, may all of them be justly branded with the appellation of laws after the fact; whereas this section calls for general regulations by a general law which may be known before the contracts be made. These acts of mercy to individuals, too often dependent upon favor or prejudice, before large bodies of men, will probably bring us into discredit, if not into debates with foreign nations. They ought to be abandoned immediately and a general law provided.

S. Laurence Shaiman, *The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law*, 4 AM. J. LEGAL HIST. 205, 215 (1960).

60. See Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 901 (2022) (describing the debate at New Jersey's 1844 convention about whether a prohibition on imprisoning debtors should be left to the legislature, rather than included in the state constitution).

61. See *id.* at 902 ("Ultimately, the use of state bills of rights to abolish imprisonment for debt is an important example of how state constitutional rights are designed to function. Through constitutional conventions, popular majorities demanded reform to their bills of rights to realign government with majoritarian preferences.").

C. *Abortion in the Twenty-First Century*

Today, the question of whether to de-judicialize state constitutional law is, again, a part of our politics. Since the Supreme Court withdrew abortion rights at the federal level, states have been confronted with the question of whether to protect abortion under their own constitutions.

In some states, courts have become the central focus in resolving this question. Eleven state constitutions include an explicit right to privacy,⁶² spurring debate over whether these privacy provisions imply a right to an abortion.⁶³ Where a state constitution enumerates a privacy right but not an explicit abortion right, this empowers courts to decide on whether the constitution protects abortion rights. State high courts that have found abortion rights in their constitutions' privacy protections⁶⁴ include those of Montana,⁶⁵ Minnesota,⁶⁶ Alaska,⁶⁷ and Florida.⁶⁸ In the same vein, some states have debated whether abortion rights can be found in equal-protection clauses, as feminists have long argued.⁶⁹ Some state supreme courts, including those of Arizona⁷⁰ and New Mexico,⁷¹ have indeed found that abortion restrictions violated their state constitution's equal-protection clause or equal privileges and immunities clause.⁷²

62. ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, §§ 12, 23; HAW. CONST. art. I, §§ 6-7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; N.H. CONST. art. 2-b; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

63. See, e.g., Martin K. Mayer, John C. Morris, Joseph A. Aistrup, R. Bruce Anderson & Robert C. Kenter, Dobbs, *American Federalism, and State Abortion Policymaking: Restrictive Policies Alongside Expansion of Reproductive Rights*, 53 *PUBLIUS: J. FEDERALISM* 378, 384 (2023) (discussing cases in the Alaska and South Carolina Supreme Courts); Sharon Van Dyck & Scott Wilson, *Minnesota After Dobbs: Understanding the State Constitution's Protections for Reproductive Rights*, 79 *BENCH & BAR MINN.* 18, 21-24 (Nov. 2022) (discussing similar cases in Minnesota).

64. *State Constitutions and Abortion Rights*, *CTR. FOR REPROD. RTS.* 12-21 (July 2022), <https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf> [<https://perma.cc/4FB8-9P8V>].

65. *Armstrong v. State*, 989 P.2d 364, 371 (Mont. 1999).

66. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

67. *Valley Hosp. Ass'n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 965 (Alaska 1997).

68. *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989).

69. See, e.g., Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 *UCLA L. REV. DISCOURSE* 160, 165-67 (2013).

70. *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 29 (Ariz. 2002).

71. *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 850-51 (N.M. 1998).

72. *CTR. FOR REPROD. RTS.*, *supra* note 64, at 22-26.

And state supreme courts in Kansas⁷³ and Montana⁷⁴ have (also) rooted abortion protections in rights of personal liberty and bodily integrity.⁷⁵

Regardless of the exact basis of abortion protection, when abortion rights are not explicitly enumerated, there will always be debate over whether a constitution protects them. To put this in terms of our earlier framework, abortion is not in the clear core of either privacy or equality rights, but rather in the debatable fringe. Indeed, some states have recently seen courts undo existing judge-made abortion protection. For example, the South Carolina Supreme Court in January 2023 interpreted the state constitution's privacy provision to include a right to abortion,⁷⁶ but backtracked on this decision only months later after the retirement of its sole female justice.⁷⁷ Another notable example comes from Iowa, where the state's highest court in 2018 held that abortion restrictions violated the state constitution's equal-protection clause,⁷⁸ but reversed course when the composition of the court changed.⁷⁹

Popular majorities can prevent courts from deciding (and redeciding) these questions by specifically protecting abortion rights in the text of constitutions themselves. Indeed, some states have passed constitutional amendments that do exactly this. The 2022 midterm elections saw the adoption of three such amendments, in Michigan,⁸⁰ California,⁸¹ and Vermont.⁸²

The Michigan amendment is worth inspecting further. It is 321 words long and takes several important questions out of the hands of both courts and future legislatures. For example, it makes clear what state interests are compelling enough to warrant regulation, by noting that the right to reproductive freedom “shall not be denied, burdened, nor infringed upon unless justified by a

73. *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 497-98 (Kan. 2019).

74. *Armstrong v. State*, 989 P.2d 364, 372-74 (Mont. 1999).

75. *CTR. FOR REPROD. RTS.*, *supra* note 64, at 5-11.

76. *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 774 (S.C. 2023); see Kate Zernike, *South Carolina Constitution Includes Abortion Right, State Supreme Court Rules*, N.Y. TIMES (Jan. 5, 2023), <https://www.nytimes.com/2023/01/05/us/south-carolina-abortion-supreme-court.html> [<https://perma.cc/F2JT-E5NF>] (describing the ruling and noting that Justice Kaye Hearn, who authored the opinion, was the court's only female justice).

77. *Planned Parenthood S. Atl. v. State*, No. 2023-000896, 2023 WL 5420648, at *2 (S.C. Aug. 23, 2023) (noting the retirement of Justice Hearn).

78. *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 237 (Iowa 2018), *overruled by* *Planned Parenthood v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022).

79. *CTR. FOR REPROD. RTS.*, *supra* note 64, at 11.

80. MICH. CONST. art. I, § 28, cl. 1.

81. CAL. CONST. art. I, § 1, cl. 1.

82. VT. CONST. art. XXII.

compelling state interest achieved by the least restrictive means”⁸³ and that “[a] state interest is ‘compelling’ only if it is for the limited purpose of protecting the health of an individual seeking care, consistent with accepted clinical standards of practice and evidence-based medicine, and does not infringe on that individual’s autonomous decision-making.”⁸⁴ It further makes clear that there can be no absolute ban postviability, by allowing the state to “regulate the provision of abortion care after fetal viability, provided that in no circumstance shall the state prohibit an abortion that, in the professional judgment of an attending health care professional, is medically indicated to protect the life or physical or mental health of the pregnant individual.”⁸⁵ But to reduce any ambiguity over when a fetus is viable, it clarifies that “[f]etal viability” means “the point in pregnancy when, in the professional judgment of an attending health care professional and based on the particular facts of the case, there is a significant likelihood of the fetus’s sustained survival outside the uterus without the application of extraordinary medical measures.”⁸⁶ The amendment also states that the state cannot “discriminate in the protection or enforcement of this fundamental right.”⁸⁷ And it further protects pregnant women from prosecution for pregnancy outcomes by clarifying that “the state shall not penalize, prosecute, or otherwise take adverse action against an individual based on their actual, potential, perceived, or alleged pregnancy outcomes, including but not limited to miscarriage, stillbirth, or abortion.”⁸⁸ It likewise protects those aiding abortions.⁸⁹ Finally, it makes clear that the constitutional provision does not depend on further legislative action by stating that “[t]his section shall be self-executing.”⁹⁰

83. MICH. CONST. art. I, § 28, cl. 1.

84. MICH. CONST. I, § 28, cl. 4.

85. MICH. CONST. art. I, § 28(1).

86. MICH. CONST. art. I, § 28(4).

87. MICH. CONST. art. I, § 28(2).

88. MICH. CONST. art. I, § 28(3).

89. *Id.* (asserting that the state shall not “penalize, prosecute, or otherwise take adverse action against someone for aiding or assisting a pregnant individual in exercising their right to reproductive freedom with their voluntary consent”).

90. MICH. CONST. art. I, § 28(5). For other state constitutional provisions protecting the right to abortion, see CAL. CONST. art. I, § 1.1 (“The state shall not deny or interfere with an individual’s reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives. This section is intended to further the constitutional right to privacy guaranteed by Section 1, and the constitutional right to not be denied equal protection guaranteed by Section 7. Nothing herein narrows or limits the right to privacy or equal protection.”); and VT. CONST. art. 22 (“That an individual’s right to personal reproductive autonomy is central to the liberty and dignity to determine one’s own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”).

Other progressive states are likely to follow suit in adopting similar amendments. For example, a similar initiative is underway in Maryland, where voters will be able to vote on an abortion-rights amendment in the 2024 election. In states where conservatives hold the majority, abortion opponents have employed a similar tactic, amending, or attempting to amend, the constitution to clarify that no part of the document protects abortion rights.⁹¹

When legislatures are unwilling or unable to initiate such amendments, voters in states with direct initiatives can also take matters into their own hands. Currently, there are initiatives underway in both Ohio and Missouri to get an abortion-rights amendment onto the ballot.⁹² If successful, popular majorities in these states will be able to bypass legislatures in their efforts to de-judicialize the question of abortion by adding specific instructions to the state constitution.

Because access to abortion remains popular in many states, it has been difficult for abortion opponents to secure constitutional change to ban abortion explicitly. But those opposing abortion access have tried to use their state constitutions to block progressive abortion amendments. Recent years have seen conservative campaigners seeking to limit the popular initiative. In Ohio, the conservative legislature sought to block the scheduled popular initiative protecting abortion rights by quickly putting on the ballot an amendment that would make it harder to amend the constitution using the popular initiative.⁹³ In response, Democratic campaigners successfully depicted the attempt to change the constitution's amendment rules as an antiabortion measure, and the proposal was defeated by voters.⁹⁴

Because successful constitutional amendments protecting abortion rights cannot easily be undone by either courts or legislatures, state constitutions are an especially powerful tool for progressives to protect abortion access. Rather

91. See Kate Zernike, *A Volatile Tool Emerges in the Abortion Battle: State Constitutions*, N.Y. TIMES (Jan. 29, 2023), <https://www.nytimes.com/2023/01/29/us/abortion-rights-state-constitutions.html> [https://perma.cc/2LRB-Q3CR].

92. See John Dinan, *State Battles Over Abortion Are Leading to State Constitutional Amendments – An Option in All States and Available Directly to Citizens in 18 States*, CONVERSATION (Apr. 12, 2023), <https://theconversation.com/state-battles-over-abortion-are-leading-to-state-constitutional-amendments-an-option-in-all-states-and-available-directly-to-citizens-in-18-states-203394> [https://perma.cc/U2XB-RMC9].

93. See Julie Carr Smyth, *GOP State Lawmakers Try to Restrict Ballot Initiatives, Partly to Thwart Abortion Protections*, ASSOCIATED PRESS (May 15, 2023), <https://apnews.com/article/democracy-ballot-initiatives-abortion-republicans-ohio-missouri-c48033311370fo71cceceoda975818cb> [https://perma.cc/2R98-NSN8].

94. Michael Wines, *Ohio Voters Reject Constitutional Change Intended to Thwart Abortion Amendment*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/us/ohio-election-issue-1-results.html> [https://perma.cc/7N5G-SV7Z].

than focusing on litigation efforts, therefore, progressive reformers may want to consider using constitutions to protect abortion access.

III. OTHER AREAS FOR DE-JUDICIALIZATION

Advocates of abortion access are already using state constitutions to de-judicialize policymaking, and this is not the only area in which progressives might consider this approach. Another area that calls for de-judicialization is the problem of legal financial obligations, sometimes described as criminal debt. Recent decades have witnessed rising punitiveness for lower-level criminal activity and growing antitax sentiments that have contributed to budgetary shortfalls at the state and local levels.⁹⁵ One response to these pressures has been to charge people for their encounters with the legal system.⁹⁶ Local governments have enacted fines for violations of low-level municipal ordinances, like traffic laws.⁹⁷ Some jurisdictions charge criminal defendants for court costs, time spent housed in prison, DNA testing, and even jury selection.⁹⁸ Those who do not pay can be jailed for failure to meet these financial obligations.⁹⁹ As we describe above, many state constitutions already contain prohibitions on imprisonment for debt. And indeed, scholars have started to argue that courts should read these existing bans to include these new types of criminal debt.¹⁰⁰

Rather than asking state courts to interpret old provisions in new ways, reformers might consider proposing new constitutional provisions that speak explicitly to this modern-day question.¹⁰¹ Such provisions could specify that debtors cannot be imprisoned if their debts are incurred through, for example, fines levied for civil offenses or fees related to costs associated with their trial or

95. See Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 193-94 (2016).

96. See generally Atkinson, *supra* note 95 (describing and critiquing the systemic use of fines and fees to punish those charged with criminal activity, in part to reverse budgetary shortfalls).

97. *Id.* at 193-94.

98. *Id.* at 190-91.

99. *Id.* at 191.

100. See generally Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1 (2016) (arguing that the imprisonment of individuals for failure to pay criminal fines and fees constitutes a new form of debtors' prison, and prescribing the use of existing state constitutional provisions to attempt to check this practice).

101. Hampson, *supra* note 100, at 46. Though Hampson notes that state constitutions can be amended, he suggests that "local abolitionist movements should consider pushing for constitutional amendments to match the broadest possible formation: 'No person shall be imprisoned for debt.'" *Id.* at 47. We, however, propose that reformers not only pursue these broad guarantees, but also include specific prohibitions related to the particular problem of legal financial obligations.

detention. These more specific constitutional texts could facilitate the kind of policy changes desired by progressive reformers without as much reliance on shifting judicial interpretations.

Another policy area in which specific constitutional amendments might be employed is the fight against climate change. Many state constitutions currently contain environmental rights.¹⁰² This has raised the question of whether these existing environmental protections can be applied in the climate-change arena. In Montana, climate-change activists won a recent victory based in part on the state's constitutional right to a clean and healthful environment.¹⁰³ But again, relying on the judiciary to interpret and enforce these provisions as applicable to climate change is a risky proposition. Courts have often (though certainly not always) been reluctant to interpret broadly phrased environmental rights expansively enough to declare state policies unconstitutional.¹⁰⁴ However, state constitutions could be amended to specify that the right to a healthful environment requires state governments to combat climate change. Such provisions could add even more specific requirements, mandating, for instance, that the state track and report greenhouse gas emissions, enact particular vehicle emissions standards, or even specify particular greenhouse gas emission targets directly in constitutions. Courts could still be enlisted to enforce these constitutional mandates, but these detailed amendments would move questions about climate policy away from the debatable fringe of environmental-rights provisions and toward their interpretive core.

Of course, one might object that U.S. state constitutions seem like an especially inadequate response to a global phenomenon like climate change. On the one hand, such a critique rings true: enacting one's preferred policies state by state is certainly less efficient than entering into international agreements or changing federal law. On the other hand, it may be a worthwhile approach, nonetheless. Even when it is possible to enact one's preferred policies at a highly

102. See ZACKIN, *supra* note 34, at 146-96; see, e.g., HAWAII CONST. art. XI, § 9 ("Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.").

103. *Held v. Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

104. See generally Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question*, 17 HARV. ENV'T L. REV. 333 (1993) (describing a widespread judicial reluctance to interpret these provisions as self-executing); Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENV'T AFFS. L. REV. 173, 201 (1993) (describing obstacles to judicial enforcement, such as the fact that these provisions are non-self-executing, barriers to standing, and the ambiguity of phrases like "healthful environment").

centralized level, state-level guarantees may still help to secure subnational implementation of these policies and provide useful redundancy in the face of changeable federal law. What is more, when it is impossible to secure one's preferred policies at the federal level, state-level change is surely better than nothing. State-level campaigns may not only succeed in changing state law but also help to keep ideas and political projects vital and productive in the periods during which it is impossible to make federal progress. As Heather K. Gerken has explained, federalism, shorn of its attachment to separate spheres of authority or limits on federal power, allows for the pursuit of unmistakably national political ends.¹⁰⁵

CONCLUSION: DE-JUDICIALIZATION, FEDERALISM, AND THE CYCLES OF POLITICAL HISTORY

When progressive readings of the U.S. Constitution dominated federal jurisprudence, it was generally conservatives who critiqued the policymaking power of the Supreme Court and insisted that the controversial questions of the day be left to state legislatures. Unwilling to submit to the egalitarian mandates of the federal courts, white Southerners used the institutions of state government to challenge them. Segregationists in Alabama, for instance, amended the state's constitution in 1956 to clarify that the state was not obligated to provide an education to its residents, thereby enabling the state to close its public schools rather than integrate them.¹⁰⁶ Southern governors and congressional representatives also pledged to fight desegregation. This resistance was quite effective. Desegregation in the first decade after *Brown v. Board of Education*¹⁰⁷ was notably sluggish, and the Court proved reluctant to follow this opinion with other equally robust civil-rights rulings for another decade.¹⁰⁸ This well-known instance of conservative resistance to the Court, along with a more recent history of conservative attacks on judicial policymaking, has understandably rendered many on the political left reluctant to endorse challenges to the Court's supremacy.¹⁰⁹

105. See generally Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014) (proposing an account of federalism that advances a nationalist vision).

106. See WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 343 (2004).

107. 347 U.S. 483 (1954).

108. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 74-75 (1991).

109. See, e.g., L. A. Powe, Jr., *Are the People Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 894 (2005); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675.

The political reaction to *Roe v. Wade* followed a similar pattern. In response to the Court's declaration of a right to abortion, Alabama, Tennessee, and West Virginia all adopted state constitutional amendments stating that there was no right to an abortion.¹¹⁰ State legislatures, too, pushed the boundaries of federal doctrine, enacting a variety of limits on abortion access, including mandatory ultrasound viewings, multiday waiting periods, and targeted regulation of abortion providers.¹¹¹ These measures were state-level attempts to limit the impact of *Roe* and narrow the protection afforded by *Planned Parenthood v. Casey*;¹¹² they were, in other words, attempts to replace court-created protections with different, electorally popular policies. They demonstrate that de-judicialization is by no means a progressive phenomenon and that this form of politics is often at odds with notions of rights as judicially enforced moral trumps on majoritarian policy preferences.

-
110. ALA. CONST. art. I, § 36.06 (“(a) This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life. (b) This state further acknowledges, declares, and affirms that it is the public policy of this state to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate. (c) Nothing in this constitution secures or protects a right to abortion or requires the funding of an abortion.”); TENN. CONST. art. I, § 36 (“Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother.”); W. VA. CONST. art. VI, § 57 (“Nothing in this Constitution secures or protects a right to abortion or requires the funding of abortion.”). After *Dobbs*, voters rejected proposed amendments in Kansas and Kentucky at the ballot box. See Laura Kusisto & Joe Barrett, *Kansas Votes to Protect Abortion Rights in State Constitution*, WALL ST. J. (Aug. 3, 2022, 1:39 AM), <https://www.wsj.com/articles/kansas-abortion-vote-results-11659440554> [<https://perma.cc/3CFW-FMUM>]; H. Con. Res. No. 5003, 2021 Reg. Sess. (Kan. 2021) (stating the proposed amendment as follows: “§ 22. Regulation of abortion. Because Kansans value both women and children, the constitution of the state of Kansas does not require government funding of abortion and does not create or secure a right to abortion. To the extent permitted by the constitution of the United States, the people, through their elected state representatives and state senators, may pass laws regarding abortion, including, but not limited to, laws that account for circumstances of pregnancy resulting from rape or incest, or circumstances of necessity to save the life of the mother”); Sharon Bernstein, *Kentucky Voters Defend Abortion Rights*, REUTERS (Nov. 9, 2022, 10:04 AM), <https://www.reuters.com/world/us/three-states-pass-initiatives-protecting-abortion-rights-2022-11-09> [<https://perma.cc/6BME-KAAL>]; H.B. 91, 2021 Reg. Sess. (Ky. 2021) (stating the proposed amendment as follows: “To protect human life, nothing in this Constitution shall be construed to secure or protect a right to abortion or require the funding of abortion”).
111. See generally Elise Andaya & Joanna Mishtal, *The Erosion of Rights to Abortion Care in the United States: A Call for a Renewed Anthropological Engagement with the Politics of Abortion*, 31 MED. ANTHROPOLOGY Q. 40 (2016) (examining legislation limiting abortion access).
112. 505 U.S. 833 (1992).

However, one lesson from examining de-judicialization efforts from very different periods in U.S. history is the recognition that struggles over the judiciary's ability to influence policy are neither new nor inherently conservative. Progressive aims have, at other times, been at odds with judicial power. When courts have advanced conservative policies, the left has used state constitutions to wrest policy choices from the judiciary.

In each of the examples we offer in this Essay, state constitutions de-judicialized a conflict by constraining the influence of a state's judiciary. State constitutions have less capacity to constrain the federal judiciary. However, they may be able to contain federal courts' policymaking power at least to some degree by pushing back against federal constitutional doctrine. This, in turn, tests the limits of these doctrines and ultimately creates conditions under which the U.S. Supreme Court may decide to step away from, or at least not step further into, a contentious policy area. Massive resistance to the Court's desegregation mandates in the middle of the twentieth century arguably had exactly this effect.¹¹³

As control of the federal judiciary changes hands, it is helpful to remember that there was a time (indeed a long time) before federal courts were associated with progressive causes. Pleas for state autonomy have, from the beginning, been linked to the maintenance of slavery and white supremacy, but the argument that states are meaningful political communities that can make consequential political choices is not inevitably or exclusively conservative.¹¹⁴ Our point is certainly not that state constitutions or the project of de-judicialization always support progressive politics. It is merely that organized groups of citizens and legislative supermajorities can deploy state constitutions to limit courts' ability to influence the outcomes of policy battles. Though we may have come to associate this tactic with conservative projects, it has also served progressive ends, especially when progressives have faced down conservative courts.

Emily Zackin, Associate Professor, Johns Hopkins University, Department of Political Science; Mila Versteeg, Professor of Law, University of Virginia School of Law.

113. Bradley W. Joondeph, *Missouri v. Jenkins and the De Facto Abandonment of Court-Enforced Desegregation*, 71 WASH. L. REV. 597, 604 (1996).

114. See generally SEAN BEIENBURG, PROGRESSIVE STATES' RIGHTS: THE FORGOTTEN HISTORY OF FEDERALISM (forthcoming 2024) (manuscript at 6) (on file with authors) (describing how Americans have deployed constitutional federalism throughout U.S. history to pursue progressive goals, not just to advance racism and white supremacy).