The State of Our Republic: State Constitutions’ Role in Creating a More Perfect Union

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The State of Our Republic: State Constitutions’ Role in Creating a More Perfect Union

submitted to
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and
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by
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Senior Thesis
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Introduction

The last amendment to the U.S. Constitution was approved in 1992. But the U.S. Constitution, though written to be amended, has proved to be virtually impossible to change. In truth, the 27th Amendment was initially proposed alongside others that ultimately formed the Bill of Rights. Remarkably, almost half a century has passed since the ratification of a modern amendment. Given the deepening political polarization in the country, the prospect of two-thirds of both the House and Senate voting to propose an amendment and then three-fourths of the states ratifying it seems extremely unlikely. It seems that, unable to adapt by amendment, the Constitution has turned against itself, relying on a brittle framework of norms to uphold and maintain American democracy.

But the United States Constitution is incomplete in itself. There is an entirely separate arena for constitutional change and progress that has been historically, politically, and academically overlooked. State constitutions present an alternative arena in which to make the necessary changes to uphold the great experiment of American democracy. State constitutions are diverse in provisions and structural arrangements, proving themselves to be laboratories to democracy dealing directly with matters of public policy, and securing distinct livelihoods and practices of each state. At a time when state constitutions are exploding into the news headlines, it is necessary to better understand state constitutions as a vehicle for hope that is more promising than winning a majority in Washington.

Modern state constitutionalism is a mechanism of change through both reinterpretation and through amendment processes. State constitutions are vehicles for significant change and progress even as Washington becomes increasingly paralyzed with polarization. State constitutions can become models of positive government, upholding and
in institutionalizing procedures and norms that are flouted at the federal level, while also serving as mechanisms to advance progressive policy and substantive change.

This thesis situates state constitutionalism in the modern context of federal constitutional paralysis. By tracing patterns of state constitutional development, we find that states were always the fundamental setting of democracy, and there has always been critical action happening at state legislatures, in state courts, and through state constitutional change. State constitutions provide an active means to achieve progress and protect rights not federally enshrined (and thus, endangered by the political process). The use of state constitutions to prescribe ways of life, protect individual and specialized rights, and to limit local governments has always occurred, but with the current federal context, state constitutions are now more important than ever. The importance of state constitutions cannot go understated, they are the most democratic vehicles available to American citizens, with the amendment process readily accessible to citizens of seventeen states through a constitutional ballot-initiative. State constitutions, therefore, serve as bulwarks of democracy, offering citizens a direct and accessible means of shaping their governance structures and protecting their rights.

Through case studies of abortion rights and environmental protections, I explain how state constitutions have always been vehicles for change. However, today as a result of the Supreme Court overturning Roe v. Wade, and a greater call for environmental protections not acknowledged at the federal level, states and constitutions have become the primary mechanism to enshrine these rights and protections. The examination of environmental rights serves as a pertinent lens through which to comprehend the function of state constitutions in safeguarding progressive rights that have yet to find expression at the federal level. These rights and protections pertaining to the environment will find formal recognition through state court jurisprudence and the enactment of Green constitutional amendments. The case study of abortion rights underscores how state constitutions are vital in advancing progressive
rights, shaping interpretations through state supreme courts and facilitating the constitutional amendment process in instances where federal guarantees have been stripped away.

Though both of these case studies delineate the availability of state constitutional change to create the desired protections, I acknowledge that securing these rights is only temporary, and should be supported and supplemented by federal action through Supreme Court interpretation, federal laws, executive orders, or Constitutional change.

State constitutionalism is not a passing trend, this thesis serves to show that state constitutions were always vital to the functioning of American democracy. But given that democratic norms have unraveled and trust in institutions have collapsed at the federal level, state constitutions are the key to making progress and shoring up norms. Individuals ought to take advantage of and find hope in state constitutions, where they can lock in norms and rights to prevent further federal backsliding. As the nation navigates through periods of federal uncertainty, state constitutions stand as beacons of democratic governance, offering a pathway towards progress, protection of rights, and citizen engagement unavailable at the federal level.
This chapter examines several distinct strands of the vast literature on state constitutions. The first section provides a general overview of understanding state constitutions and their distinctiveness from the federal Constitution. The following section delineates the patterns of amendment and development seen across state constitutions, often in response to national political or social movements. The final section discusses new judicial federalism and examines the extent to which it has empowered states to advance social and civil progress using their own state constitutions.

**Part 1: Understanding the Distinctiveness of State Constitutions.**

The failures of the Articles of Confederation shaped the constitutional structure of modern America. The framers of the U.S. Constitution aimed to establish a republican form of government with a stronger national authority than that under the Articles of Confederation. Subsequently, they sought to integrate structural limitations into the new constitution to prevent federal government overreach. This belief in limited government stemmed from the framers’ opposition to the patterns of statism, absolutism, and totalitarianism existing in the eighteenth-century world and as a result of the oppression the colonies and early Americans felt from the rule of King George. In the Federalist Papers, specifically Federalist 51, Hamilton and Madison established the need for an American federal government that is limited by a process of checks and balances between departments and between state and federal governments. Madison argued the need for a compound republic affording a double security to the rights of the people (Madison, 1788). The scheme of limited government built into the Constitution served as a means of safeguarding liberty, since a government limited in power would be less able to exercise power in abusive or oppressive ways.
The United States Constitution is incomplete in itself. Its Tenth Amendment calls for all non-delegated powers to be reserved to the states or the people, in this phrase it affirms the system of American federalism. Because of this, whereas the federal government may exercise only those powers granted to it in the federal Constitution, state governments inherently possess all powers not ceded to the general government (Tarr, 1987). State constitutions, then serve a double context (Lutz, 1982). They must operate as a state constitution on its own for the people within its jurisdiction, while simultaneously operating within the political context defined by the Federal Constitution. These constitutions thus become political technologies used by the citizens of states to establish distinct ways of life. State constitutions are distinct in the fact that they are plenary and then must limit or restrain themselves, while also contributing to the greater democratic dialogue present in American federalism and the federal Constitution.

The length of state constitutions is both a distinguishing feature and crucial, as their extended content accommodates policies and rights not covered at the national level. The federal Constitution stands at approximately 6,000 words in length. Every state constitution is notably longer than this, and approximately three-fourths are at least twice as long, with several states having constitutions more than ten times as long (Lutz, 1982). State constitutions are longer because the U.S. Constitution is brief and delegates much authority to the states. State constitutions are also longer because they must tailor their constitution to their state, to the creation and limitation of local governments and to their constituency. The content will thus vary according to the history, needs, value commitments, and specific environment of the people involved. State constitutions have an immense impact on defining local political culture which has broad variance across all fifty documents and states (Lutz, 1982).
While the federal government’s powers are limited to those explicitly outlined in the Constitution, state constitutions are more extensive to encompass various topics and policies vital for the functionality of American democracy, which are not covered in the federal Constitution. State constitutions are consistently longer than the federal Constitution because they address regional policies, the functioning of local governments, and help prescribe a way of life. First, state constitutions must respond to many more issue areas than the federal government. State constitutions must define institutions of education, civil and criminal codes, the police power to enforce laws, regulations for the economy as it affects life within the local community and environment (Lutz, 1982). All of these state activities complete constitutional functions essential to responding to the issue areas within a state’s jurisdiction.

State constitutions are longer because they have the power to describe county and local governments, and limit their power. In doing so, state constitutions have a hand in the distribution of political power with the state. The distribution of political power structured by the constitution includes the scope of local, county, and state governmental power, the function of specific institutions in decision making processes, and the specification of the limitations on power. (Lutz, 1982). Each state had to establish procedures for creating units of local government and determine the structure and powers of those units in considerable detail (Tarr, 1998). Through state constitutions, local governments are created to be entities "whose powers are derived from and subject to the sovereign state legislature" rather than as component units of a “quasi-federal-state government” (Tarr, 1998). State constitutions must decide the election and appointment processes of state and local elected officials as well as executive officers, local officials, and judges. State legislative powers are plenary, and thus, state constitutions limit rather than grant legislative power. Within these constitutions limits are found in provisions granting power or removing limitations; expressing prohibitions on specified exercises of legislative power; provisions embodying substantive policy values or
special interest preferences; and stringent and detailed procedural requirements (Kincaid, 2013).

State constitutions are typically more extensive because they serve as a platform for states to craft a distinctive portrayal of their societal values and way of life. Alexis de Tocqueville famously depicted the US federal government by stating “the rights and duties of the governments of states [are] many and complicated, for such a government [is] involved in all the details of social life” (Tocqueville, 1966). It is within the state constitutions that governments have a direct hand in shaping the social life and political culture of its citizens. American historian Lawrence Friedman understands the power of state constitutions in revealing culture and history, "An observer with nothing in front of him but the texts of these [state] constitutions could learn a great deal about state politics, state laws, and social life in America”(Friedman, 1985). State constitutions assume the burden of what Aristotle deems to be the fundamental purpose of a constitution: to define a way of life for the people in a state.

State constitutions not only vary from the federal Constitution but also exhibit unique differences among themselves. Constitutional variance may occur by region, when they were written, or political climate as current politics and political issues are often enshrined within the document (Lutz, 1982). Though similarities may occur due to proximity and the nationalization of state constitutional politics has also contributed to interstate borrowing, as will be analyzed further in the following section, state constitutions differ greatly based on structure and arrangement. Diversity of provisions and structural arrangements are recurring characteristics of state constitutions. It is from this textual assortment that state constitutions derive their unique character (Kincaid, 2013). For example, the 1901 Alabama State Constitution which was in place until the passage of a new state constitution in 2022 was structured so that every amendment and change to it added to the constitution physically without removing any amended sections. It is also required that general referendum revenue
issues be physically written into the Constitution upon passage, as a result, the constitution was approximately 389,000 words (“State Constitution”, 2024).

State constitutions derive both distinctiveness and democratic power from their frequency of constitutional change. Literature has revealed that perhaps the most striking difference between state constitutionalism and national constitutionalism, as well as the one with the broadest implications, is the frequency of state constitutional change through amendment and revision (Tarr, 1998). On the federal level, Americans have only successfully ratified 27 of the 11,969 proposed amendments. Americans have never convened to replace the Constitution, and rarely significantly reinterpret the document (Woodward–Burns, 2021). Conversely, states have called for 411 state constitutional revision assemblies, ratified 144 different constitutions, and held 255 state constitutional conventions. Additionally, across all fifty states, there have been 11,635 amendments proposed to the current state constitutions, 7,695 which have been ratified. These state documents are also continually reinterpreted (Woodward–Burns, 2021).

Part 2: Tracing Patterns of Constitutional Development.

Historical analysis has revealed states have had a strong impact on the creation of the federal constitutional process. Most Americans forget that when our Founding Fathers met together in Philadelphia to “form a more perfect union," they had access to, and drew from, the written constitutions of thirteen independent states (See table 2.1 below for the original thirteen colonies and when their constitutions were passed. (Morey, 1893). By the time the Federal Constitution was written and ratified, two states, South Carolina and New Hampshire, had already ratified a second constitution. The primary historical significance of the first state constitutions is that they were the connecting link between the previous organic law of the colonies and the colonial charters and the subsequent organic law established for the American Federal Union (Morey, 1893). Using the thirteen state constitutions, the Founders already had
many of the quintessential building blocks to American democracy that were used to draft the U.S. Constitution at the Philadelphia Convention in 1787 (Constitutional Rights Foundation).

Table 2.1: State Constitutions Written and Ratified before the Federal Constitution.

<table>
<thead>
<tr>
<th>State</th>
<th>Written and Ratified</th>
</tr>
</thead>
<tbody>
<tr>
<td>Massachusetts</td>
<td>July, 1775</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>January, 1776</td>
</tr>
<tr>
<td>South Carolina</td>
<td>March, 1776</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>May, 1776</td>
</tr>
<tr>
<td>Connecticut</td>
<td>June, 1776</td>
</tr>
<tr>
<td>Virginia</td>
<td>June, 1776</td>
</tr>
<tr>
<td>New Jersey</td>
<td>July 3, 1776</td>
</tr>
<tr>
<td>Delaware</td>
<td>September, 1776</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>September, 1776</td>
</tr>
<tr>
<td>Maryland</td>
<td>November, 1776</td>
</tr>
<tr>
<td>North Carolina</td>
<td>December, 1776</td>
</tr>
<tr>
<td>Georgia</td>
<td>February, 1777</td>
</tr>
<tr>
<td>New York</td>
<td>April, 1777</td>
</tr>
<tr>
<td>South Carolina **</td>
<td>1778</td>
</tr>
<tr>
<td>New Hampshire**</td>
<td>1784</td>
</tr>
</tbody>
</table>

** Second State Constitution Written and Ratified
Historians contend that by 1780, the initial state constitutions, along with the controversies they engendered, had laid the groundwork for the drafting of the U.S. Constitution during the Philadelphia Convention in 1787. The states made it clear that the rule of law would control their republican governments. Most early state constitutions expressly recognized the doctrine of separation of powers, often exalting legislative power at the expense of the executive and judiciary. After the colonial states had struggled so long against powerful governors, it would have been politically impossible to make a strong governorship (Williams, 2009). Thus, it is sensibly deduced that the founders instead rested the power within the people and popular sovereignty within the legislatures. The first state constitutions were, by analyzing their main features, the direct descendants of the colonial governments, modified to the extent necessary to bring them into harmony with the republican spirit of the American people (Morey, 1893). The struggles of the colonial period that aroused a bitter jealousy of executive authority helped to establish checks and balances. The system of a double legislature originated in American colonial assemblies, and all but two (Pennsylvania and Georgia) adopted bicameral legislatures in their original state constitutions (Williams, 2009). The sovereignty of the American people was substituted for the sovereignty of the British Crown; and a written constitution took the place of a written charter as the instrument which determined the powers of the government and secured the rights of the people (Morey, 1893). Many of the states faced similar problems after the founding of their state constitutions, and the clashes over these issues reached a climax in the most momentous question of the decade: the ratification of the Federal Constitution (Williams, 2009).

Not only did the formation of the new state constitutions in 1776 establish the basic structures of the American political institution, their creation also cultivated the primary conceptions of America’s political and constitutional culture that have persisted to present (Wood, 1993). Because of ease of amendment and modification, state constitutional change has come to reflect not distinctive state political cultures, but rather the political forces
prevailing nationally at the time they were adopted (Williams, 2009). Evidence of the periods of distrust of the legislature, Jacksonian democracy, the Civil War and Reconstruction, the Industrial Revolution, the Progressive Movement, the settling of the West, bankruptcy in public finance, concern for efficient management, and many other matters are seen clearly in any modern state constitution, and the history of amendment and modification is revealing of national and regional political sentiment (Williams, 2009).

Various historical analyses of state constitutions have found states more often model amendments and constitutional change off of neighboring states instead of the federal constitution. This has created trends of state constitutional development through a process called horizontal federalism. As state constitution-makers confront the distinctive problems for which the federal constitution making experience offered no guidance, states regularly look to other states for inspiration and solutions (Walker, 1969). This diffusion of innovation has been impactful from the very outset of drawing state constitutions, and the passage of time has only increased interstate borrowing. On several occasions, constitutional innovation in one or a few states has unleashed a contagion of emulative change (Tarr, 1998). In the past century, the nationalization of state constitutional politics has also contributed to horizontal federalism and interstate constitutional borrowing. Because of these emulative patterns, historians use state constitutions to trace the political history of states and localities. As British Academic James Bryce said nearly a century ago, state constitutions are "a mine of instruction for the natural history of democratic communities" (Tarr, 1998).

Before the founding, and in the years following, states paid close attention to the successes and failures of their neighboring states. Historian William Morey recounted that “The most eventful constitution-making epoch in our history was not the year 1787 but an antecedent period extending from 1776 to 1780” (Morey, 1893). It was during this time that states found that their sister states shared similar problems and thus, these state constitutions were a better source of instruction than the federal Constitution (Tarr, 1998). And even more
so before the federal Constitution was ratified. State constitutions addressed the same goal of capturing the American energy during the surge for independence and converting it into a passionate and excited polity.

States learned from each other when writing their constitutions. After the Pennsylvania constitution of 1776 was quickly drafted and adopted, the controversies surrounding the lack of checks and balances and its radical democratic nature created a broader debate on the nature of republicanism and the distribution of authority within government (Williams Ch2, 2009). Other states, seeing the internal controversies in Pennsylvania, began to take a more deliberate and precarious nature when drafting their constitutions, using specially elected conventions and ratifications of popular sovereignty (Williams Ch2, 2009). Not all states faced all issues faced by Pennsylvania, or one other state, but various states faced many of the same challenges which stimulated a similar response. One major trend in eighteenth century constitutions was the adoption of declarations of rights. The Virginia Declaration of Rights inaugurred the practice of including separate protections for rights in state constitutions, and after its adoption, only four states failed to include a declaration of rights in their constitutions (Tarr, 1998). These declarations were the first Bills of Rights, and by 1780, the first state bills of rights together accounted for all but one of the rights that ended up later in the U. S. Bill of Rights. (TeachAmerica). As the states faced similar problems of forming constitutions and republican governments, they looked to each other and each constitution was impacted by the horizontal federalism.

Historians found in the nineteenth century that the federal and state constitutional experiences began to diverge greatly. While the federal Constitution was amended only four times during the century – once to correct the election of 1800 between Thomas Jefferson and John Adams and three more times in the aftermath of the Civil War. In contrast, campaigns for political change that the federal Constitution accommodated for without amendment—such as Jacksonian democracy, the Granger movement, and Populism—produced fundamental shifts
in state constitutions through amendment (Tarr, 1998). From 1800 to 1860, thirty-seven new state constitutions were adopted.

In the nineteenth century while the federal Constitution achieved a nearly sacred status, state constitution-makers came to view constitution making as a progressive enterprise and a reflection of the natural history of the democratic communities. Movements for constitutional reform and amendment often involved parallel state-based campaigns rather than national organization. While these amendments left much to subsequent state legislation, the Reconstruction era brought state constitutions to define in great detail the rights of African-Americans to vote, to hold office, to attend integrated schools, to contract interracial marriages, and more (Tarr, 1998). These amendments were part of the continuing interactions between state and federal governments in what is recognized to be a process called cooperative federalism.

The most striking differences among state constitutions during the nineteenth century were regional. Though Southern and Northern states generally confronted the same constitutional issues and agenda- suffrage expansion, apportionment, economic development- they adopted more or less the same constitutional solutions to those problems. The New England constitutions; however, for the most part did not revise their constitutions, excluding the occasional narrow-focused amendment, this fact underscores how the era in which a constitution is adopted crucially affects its contents (Tarr, 1998).

In the aftermath of the Civil War, the states also faced a regulatory challenge as the nation entered a new economic era in which large corporations wielded significant economic and political power. In the West, state constitution-makers adopted antimonopoly provisions or equality guarantees designed to safeguard the majority from minority privilege and to curtail the abuse of corporate power (Tarr, 1998). Colorado, Idaho, Utah, and Wyoming all adopted women's suffrage in the last decade of the nineteenth century, the latter two by including woman suffrage in their original constitutions, as their constitutions were being
written at the time when women’s suffrage was a national conversation (Tarr, 1998). The constitutionalization of national politics into state constitutions occurred in part because of the timing of the constitutions’ drafting and in part because of the work interest groups did in advancing amendments and policies across a region of states.

The beginning of the twentieth century saw relative infrequency of state constitutional revision: only twelve states revised their constitutions from 1901 to 1997, although five states did adopt their first—and only—constitutions during the century (Tarr, 1998). As the expansion of federal authority altered the relationship between nation and states, the significance of state regulation and policy reduced significantly. However, states did see success in positive rights-provisions in the late half of the century. Every state constitution written from 1959 to the present committed the state to protection of the environment and six states have amended their constitutions to do so (Tarr, 1998). The success of positive-right provisions signaled a reorientation of state policy, as the latter half of the century say constitutional initiatives shift away from questions of governmental structure, responsiveness, and expense to questions of substantive policy. Highly controversial economic and social issues avoided legislatures by instead turning to the state amendment process, often through popular referendum. Despite small amounts of revision in the twentieth century, one of the most heralded constitutional developments occurred: judges’ increased reliance on state declarations of rights to secure rights unavailable under the federal Constitution. The increasingly conservative direction of the U.S. Supreme Court under Chief Justice Rehnquist promoted an increased reliance on state constitutions, especially where distinctive state provisions promise a prospect of success (Tarr, 1998). This trend, beginning in the 1970s, is a phenomenon commonly known as the new judicial federalism, and is the trend that will dictate the power and frequency of state constitutional development.

The evolution of American federalism greatly reveals the relationship between federal and state governments. At the founding, the United States operated under Dual Federalism, in
which the Federal and state governments occupied “separate spheres of influence” (Corwin, 1950). Under this theory of Dual Federalism, it was believed that the federal government could only operate based on those items listed in the U.S. Constitution. States thus possessed a large amount of reserved or plenary powers. Growth of government and during the Great Depression caused the federal government to have a more expansive role. The growing role of the federal government led to Cooperative Federalism, which offers a vision of independent governments working together to implement federal policy (Hills, 1998). Cooperative Federalism created a deepening coordination between the states and federal government, but it also left a nationalization of politics that is still seen today.

While the federal government initially held the majority of power in Cooperative Federalism, the balance gradually shifted, ultimately restoring states to their traditional role as the default setting of American democracy. New Federalism was a policy decentralizing power from the federal government to state and local governments. This new model of federalism aimed to restore some of the autonomy and power individual states had lost to the federal government as a result of President Roosevelt’s New Deal policies and Cooperative Federalism (Walker, 1995). Through devolution, New Federalism involved the federal government providing block grants to the states to resolve a social issue. The federal government monitors the outcomes but provides broad discretion to the states for how programs are implemented. The modern form of federalism was coined by Professor Frank J. Thompson, Compensatory Federalism describes increased activity by state governments to make up for a federal role diminished by inactivity (Thompson, 2008). Compensatory Federalism calls on states to act despite federal inaction, and states can do so on various policies from individual rights to addressing the issue of climate governance (Derthick, 2010). By tracing the patterns of American federalism, it can be seen that state governance is not only important in the modern model of Compensatory Federalism, but state governments have always been crucial institutions in American democracy and development.

Much of recent state constitutional research focuses on New Judicial Federalism. The shift to New Judicial Federalism occurred in the late twentieth century, with state courts increasingly taking on a significant role in shaping state constitutional development by drawing upon state declarations of rights to afford broader protections for rights than those offered by the federal Constitution. Historians and constitutional law scholars agree that prominence of state constitutions skyrocketed with the advent of the New Judicial Federalism. The New Judicial Federalism is a rediscovery of state constitutions. Prior to the selective incorporation of the federal Bill of Rights into the 14th amendment by the Supreme Court in the late nineteenth century, the only constitutional rights guarantees applicable against the states were in the constitutions (Williams, 2009). When the Supreme Court began selective incorporation, it made most of its provisions and rulings binding against the states and the prominence of rulings on rights based on state constitutions greatly diminished. As aforementioned in the previous section, during the early 1900s, the modification of state constitutions was not prevalent, and nor was meaningful interpretation. It was not until the 1970s that state constitutional interpretation became meaningful again.

The importance of state constitutions and their content was emphasized by how they were interpreted and used, distinct from the federal Constitution, in state supreme courts. The Warren Court, led by Chief Justice Earl Warren from 1953 to 1969, was known for its significant judicial activism, particularly for promoting a more expansive understanding of constitutional rights and liberties. After the activism of the Warren Court, states and activists looked for alternatives to the relative conservatism of the Burger Court which exhibited a more cautious and restrained approach to these issues (Tarr, 2022). The Burger Court often favored states’ rights over federal intervention and showed reluctance to expand constitutional protections beyond what was explicitly stated in the text, and after the activism of the Warren Court,
activists looked for other avenues to make progress using the Courts. The 1972 California case *People v. Anderson*, is the case that set a precedent for state courts to establish the ability of state constitutions to grant rights greater than the federal minimum (Miller, 2015). In this case, the court established that capital punishment is considered impermissibly ‘cruel or unusual,’ raising the national standard of both ‘cruel and unusual’ (Williams, 2009). It was primarily criminal procedure cases in the 1970s that both resulted from and further stimulated the insight that state courts could in fact disagree with the Supreme Court that declined to recognize federal constitutional rights. However, once some state courts pioneered such state constitutional activism, their example encouraged other state courts to follow their lead. In interpreting state constitutional provisions, state judges regularly inquire into how sister courts, both state and federal, have interpreted similar provisions in a process of horizontal federalism (Tarr, 1998). The opinions of these sister courts are a prime source of constitutional doctrine, and their rulings often serve as persuasive precedent, allowing other states to both begin the practice of reinforcing rights based on state constitutional rights provisions and allowing other states to mirror their constitutional arguments to secure said rights for their own state as well.

The timely encouragement from Supreme Court Justices played a crucial role in fostering the emergence of the New Judicial Federalism. Endorsing the New Judicial Federalism, Justice Brennan stated that “[s]tate constitutions, too, are a font of individual liberties” and cautioned that “[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law” (Tarr 2022). The Supreme Court upheld Justice Brennan’s sentiment, in *Pruneyard Shopping Center v. Robins* a unanimous Supreme Court endorsed state courts’ reliance on their own constitutions to extend rights protections, noting that its rulings under the Federal Constitution did not “limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expensive than those conferred by the Federal
Constitution” (Pruneyard v. Robins, 1980). And again in Michigan v. Long, the Supreme Court recognized “[i]t is fundamental that state courts be left free and unfettered by [the Supreme Court] in interpreting their state constitutions (Michigan v. Long, 1983). In the decade after the emergence of the New Judicial Federalism, the Supreme Court affirmed that reliance on state constitutions was both a valid and important aspect of American federalism.

Since the emergence of the New Judicial Federalism, state judges increasingly have opportunities to rule on and advance the constitutional provisional rights of their states’ citizens based on their respective constitution. Whereas from 1950 to 1969 state courts in only ten cases relied on state guarantees to afford greater protection than was available under the Federal Constitution, from 1970 to 1986 state courts did so in over three hundred cases (Tarr, 2022). The New Judicial Federalism is understood to be the signature development of state constitutions law over the past few decades, and because of it, presently, state courts are seeing opportunities to rule on cases based on state constitutional rights provisions for abortion, capital punishment, environmental rights, exclusionary zoning, freedom of speech, separation of church and state, and sexual relations and same-sex marriages. As Wisconsin Chief Justice Shirley Abrahamson remarked, “Just as it seems strange to lawyers in 1990s that in the early part of the twentieth century the federal Bill of Rights did not extend to protection of individuals against the state government, future generations may look back and wonder why state courts have ignored their state constitutions for so long” (Williams, 2009). The maturation of the New Judicial Federalism has granted states a greater part in the dialogue of individual rights and policy-oriented litigation rooted in state constitutions.

The constitutional dialogue of the United States is made of fifty-one constitutions, not just the federal constitution. However, there is much debate between constitutional scholars on how to situate conversations and interpretations of state constitutions within the systems of horizontal and cooperative federalism. This debate is evidence of the maturation of The New Judicial Federalism over the past few generations, and the greater focus of constitutional
interpretation conversation on legitimacy and methodology. Because state constitutional interpretation is situated in the context of “a universe of constitutions,” this raises the question whether a single interpretive approach is appropriate for the disparate provisions (Tarr, 1998). Oftentimes, judges and scholars analyze both their state constitution and the federal constitution, though order of analysis is important to the legitimacy and methodology of the court’s ruling. Justice Robert Utter of the Supreme Court of Washington has advocated for a dual sovereignty technique in which both constitutions are analyzed, allowing judges to rule on both state and federal grounds (Utter, 1985).

Evidence of the maturation of the New Judicial Federalism is that many state courts, even after independently analyzing their state constitutional claims, decide to follow the Supreme Court’s federal constitutional rights analyses (Latzer, 1991). Overwhelmingly, scholars now agree that a state supreme court has the duty, in interpreting the supreme law of the state, to adopt a reasoned interpretation of its own constitution despite what the U.S. Supreme Court has said when interpreting a different constitution under different institutional circumstances (Williams, 2009). This has created a newfound dynamism in constitutional interpretation (Woodward-Burns, 2021).

The doctrine that state courts should interpret their own state constitutions where appropriate to supplement rights guaranteed by the federal constitution is no longer in dispute. In recent years, the Supreme Court, as well as its individual justices, have reminded state courts not only of their rights but also of their responsibilities to interpret their own state constitutions. And where state courts view those provisions afford greater safeguards than the Supreme Court would find, to make plain the grounds for state decisions so as to avoid unnecessary Supreme Court review (Williams, 2009).
Conclusion

While the federal Constitution is comparatively better known, state constitutions are just as vital for the functioning of American democracy. The original state constitutions created the framework for the U.S. Constitution. State constitutions continue to be hubs of policy and innovation. With their work diffusing both to neighboring states and up to the federal level. State constitutional development is an important historical tool that captures the sentiments and political energies of citizens as they amend and reform their state constitutions. The development of American federalism also tells the story of the interactions between the federal and state governments throughout different presidential administrations, political eras, and periods of war. Much of the work on state constitutions study them in the shadow of the federal constitution: what makes them distinct, why they are longer and easier to amend.

State constitutionalism has greatly developed through the advent of new judicial federalism. This judicial development emphasizes the importance of state courts and state constitutions, allowing judges to interpret and actualize the unique rights that state constitutions grant. State constitutional interpretation is now a standard practice nationwide. Through interpretation of the positive rights states constitution grant, state supreme courts have been able to enshrine greater rights than even their state constitutional text may provide. Many state courts have found grounds for abortion rights within privacy or due process protections, and other states have advanced climate protections as a result of environmental clauses in state constitutions. The interpretation of state constitutions is a powerful tool for government reform.
State Constitutions: The Beacon of Hope in a Sea of Federal Dysfunction

Today, distrust and disappointment in the American system of governance is not uncommon. With partisan polarization and the fraying of constitutional norms contributing to federal gridlock, Americans are rightfully disenfranchised with their national government. However, Americans are not at the mercy of the polarized dysfunction of Washington. A crucial part of the American system of federalism is the state governments, and their constitutions. Hope for progressive change is found within state constitutions more readily than winning a supermajority in Washington. And while norms and procedures are being flouted federally, they are being upheld and enshrined within the states. States and their constitutions have served, and continued to serve, as models of positive governance. They also operate as hubs of democracy in which citizens have the power to have a continual conversation about democracy by regularly reforming their constitutions for the progress they desire.

This chapter will emphasize the limitations of federal political institutions and the resulting reliance on norms to operate effectively. While Washington and the federal government have become more and more paralyzed due to hyperpolarization, trust in federal institutions collapsing, and democratic norms unraveling, hope for effective change lies in reforming state constitutions, more so than winning a majority in Washington, or overcoming the filibuster in the Senate. State constitutions have always been active hubs of democracy; however, now more than ever, they are the most viable option to enact progressive change.

The Problem: Paralysis of the Federal Constitution

The United States Federal Constitution is notoriously hard to amend. The threshold for amending the constitution requires a two-thirds vote in both the House and Senate, then ratification by three-quarters of the states. The other option is Congress calling a convention to propose amendments upon application by two-thirds of the states, though this threshold
has never been reached, and scholars are unsure how a convention would function in practice. The Founding Fathers believed that a long and complicated amendment process would help create stability in the United States and a Constitution that would endure for ages to come. Of the roughly 12,000 amendments proposed since the Constitutional Convention, only 33 have gone to the states for ratification, and just 27 have made it all the way into the Constitution (Desilver, 2018). Congress has not managed to propose a successful amendment since 1971, more than 50 years ago (Sachs, 2022). The 26th Amendment, expanding voting rights to all 18-year-olds, was also the last meaningful change to the United States Constitution, as gridlock and polarization have prevented any meaningful and substantive change in the last half century.

Though no longer a readily available option, Constitutional amendment previously proved a viable pathway for institutional and progressive change. In the past two centuries, only three brief periods of constitutional change stand out (Wegman, 2021). The 1860s, when the post-Civil War amendments banned slavery, made Black people citizens, and prohibited racial discrimination in voting. The second period of progress occurred in the 1910s when amendments established a federal income tax, a direct vote for Senators and the enfranchisement of women. Finally, the 1960s, when the civil rights movement led to democratic reforms began the painful but largely peaceful process of reversing two centuries of political and economic discrimination against African Americans by abolishing the poll tax, giving presidential electors to Washington, D.C., and allowing 18-year-olds to vote. The 26th Amendment was the fourth amendment in the span of a decade, three of which expanded voting rights. These amendments were a burst of democratic reform nearly unequaled in the nation’s history (Wegman, 2021). With the exception of Prohibition and its revocation, the main thrust of the successful amendments has been to protect or expand the rights already guaranteed in the Constitution and the Bill of Rights. These institutional reforms had been long promised to Americans, and thus were all part of the natural process of constitutional
evolution. Today, Americans rightly consider them to be as central to the functioning of the Constitution and nation as the original words written down by the founders in 1787.

Recent failed efforts to amend the Constitution to include the Equal Rights Amendment shows how difficult the amendment process is. Even though the Equal Rights Amendment (ERA) is an expansion of rights given in the Constitution and Bill of Rights, similar to the periods of progressive amendments adopted and mentioned above, the ERA failed to become institutionalized. The Amendment, which would ban discrimination on the basis of sex, passed Congress in the early 1970s and picked up its 38th state in 2020. However, it will likely never be adopted because it exceeded the time limit set out in the original bill and because several states that approved it later rescinded their ratification (Wegman, 2021). Despite the lack of an amendment, sex-based discrimination has been banned both through statute and normatively. This highlights the manner in which states have been influenced by federal policies and movements to enshrine rights and protections.

To remain a living document, the Constitution needs to be adaptable to changing times, perspectives and conditions. To do this, the American system of constitutional governance and political regime is highly reliant on norms and standards of behavior. Changes in governing principles and institutions at the national level have taken place primarily outside of formal processes. These informal processes include presidential or congressional actions or through decisions of the U.S. Supreme Court, a body that has been described as a continuing constitutional convention (Dinan, 2009). Much that is “constitutional” in the system of American governance is found in norms of political behavior — the practices and rules of conduct that help create the political regime, are mostly informal in nature, and primarily enforced through political sanctions rather than law (Tamir, 2021). Specifically, constitutional norms refer to the legally enforceable principles that govern the conduct of public officials, the structure and function of government, and the operation of elections and campaigns.
These unwritten norms have greatly impacted the history of American constitutionalism. Constitutional norms seek to guide the actions of public officials in areas where law otherwise leaves those officials without discretion. They are “enforced by the threat of political sanctions, such as defeat in reelection, retaliation by other political institutions and actors, or the internalized sanctions of conscience” (Gould, 2021). The prominence of constitutional norms suggests that the Constitution in action is composed of, and sustained by, more than just the law on the books. Norms form a central part of the ‘constitutional order and the broader set of rules, doctrines and practices that structure political decision making in America (Ahmed, 2022). The majority of contemporary constitutional reform has been shaped through the interpretation of the Supreme Court and the preservation of constitutional norms established by both the Court’s decisions and long standing precedent. The Constitution vests a great deal of discretion in government officials and branches, and in the nearly 250 year experiment called American Democracy, consistent constitutional norms have become absolutely critical to the functioning and promise of the United States Government.

Constitutional norms have become central to nearly every aspect of politics and governance in the United States. Norms are now recognized by scholars to play an important role in supplementing the written Constitution and as part of the “small-c” component that operates alongside it (Tamir, 2021). Norms structure the internal organization of each branch and interbranch relations, and how officials behave while running for and holding public office. Norms are central to the functioning of the Executive Branch. Norms structure internal White House decision making, providing, for example, that the President receives briefings on national security matters (Gould, 2021). Norms are similarly pervasive in Congress. Norms dictate that members of Congress take part in committee hearings and floor votes, meet with interest groups and other stakeholders, and provide constituent services (Gould, 2021). Norms also heavily influence the operation of courts. The particular modalities of constitutional interpretation are not enshrined in law, but rather are best understood to be norms around
which interpretive methods are acceptable. They also place some modes of reasoning outside
the bounds of permissible constitutional argument, promote Supreme Court Justice ethics and
prevent them from publicly endorsing candidates or from deciding cases in which they have a
conflict of interest (Gould, 2021). Norms also uphold the practice of *stare decisis*, a critical
practice for the functioning American jurisprudence. Norms shape interbranch relations. It is
norms that dictate that the House speaker invites the President to share a State of the Union,
and norms also prevent the Supreme Court from being packed. These norms set a collective
understanding of rights, dictate the processes of elected officials, and set the relationships
between different political branches.

Unwritten constitutional norms in the United States government affect or expand the
understanding of the enforcement of certain fundamental rights, in regard to judicial review of
legislation. When considering the debate about abortion rights in cases like *Roe v. Wade*, it is
ture that some defenders of the decision in *Roe* insist that its holding is dictated by the terms of
the written Constitution, and some of its opponents oppose the decision because they think the
constitutional text contains or implies no such thing. But much of the debate proceeds on the
basis of fundamental norms about liberty and privacy that all sides admit have only a dubious
relation to the constitutional text, but have constitutional force nonetheless (Waldron, 2006).
Courts occasionally acknowledge constitutional norms and actively uphold them during legal
proceedings, as extensively documented in previous literature. These norms are also
understood to potentially account for some changes in the Constitution, even though these
“informal amendments” are achieved beyond the processes envisioned by Article V (Tamir,
2021). Such constitutional norms influence Supreme Court decisions, judicial review, and thus,
what Congress can and cannot effectuate. Despite having no textual grounding, norms dictate
the operations and functions of much of American governance.

Norms occupy a liminal, but powerful position. They are not found in the venerated text
of "The United States Constitution." But without them, the system of American government
would not function. There is no mention in the Constitution of the party system, or of primary elections, yet these are indispensable features of America’s political structure. There is no text in the Constitution that members of the electoral college should vote for the presidential candidate supported by the voters in their state; yet clearly this operates as a convention and as an important feature of the normative election procedure to this crucial office. (Waldron, 2006). Though they are much trickier to enforce and maintain overtime, American constitutional norms are embedded in and hold up the political regime.

The importance of constitutional norms cannot go understated. They serve “as the soft guardrails of American democracy, helping it avoid the kind of partisan fight to the death that has destroyed democracies elsewhere in the world” (Gould, 2021). However, because they are not codified, threats or erosion of norms will occur by those looking to take more power or protect it. Threats to these constitutional norms naturally give rise to the question of preservation. Political and constitutional norms experience radical and rapid transformation if actors refuse to adhere to the status quo. Because there is no defined set of institutions where norms are filtered through and no one to enforce them, the mere fact that a breach has occurred, and the relevant societal behavior has been altered may necessitate a norm’s demise (Tamir, 2021). The nonenforcement of norms cannot be explained or treated the same way as the nonenforcement of statutory and legal rules.

Norm violations are not new to the current nature of the American political system. Allegations of norm violations were a staple of the Franklin Roosevelt and Richard Nixon administrations, for example. It is no coincidence that, although presidential term limits were proposed over two hundred times between the Founding and the ratification of the Twenty-Second Amendment, there was never enough political support to codify the norm until after President Roosevelt’s unprecedented twelve years in office. A generation later, in response to President Richard Nixon’s actions, Congress codified norms on topics ranging from ethics in government to the federal budget process (Gould, 2021). Speaking on the
practice of norms, Representative Jimmy Gomez stated, “A lot of things over time in our history of government were custom and practice and somebody came along and broke it, and then we passed a law to fix it” (Gould, 2021). If a norm is threatened— if it has been, is being, or may soon be violated—it might be secured by enacting its content into law. The codification of norms often does not happen until after they are broken. It may have been possible that the twenty-second amendment would have never passed if Roosevelt had never held three terms. Constitutional norms are perpetually in flux because of the actions of government officials and the branches of government. As it is periodically rediscovered that U.S. constitutional law is heavily based on conventions and unwritten political norms, it is also simultaneously rediscovered that these norms are subject to radical revision (Chafetz, 208). Codification can secure against destruction, decomposition, or displacement of norms. Amendments and statutory action can help heal the body politic by fortifying the norms that are necessary for the maintenance and protection of the American Government.

The twenty-first century has become an era of fraying constitutional norms. Norms that have long dictated the conduct of public officials have in recent years been violated by the White House, in Congress, and in the states. Constitutional norms in the United States are weaker now than they were a decade ago (Gould, 2021). The stakes of these recent changes are high, given that some norm erosion may be linked to prospects of democratic deconsolidation or backsliding.

In Congress, the decomposition of bipartisanship as a normative standard of behavior has created an increase of toxic partisanship and ineffective gridlock. The Gingrich Revolution in the House of Representatives turned partisan battles into near blood sport, intensifying partisan partisanship (Chafetz, 2018). Partisan polarization has spoiled democratic norms by encouraging partisans to oppose particular constitutional protections when their party is in power but support them when their party is out of power, via a cue-taking mechanism and by generating biases that motivate voters to restrict the other party’s rights (Kingzette, 2021).
As norm violations accumulate, there are two potential outcomes: either the norm is formally codified to deter further transgressions, or a threshold is reached where the norm loses its efficacy, leading governance to proceed without it. Rather than merely regarding these infractions as breaches of the norm while the norm remains intact, the threshold marks a point where governance advances independently from the norm (Whittington, 2021). This has arguably occurred with the allowance of partisan polarization and extreme partisanship by powerful elites since the Gingrich Revolution in the House. The polarization around norms harkens back to classic understandings of Dahl (1956), Lipset (1960), and others who warn about the ways in which cleavages undermine democratic governance, though none of them foresaw, in that era of partisan quiescence, that partisanship would become such a divide (Kingzette, 2021). The simultaneous violation of constitutional norms with the increasing effects of partisan polarization has prevented codification of the constitutional norms that have become enmeshed with partisan politics.

The decomposition of norms has allowed for partisan polarization to influence the Supreme Court. In a senate hearing motivated by lavish vacations and land deals not disclosed by two of the court’s conservative Justices, Clarence Thomas and Neil Gorsuch, America discovered that the highest standards of ethics understood to govern the Supreme Court were norms in the process of decay. "The highest court in the land shouldn't have the lowest ethical standards," said Senate Judiciary Chairman Sen. Dick Durbin, D-Ill., at a hearing on ethics oversight at the high court. "That reality is driving a crisis in public confidence in the Supreme Court. The status quo must change" (Montanaro, 2023). Durbin’s claim in the declining trust and confidence in the Court was accurate, as a recent poll found that sixty-two percent of Americans said they have not very much or no confidence in the Supreme Court, the lowest recorded statistic in five years (Montanaro, 2023). In the place where laws are made and judged, normative and ethical decay has catalyzed mistrust from the body politic, and furthered the recent ineffectiveness of federal institutions.
There has been no greater recent period of norm destruction in American governance than the presidency of Donald Trump. For four years, President Trump was “a norm-busting president without parallel in American history” (Gould, 2021). By dismissing concerns about Russian interference in the U.S. election, refusing to disclose his tax returns, openly pursuing policies that serve his family’s financial interests, vilifying Hispanic and Muslim Americans, propagating conspiracy theories, relentlessly lying to the press, and seeking to undermine American trust in electoral processes, the president has left practically no norm of democratic governance unviolated (Acemoglu, 2020). Democracies depend on candidates and parties affirming the legitimacy of election results even when they lose (Clayton, 2021). This norm was challenged when former president Trump repeatedly attacked the integrity of the 2020 U.S. election, and the norm, as well as the American electoral system, continue to be threatened by the upcoming 2024 presidential election, with President Trump once again on the ballot. Although there was no credible evidence of widespread voter fraud in the United States, Trump’s claims are an especially egregious violation of democratic norms because they target confidence in free and fair elections, which is central to citizens’ understanding of democracy (Clayton, 2021). If losers see elections as illegitimate and no longer respect their outcome, the democratic compact can unwind. The rhetoric and action of political elites have a great impact on the norms that govern systems of governance and the trust individuals hold in their government.

Two governing norms are thought to be critical to the stability of liberal democracy: toleration of the legitimacy of the opposition and forbearance from using state power to tilt the playing field against political rivals. In How Democracies Die, renowned political scientists Steven Levitsky and Daniel Ziblatt identify these norms in particular as the key to maintenance of American democracy and the norms most threatened in the current moment (Levitsky, 2018). The erosion of these critical norms has hastened the erosion of American democracy. The bill of particulars in violating these two norms is long and has been well-documented.
These actions not only weakened the institutions that are supposed to restrain the president but also further polarized the U.S. electorate, creating a constituency that unconditionally supports Trump out of fear that the Democrats will take power. President Trump has set about destroying the institutions themselves, one oversight mechanism at a time. His actions, and the subsequent erosion of democratic norms, has destroyed many Americans’ trust in their country’s democratic institutions (Acemoglu, 2020).

The decay of American constitutional and democratic norms have contributed to a growing sense of mistrust in American government. A strong belief in democracy has always been a core component of the American creed (Tocqueville, 1835). While Americans still support democracy in the abstract, scholars have recently sounded alarm bells about the decline in support for democratic norms – “the ‘fundamental values’ or ‘rules of the game’ considered essential for constitutional government.” If these norms erode, there is a serious risk of democratic backsliding or failure (Kingszette, 2021). A 2022 poll found that more Americans than ever believe that U.S. democracy is “more at risk” now than it was even after the Capitol insurrection of January 6th, 2021 (Rose, 2022). Two in three Americans believe that their democracy is “in crisis and at risk of failing” (Rose, 2022). The distrust is not specific to one government branch, as nearly eight in ten Americans disapprove of the job of Congress, and the Supreme Court is facing the lowest level of confidence ever recorded (Montanaro, 2023). The vast majority of Americans do not support democratic norm violations and reject the use of political violence, but the actions of their elected representatives are less than fully committed to the democracy they are elected to promote (Holliday, 2024). The erosion of norms by political elites has caused a growing sense of distrust and overall fragility of American institutions.

In the face of these threats to constitutional norms, codification of constitutional norms may provide a means to regain trust and enshrine the democratic practices and standards that have maintained American democracy. Violations of norms by President Trump
and his Administration prompted a revival of interest in codifying constitutional norms. Just as their decline is due to political causes, their restoration must also be political, requiring both elite cooperation and popular mobilization (Ahmed, 2022). Codification efforts must first overcome a set of practical and political hurdles. Even if a norm’s existence is recognized, there may be disagreement about its precise contours, and it will seem unnecessary to tackle this disagreement before the norm is threatened (Gould, 2021). Calls for codification are also closely linked to the state of trust in contemporary U.S. politics. Scholars have long argued that there is a link between law and mistrust, with law stepping in to fill a void when social trust is low and perhaps even further eroding whatever trust exists (Gould, 2021). Even though low levels of trust that characterize the current climate of American politics may make codification seem appealing, it is important to reconcile that codification alone, cannot create a more trust-filled politics.

The ability to codify democratic norms are threatened by the same powers eroding them. The paradigmatic codification involves passing a statute that enacts the norm’s substance into law. Other means such as constitutional amendments, administrative regulations, and cameral rules can also codify a norm (Gould, 2021). Previous efforts to codify norms helped heal the body politic by fortifying the norms that in turn built trust in democratic institutions (Acemoglu, 2020). However, due to current levels of partisan polarization it is highly unlikely that statutory or constitutional change is available as a mechanism for codification. As previously explored, the process of amending the Federal Constitution is not presently viable for constitutional change, and statutory codification may not survive judicial review, subsequent congressional sessions, or executive actions.

With the federal government paralyzed from effectuating change and many constitutional norms that stand as pillars to American federalism at risk, it is not surprising that everyday Americans have become disenfranchised from their federal government.
Ultimately, the vitality of American democracy hinges greatly on elected officials' willingness to sacrifice democratic principles and norms for their own political gain. Their choices in this regard will profoundly influence the health of American democracy (Holliday, 2024). Any account of American constitutional practices cannot end with just politics or statute and must also include constitutional and democratic norms. Their prominence cannot be understated, and greatly affect every branch and interbranch relationships. What is further unique about the current moment in this political era is that an important and increasingly growing subset of these norms appears to be exceedingly fragile and under persistent attack. The erosion of norms has resulted in a growing sense of mistrust within the body politic and a call for the codification of norms to promote a functional and progressive government. Americans have an intense and growing sense of distrust in their federal government, they are regularly exposed to American political elites increasingly exhibit an antidemocratic posture. Despite this, Americans still overwhelmingly support democratic norms despite high levels of partisan polarization (Holliday, 2024). Americans need to see the substantive progress they desire as well as restoration of critical norms in order to restore a sense of trust in American constitutional governance.

**The Solution: State Constitutions**

As the norms governing American democracy and its institutions teeter on the edge of uncertainty, and with a growing discontent among many Americans regarding the stagnation at the federal level, the prospect of immediate transformative change appears unachievable. In this climate, the pursuit of significant shifts in policy or governance remains impractical in the short term, compelling a reassessment of available approaches towards fostering progress. The key to the progress Americans desire lies in the most overlooked powers of American democracy: state governments. In 1988, a national poll found that only 44% of respondents knew their state had its own constitution (Kincaid, 2014). Thirty years later, this statistic has
stayed consistent (Rosen, 2018). Despite their little-known stature compared to the Federal Constitution, state constitutions are now exploding into the headlines. State Constitutions offer an unsung opportunity for progress. They can alter state governance, achieve objectives not attainable in the national arena, influence federal policy-making, and enshrine rights for their constituents not granted at the federal level. States collect an estimated $1.7 trillion in tax dollars and spend about $1.9 trillion on everything from education to health care, impacting nearly every aspect of living in American political society and directly benefiting individuals more so than Washington (Rosen, 2018). Despite this, state constitutions as a vehicle for progress are regularly overlooked and overshadowed by the federal Constitution.

State governments and their constitutions fulfill the American promise of a more perfect union. With democratic norms unraveling at the federal level, and trust in those institutions collapsing, states are more important now than ever to enshrine individual rights, norms, and the many promises that America makes to its citizens. The states were always prominent in the system of American government. The federal constitution is incomplete in itself as a governing document, it relies on the state governments to function within it and serves to delegate a limited set of powers to the national government (Williams, 2009). State constitutions serve to structure a subnational system of governance, limiting the plenary authority retained by state governments when the Union was first created, and giving citizens a direct avenue to democracy and reform.

The states are the fundamental polities of the American federation. At the time of America’s founding, the Founding Fathers, specifically James Madison, stressed the nature of the United States as a compound republic, one in which the centralization and decentralization of governments would coexist, allowing independence to individuals through states as distinct political societies (Derthick, 2001). States have retained large roles in the development of the United States. State courts created the framework of law within which American capitalism developed, family relations were structured, and property rights were defined. State
legislatures promoted and subsidized economic development by creating the infrastructure America was built on and by institutionalizing public education for all. And state executives served as directly elected executives, one much closer to the issues and constituents at home compared to the President or the Congress women and men of Washington. State governments are crucial for the balance of federal government, and without them the American federal system would be in complete disarray.

State constitutions are hubs of democracy legitimized by the direct democratic processes that create them. They must be ratified by the electorate, and are therefore a “voice of the people” (Williams, 2009). The state constitution thus derives its force not from the convention that framed it, but rather from the populations that ratified it and its intent to be a document for the people. This democratic origin gives the document further effect and power. From the founding, the formation of state constitutions established the basic structures of political institutions: their creation also brought forth the dominant conceptions of America’s political and constitutional culture that has persisted to the present day (Bakken, 1993). Insofar as states are laboratories of democracy, their policies and constitutions play a central role in state and local governance, as well as national policy debate (Kincaid, 2016). States offer a smaller less consequential arena to adopt new policies, and one that is not inhibited by toxic partisan divides. State constitutions and governments are the purest forms of direct democracy in the system of American federalism. They derive their legitimacy in the federal and political dialogue from these democratic processes and their direct involvement with their constituents.

A state constitution is more accountable and amenable to its constituents, allowing it to be a reliable vehicle for progress. Unlike the federal constitution, Americans rewrite and amend their state constitutions regularly. State governments and their constitutions derive legitimacy for the ease of amendment and reformation. Additionally, because of the ease of amendment the state government is more accountable and reflective to their constituents.
Because of the relative ease of amendment and reformation, the increased ability of state constitution innovation allows states to exist as important laboratories of American democracy.

State constitutional amendment and interpretation are meaningful ways to expand and extend rights to constituents. The relative accessibility of state constitutional amendment processes leads groups and officials at the state level to view the amendment process as a feasible way of adjusting the level of protection for various rights. As a result, rights-related amendments are considered and approved regularly, and for a variety of purposes. In the past few decades, supporters of crime victims’ rights, religious freedom, and search-and-seizure protections, among other rights, have sought to expand protection of these rights by passing amendments that add or revise state constitutional provisions (Dinan, 2023). The vast majority of states also provide a relatively easy path to ratifying amendments, either through a simple majority of voters approving a legislatively-referred or citizen-initiated amendment.

Legislatively-referred initiatives seeking to amend the state constitution is a powerful option for change across the United States. This option underscores the importance of local elections. State legislators draft language for the initiative, and introduce it to the legislature, similar to how they might introduce language for bills. Both chambers of state legislatures must vote to approve the language before it is placed on a ballot. The threshold for approving a ballot initiative in the state legislatures differs from state to state. In every state except Delaware, initiatives seeking to amend a state’s constitution must be placed before the voters and cannot be enacted without voter approval (Felix, 2024). In some states, a simple majority is necessary, but approval from the necessary population varies by state.

A more powerful method for constitutional amendment is through citizen-initiated proposals. Citizens are allowed to propose constitutional amendments in seventeen states (see Figure 3.1) (Felix, 2024). Particularities vary by state, but generally a citizen group submits a draft of the proposed amendment and ballot title to a government official, typically the
Secretary of State. If the petition is approved, the group must gather signatures in support of their measure, often with distribution requirements across the state’s congressional districts, and submit their support signatures for validation. If enough signatures are deemed valid, the measure is cleared to be on the ballot, where it must receive anywhere from a simple majority to 60% of the vote in favor to be approved. This amendment process may be the most prominent example of grassroots democracy available to American citizens.

Figure 3.1: States that Allow Citizen-Initiated Amendments on the Ballot (Felix, 2024).
Citizen-initiated constitutional amendments are the most democratic tool available to enact permanent policy change. With this process, citizens create meaningful institutional change without relying on elected officials. These amendments garner lots of power from their grassroots creation and broad citizen support. Unfortunately, not every state has a pathway for it. For example, in twelve states that currently ban abortion or have early gestational limits in effect, there is no process for a citizen-initiated ballot measure (Felix, 2024). These states must rely on their state legislatures. State constitutions and their ease of amendment help to underscore the importance of local elections. In these states, absent legislative action, the only avenue to secure the legality of abortion, enshrine environmental rights into state constitutions, or make other meaningful change, state citizens must elect policymakers and legislators that align with their belief.

State constitutions provide a unique and meaningful opportunity to enshrine robust protections of positive rights that many Americans support. This is because of the different available ways citizens can amend and reform their state constitutions. The absence of any positive rights provisions in the federal Constitution should not be viewed as a definitive expression of the accumulated wisdom and experience of the American constitutional tradition; rather it is because the difficulty of amendment. Because states retain all plenary power from the federal government, Americans have written robust protections of positive rights into their state constitutions, among other changes, bringing them more closely into line with the world’s other national constitutions in terms of their length and content. It's crucial to acknowledge that state constitution makers have had more frequent chances to revise their foundational documents, thus serving as a reflection of America’s democratic history and various grassroots rights movements nationwide.

State constitutions serve as primary instruments for enshrining the positive rights that Americans expect to be protected due to their responsiveness to political needs. Because of the erosion of norms, Americans can no longer rely on their federal government to protect them,
especially without a written statutory promise. In the 1960s, prominent legal scholars began to argue that various clauses in the federal Constitution might be interpreted as securing protection for social and economic rights (Reich, 1964; Michelman, 1968). Various efforts have been made to secure federal constitutional protections for social, economic, and environmental rights, but with little success. Additionally, though the Supreme Court has read some rights into the federal Constitution, such as the right to same-sex marriage in Obergefell v. Hodges, Americans cannot rely on courts to maintain such rights as they may be later redeced, as in the right to an abortion with Roe v. Wade and Dobbs v. Jackson. Social and economic rights had gone unrecognized by drafters of the United States Constitution, but by mid-twentieth century, political and societal conditions had changed to the point that social and economic rights were now sufficiently important to be entitled to constitutional status (Dinan, 2009). Despite this, the absence of social, economic, and environmental rights in the federal Constitution is notable, especially when compared to how frequently these rights have been recognized in other countries’ constitutions and international treaties. Unlike the federal Constitution, state constitutions' relative ease of amendment allows them to capture and act on the political sentiments, movements, and frustrations, while capturing history as well.

State constitutions provide citizens with the rights and the opportunity to enshrine the rights that they advocate for. The call to codify these rights has been met with great resistance at the federal level, and with much more success at the state level. In this regard, state constitutional provisions may serve a purpose similar to the Declaration of Independence at the federal level, by setting out enduring principles that the people of a state would be committed and inspired to honor (Dinan, 2009). Peter Tomei, a participant in the Illinois convention of 1970 argued that “one of the jobs of a state constitution is to set out, not only the legal framework of government, but also to capture the hopes and aspirations of the people (Dinan, 2009). This also helps explain why state constitutions overwhelmingly enshrine more rights for their constituents, than the rights available at the federal level. Most state
constitutions contain broad grants of rights similar to the Federal Bill of Rights, followed by an accumulation of specific grants, or authorizations to act, as well as positive grant enumerations (Williams, 2009). Positive rights provisions in state constitutions give expression to the fundamental goals and values of a polity, as well as the movements and energies of historical context.

State constitutions also provide for more positive rights than the federal government through state supreme court interpretation. State high courts play an important role in interpreting positive right provisions allowing state constitutions to become ‘living’ documents. This is important for state constitutional history as state supreme court decisions capture public sentiments and interests. Through positive rights adopted into state constitutions and through the interpretation process of new judicial federalism, states recognize rights not available under the federal Constitution. Recently, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased (Brennan, 1977). These constructions are important to further enshrine citizen’s rights, that the Supreme Court does not guarantee through the Fourteenth Amendment. State constitutional history justifies interpretations that are more protective, or recognize greater rights than those available at the federal level (Williams, 2009). State constitution interpretation may be impacted by other states through horizontal federalism. As established, many states drew inspiration from other states in passing similar amendments. Similarly, state supreme courts draw on interpretations from other states. This is a very important approach where many states assign added, if not binding, authority to the judicial interpretations of the borrowed or parent provision from another state. Another closely related technique is comparing the judicial interpretation of similar constitutional provisions in other states (Williams, 2009).
State constitutions provide a strategic avenue to navigate around the autonomy of state supreme courts, potentially expanding protections for individual rights. If the state supreme court upholds something that the state’s citizens do not agree with, they can use the amendment process to overrule the decision. For example, many state supreme courts are upholding abortion bans that have been challenged. However, provisions in state constitutions may be included by amendment to overcome or even ‘overrule’ judicial interpretations of early provisions and to displace statutes. These amendments may also be added to eliminate doubt and clearly define policy. The ease of amendment of state constitutions allow for the document to be entirely receptive to the interests of its constituents, ensuring that political elites do not determine and restrict the polity.

Despite federal pressures and the reliance on norms, there is great risk in states being the primary effectuators of progressive change. There are several disadvantages to relying on states to protect individual rights. The primary disadvantage is national consistency and variability. State constitutions vary widely in their content of the rights and protections they provide. Some state constitutions may have provisions that are conducive to progressive change, while others may have more conservative or restrictive provisions. This variability can make it difficult to achieve consistent progressive outcomes across the nation. National consistency may be important because achieving meaningful progress on issues like climate change, healthcare, or income inequality often requires action at the federal level to ensure consistency and effectiveness across states.

The primary risk of relying on states to enforce and protect individual rights is that individuals will have different rights based on where they are located geographically across the United States. Inherently, this creates inequality among citizens from different states. If a citizen from Montana has thirteen individual and collective rights enshrined in their state constitution that do not appear in the federal Constitution, an citizen of Idaho with less protected rights may argue that having less rights goes against the principles of equality that
the United States rests on. This can also have important consequences for individuals such as our American military men and women who do not get to choose where they live. It would exacerbate the recruitment, retention, and deployment challenges that the military faces (U.S. FDA v. Alliance for Hippocratic Medicine; amicus). Overall, while state governments can play an important role in protecting individual rights, relying exclusively on states for this purpose can pose risks and limitations. States’ actions should be supported by the federal system and by Washington, ultimately through Federal Court interpretation, amendment, or legislation. Historically, states have typically been the first to respond to new challenges and threats, their responses are then diffused horizontally to other states, and vertically to the federal level. As laboratories of democracy, States' actions should find support from the federal system and Washington, primarily through interpretation, amendment, or legislation by Federal Courts (New State Ice Co. v. Liebmann, 1932).

Interest groups, typically conservative ones, have relied on the Tenth Amendment and the notion of “states’ rights” to fight against federal laws and regulations. In the civil rights era, some called this a “states’ rights” movement under the doctrine of “interposition” (Cohen, 2022). Similarly, proponents of overturning Roe v. Wade advocate for returning the authority over abortion regulations to the states, citing principles of federalism. They argue for a decentralized approach, emphasizing state-level regulation over federal oversight.

It is not the purpose of this paper to address the advocacy of state governments to enshrine rights and pass regulations instead of action occurring at the federal government. This paper recognizes that while state constitutions can be an important tool for advancing progressive change, they have limitations when used in isolation. However, considering the paralysis and polarized dysfunction of the federal government and barriers to amending the Federal Constitution, state constitutions offer a pathway for timely action and progress.

Despite over two hundred years of national development, states and their constitutions remain absolutely fundamental to the functioning and promise of American democracy. State
constitutions do not represent a single set of truths, but rather an ongoing discourse and reflection on ideas of liberty, equality, and due process (Williams, 2009). They have been and continue to be fundamental to the constitutional discourse of America and are integral in the fulfillment of creating a more perfect union. As American Political Scientist Martha Derthick states, “The states are the ‘default setting’ of the American Federal system” (Derthick, 2001). While the federal government may lack the resources or purview to act, the states have the institutional capacity, authority, revenue, will power, and political consensus to fulfill the job. As laboratories of democracy, states and their constitutions continually enshrine social, political, and economic rights as they are actualized by the state democratic processes. The future of American constitutional democracy does not lie in Washington, where democratic norms are unraveling and trust in institutions and the federal Constitution itself has collapsed; it instead lies within the hope that state constitutions promise: their ability to enshrine rights and protections and serve as a mechanism for progress for the American people.
Abortion Case Study

In its ruling in *Dobbs v. Jackson Women’s Health Organization*, the U.S. Supreme Court moved the debate of reproductive autonomy and the right to an abortion to the states. While this development has rightfully infuriated many Americans, it has energized state legal systems and has given great attention to state supreme courts and state constitutions. State constitutions have always been important in the fight for reproductive autonomy, but since *Dobbs* they have once again been thrust into the spotlight. This chapter will analyze the state constitution’s role in securing the right to an abortion both before and after *Dobbs*, and underscore the importance of state supreme courts and state constitutions in securing rights not given in the federal constitution. It will also incorporate the recognition that state constitutions offer greater flexibility for amendment into the discourse on safeguarding abortion rights, and explore potential avenues for policymakers to enact change in the coming years. The case study of abortion rights is perfect for understanding the importance of state constitutions in securing progressive rights through supreme court interpretations and the constitutional amendment process, when the federal right guarantee is currently not a viable option.

Abortion before and during Roe

Before *Roe vs. Wade* established a national precedent making state abortion bans unconstitutional, states enjoyed virtually unlimited discretion in determining the level of protection for abortion rights. From the mid- to late- nineteenth century, abortion was generally legal, especially for women in the first trimester. In 1847, with the formation of the American Medical Association, the male-dominated membership determined that they alone should have the power to decide when an abortion could be legally performed and launched a full-fledged criminalization campaign against abortion and female abortion providers (Carmon, 2017). This lobbying moved state legislatures to ban abortion. The Catholic Church
also announced it was banning abortions, and in 1873, Congress passed the Comstock Act which prohibited the distribution of contraceptives and abortion-inducing drugs through the mail (Le Moult, 2022). By the 1880s, abortion was essentially outlawed nationwide.

The 1960s saw the rise of the women’s rights movement and targeted litigation to improve access to abortion. Hawaii became the first state to legalize abortion, followed quickly by New York, Alaska, and Washington (Le Moult, 2022). California became the first state to secure the right to abortion through state supreme court interpretation of the state constitution in 1969 in the case People v. Belous (People v. Belous, 1969). The right to an abortion for Californians was secured under the court’s interpretation of the Inalienable Rights clause (CA, Art. 1, § 1).

By the time of the Roe ruling, the nation was considerably divided on the topic of abortion. In 1972, the court decided Roe v. Wade, securing American women the right to an abortion. This overturned all the state bans due to the Supremacy nature of federal law and the Supreme Court. However, in 1992, the Supreme Court heard Planned Parenthood v. Casey upheld the concept of Roe, but acknowledged that government restrictions on abortion procedure are acceptable so long as they do not pose an ‘undue burden’ on the woman’s right to choose (Planned Parenthood v. Casey, 1992). This ruling opened the doors for state legislatures and state supreme courts to effectively limit or restrict a woman’s ability to access an abortion through parental consent laws and notification laws, waiting periods, and restriction of public funding.

While state constitutions were previously used to protect abortion rights, with the removal of federal protections, states once again became the primary legal landscape to address the issue of abortion. On June 24, 2022, in Dobbs v. Jackson Women’s Health Organization, Justices Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett denied the critical right to bodily autonomy. They overturned Roe v. Wade as well as 50 years of precedent; thus allowing numerous restrictive abortion bans across the
United States to take effect. Once the US Supreme Court overturned *Roe v. Wade*, the legality of abortion was left to individual states. Because of this, the political makeup of state legislatures has since played a significant role in determining abortion restrictions and regulations (Dapena, 2023). The Supreme Court’s decision in *Dobbs* has activated the legal landscape at the state level at levels previously unseen.

Policymakers at the state level now have an even more critical role to play in supporting and expanding abortion access and rights. *Dobbs* broadened considerably the scope of state policy authority, by holding that the Federal Constitution provides no barrier against states banning abortion at any point during pregnancy (Dinan, 2023). This has permitted states to enforce virtually any restrictions they might choose to enact, so long as they can pass it through the state legislature, including a number of restrictions that were unenforceable before *Dobbs*. Abortion access has shifted dramatically around the country in 2023, as states across the South, the Plains and the Midwest have banned abortion or restricted access to care (Nash, 2023). Nearly a quarter of U.S. states have banned or restricted abortion through state legislative measures since *Roe v. Wade* was overturned (Gonzalez, 2023). Meanwhile, states mostly along the West Coast and the Northeast have enacted 77 abortion protections in the year after *Dobbs*, the highest number ever passed in one year (Nash, 2023). Lawmakers are moving quickly to ensure that access to abortion remains guaranteed for their constituents, and to accommodate out-of-state providers and patients (“State Constitutions and Abortion Rights”, 2024). *See Figure 4.1 for state-by-state information about current abortion bans in effect.*
Protecting the Right to an Abortion: Executive Orders and Laws

With the legality of abortion now completely in states’ purview, states are able to secure protections or implement restrictions through numerous vehicles. Though limited in power, governors can issue executive orders to declare or enact policy. Sixteen governors issued a total of twenty executive orders related to abortion following the leak of the *Dobbs* decision (Fairbanks, 2023). Most of the orders declared that abortion patients and providers would be legally and professionally protected from consequences enforced by a state that banned abortion. Through gubernatorial executive orders, governors decreed that their state would refuse to cooperate with other states’ attempts to investigate and prosecute abortion seekers and providers.
Executive orders are quick and efficient, and have the force of the law, but they are not
enshrined in state statutes, nor in state constitutions, and can be rescinded by state
legislatures or succeeding governors. However, abortion advocates have found executive
orders particularly helpful in states such as North Carolina—where the governor is supportive
of abortion rights but the legislature is not (Fairbanks, 2023). Where the executive and
legislative office are politically divided, a governor’s executive order, even if not permanently
enshrined in law, can bring immediate relief and more than what may be promised in the
legislative process. Executive orders are much less unwieldy and often more accessible to the
public as they can garner great press attention. Additionally, executive orders are often
impacted by horizontal federalism, as governors mimic verbatim and advance the same
protections as other gubernatorial executive orders. This can be seen as the majority of
executive orders protecting individuals from out-of-state investigators. Executive orders can
also be unique to the state and its own legal landscape. Following unsubstantiated legal attacks
on the abortion drug mifepristone, Governor Maura Healey of Massachusetts issued an
executive order to protect access to the medication (MA, EO no. 609). Governor Katie Hobbs, of
Arizona, signed an executive order that gave the state attorney general the sole authority to
prosecute criminal cases regarding abortion, limiting who can act in the state’s legal landscape
(AZ, EO no.2023-11). Executive orders are one way that states can declare protections for
abortion seekers and providers; however, the problem of impermanence must be supported
with legislative or judicial action.

In contrast to the federal level, where polarization and limited authority hinder
congressional action, policymakers at the state level wield significant influence in shaping
abortion access laws due to the powers reserved to them under the Tenth Amendment.
Whereas Congress is constrained in the policies it can enact regarding abortion, states are not
similarly constrained. Congress can only act pursuant to its delegated powers, and it is widely
understood that these powers are not broad enough to authorize a nationwide policy
regulating abortion, specifically under the commerce clause (Dinan, 2023). In contrast, state legislatures possess plenary power and do not encounter similar concerns, meaning that they can effectuate protections and restrictions so long as they pass the state legislature and are signed into law by the Governor. Seventeen states and the District of Columbia have enacted laws that protect the right to an abortion (see Figure 4.2) (“Abortion Policy in the Absence of Roe, 2023). Similar to executive orders, the effectiveness and permanence of state laws are subject to the state supreme courts and to time itself. Later legislatures can overturn laws protecting abortion rights and access, leaving the right subject to the political process. Jessica Arons, senior policy counsel for the American Civil Liberties Union argues "You can pass a bill that codifies abortion rights ... but if a future election changes the political makeup of the legislature and who's in the governor's office, then they could repeal the statute" (Gonzalez, 2023). Even if the law is passed and is not challenged in the legislature, it can be invalidated by state supreme courts. State supreme courts act similar to the federal Supreme Court, interpreting the meaning, relevancy, and how or if a law should be applied. Thus, even if state legislatures pass laws enshrining protections to abortions, they can still be challenged and overturned in the state legal system.
### States with protections for abortions

As of Feb. 1, 2023

<table>
<thead>
<tr>
<th>State</th>
<th>State law</th>
<th>State constitution</th>
<th>Executive order</th>
<th>State Supreme Court precedent</th>
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Data: Guttmacher Institute; Table: Alice Feng/Axios

Figure 4.2: States with Varying Vehicles for Abortion Protection. ("Abortion Policy in the Absence of Roe", 2023)
Interpreting the Right to an Abortion through State Courts

For decades, state courts have played a critical role in securing abortion rights or upholding restrictions. State supreme courts heard challenges to abortion restrictions and interpreted a wide range of state rights to uphold or strike down state laws independently from federal courts. One consequence of Dobbs is to redirect from federal to state courts nearly all litigation challenging abortion policies. State supreme courts are now, more than ever, deciding for the first time whether and how their state constitutions protect abortion. Many state courts have decided challenges to abortion bans and restrictions both before and after Dobbs. Some courts have determined that their constitutions protect a right to abortion, while others have denied constitutional protections. Thirty state high courts have decided cases challenging abortion restrictions under their state constitutions; out of that, twelve have recognized their state constitution protects abortion rights independently from the Federal Constitution or Supreme Court precedent (“State Constitutions and Abortion Rights” 2024). Other state supreme courts have upheld or blocked laws without ruling on whether a constitutional right exists.

During the fifty years that Roe was precedent, opponents and proponents of abortion rights used state constitutions and state supreme courts to alter their state laws. For example, in 2018, Mississippi passed a law banning most abortions after 15 weeks of pregnancy, which was subsequently challenged in court (House Bill 1510: the Gestational Age Act). The passage of this bill reflected the state's ongoing efforts to limit abortion rights and restrict access to abortion services even when it was nationally protected. It was later challenged in court, which exemplifies the state court’s role in determining the legality of abortion bans and protections even during Roe. Texas was also a battleground state for abortion restrictions. With a Republican governor at the helm of the state’s government and large Republican majorities in both chambers of the Legislature, anti-abortion laws had enough popular support to pass. The passage of House Bill 2 in 2013 which imposed undue burdens and restrictions on abortion
clinics, saw immediate legal retaliation, with the Supreme Court overturning the law in 2016 (Whole Woman’s Health v. Hellerstedt, 2015). Even with a federal protection in place, there was always action occurring at the state level using state legal systems.

After Roe, states retained a fair amount of discretion in enacting abortion policy. States could decide at what point after fetal viability to ban abortions, with some states choosing to ban abortions as early in a woman’s pregnancy as they were permitted to do so by the Court’s rulings and other states opting to allow abortions through a later point in pregnancy (Dinan, 2023). This occurred to some degree after Casey, but opponents also sought change through state amendment. Even before Roe was overturned, ballot amendments in Tennessee, Louisiana, West Virginia and Alabama changed those states’ constitutions to say that nothing in them protected a right to abortion (Zernike, 2023). Thus, while Roe ruled as precedent, state courts and legal systems were an active place for abortion opponents to advocate for their desired policies.

Because of our federal system, each state’s unique constitution and court system is free to protect reproductive autonomy under novel legal theories and rights that the Federal Constitution may not currently recognize or secure (“Legal Analysis: State Constitutions and Abortion Rights”, 2022). This has provided states with the chance to extend their legal scope, as state court rulings frequently rely on constitutional rights that extend beyond those explicitly stated in the Federal Constitution. State supreme courts have often secured the right to abortion through a right to privacy, equal protection, due process, or natural rights (See Table 4.1 below). And some courts have limited their analyses to specific situations, such as when a patient’s life or health is at risk. The U.S. Constitution does not include a textual right to privacy. While earlier U.S. Supreme Court and federal court opinions found that the right to liberty includes privacy, later opinions on the right to abortion moved away from a privacy analysis. State courts in Alaska, Florida, Minnesota, and Montana (along with California, Massachusetts, and New Jersey) have relied on rights to privacy in their state constitutions to
recognize the strongest protections for abortion and these have been upheld to the present ("Legal Analysis: State Constitutions and Abortion Rights", 2022). Additional rights, such as the explicit right to privacy, secured in state constitutions, have allowed state high courts to strengthen access to abortion, and after Casey, allow for some restrictions as well.

State high court decisions not only strengthen or weaken access to abortion within their state, but can also contribute to further outcomes across the country through horizontal federalism. The body of precedent becomes increasingly influential and robust as more courts rely on it. For example, the Florida Supreme Court opinion in In re T.W. functioned as a guide for several other state courts considering abortion rights and access under their respective constitutions, with five other state supreme courts citing it in striking down a range of restrictions ("Legal Analysis: State Constitutions and Abortion Rights", 2022). Over the past three decades, state courts have built a foundation of novel jurisprudence that recognizes equality principles, strong autonomy and personal privacy rights, and the deeply rooted nature of abortion protections in both history and text. The table below shows the twelve states with a constitutional right to abortion recognized through state high court decisions on abortion rights.

<table>
<thead>
<tr>
<th>State</th>
<th>Court Precedent</th>
<th>Constitutional Provision</th>
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| Alaska | The Alaska Supreme Court recognized that the state constitution protects the right to abortion as fundamental under its privacy and equal protection guarantees, striking down multiple restrictions.  
  - Right under privacy established: Valley Hospital Association, Incorporated v. Matsu Coalition for Choice (Alaska, 2007)  
  - Right under equal protection Guarantees: State v. Planned Parenthood of Alaska (Alaska, 2001) | Alaska Const. Art. 1, § 1: “This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.”  
  Alaska Const. Art. 1, § 22: “The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.” |
<table>
<thead>
<tr>
<th>State</th>
<th>The Supreme Court recognized that several provisions of the state constitution protect a right to abortion, striking down multiple restrictions.</th>
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<tbody>
<tr>
<td>Florida</td>
<td>The Supreme Court recognized that the state Constitution’s privacy provision protects a fundamental right to abortion, striking down multiple restrictions. However, it has also upheld restrictions against constitutional challenges.</td>
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<tr>
<td>Illinois</td>
<td>The Supreme Court held that the state Constitution’s due process and equal protection provisions protect a right to abortion, but upheld a parental notification law as consistent with federal and state protections.</td>
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<tr>
<td>Kansas</td>
<td>The Supreme Court recognized that the state Constitution’s equal and inalienable rights provision, which includes a natural rights guarantee, protects a right to abortion.</td>
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<tr>
<th>State</th>
<th>Provision of the Constitution of the State of California</th>
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<tr>
<td>California</td>
<td>Cal. Const. Art. I, § 1: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”</td>
</tr>
<tr>
<td>Florida</td>
<td>Fla. Const. Art. I, § 23: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.”</td>
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<tr>
<td>Illinois</td>
<td>Ill. Const. Art. I, § 2: “No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”</td>
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<tr>
<td>Kansas</td>
<td>Kan. Const. Bill of Rights § 1: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”</td>
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<td>State</td>
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<tr>
<td>Massachusetts</td>
<td>The Supreme Judicial Court of Massachusetts recognized that the Massachusetts Constitution’s due process provision protects a right to abortion and has struck down a ban on Medicaid reimbursement for abortions. However, it also upheld aspects of a parental consent law against constitutional challenge. - Established under the constitution’s due process clause: <em>Moe v. Secretary of Administration and Finance</em> (Massachusetts, 1981) - Upheld parental consent law in <em>Planned Parenthood League of Massachusetts, Inc. v. Attorney General</em> (Massachusetts, 1997)</td>
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<td>Minnesota</td>
<td>The Supreme Court of Minnesota recognized a fundamental right to an abortion under a combination of guarantees in the Minnesota Constitution and has struck down a restriction on public funding for abortions. - Protected abortion as a fundamental privacy right: <em>Women of State of Minnesota by Doe v. Gomez</em> (Minnesota, 1995) - Rejected <em>Harris v. McRae</em> (US 1980) and public funding for abortions</td>
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<td>State</td>
<td>Supreme Court of State Ruling</td>
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<tr>
<td>Mississippi</td>
<td>The Supreme Court of Mississippi recognized a fundamental right to an abortion under the Mississippi Constitution’s implicit right to privacy, but upheld abortion restrictions including mandated counseling and waiting period requirements and a parental consent law. Establish under right to Privacy: Pro-Choice Mississippi v. Fordice (Mississippi, 1998) Upheld undue burden standard from Planned Parenthood v. Casey (U.S., 1992)</td>
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<td>New Jersey</td>
<td>The New Jersey Supreme Court recognized that the New Jersey Constitution’s inalienable rights provision and equal protection guarantees protect a right to abortion, striking down a restriction on abortion funding and a parental notice requirement for minors. Established under Equal Protection Guarantee: Right to Choose v. Byrne (New Jersey, 1982) Established under Natural Rights Provision: Planned Parenthood of Central New Jersey v. Farmer (New Jersey, 2000)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>The North Dakota Supreme Court held that the North Dakota Constitution’s inherent rights and due process clauses protect a right to abortion to preserve life or health, without addressing whether the right extends more broadly. Established in Wrigley v. Romanick (North Dakota, 2023) A previous ruling left the court fractured and undetermined whether the constitution supported the right to abortion: MKB Management Corporation v. Burdick (North Dakota, 2014)</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>The Oklahoma Supreme Court held that the Oklahoma Constitution’s inherent rights and due process clauses protect a right to abortion to preserve life, without addressing whether the right extends more broadly. Established under Inherent Rights and Due Process clause: Oklahoma Call for Reproductive Justice v. Drummond (Oklahoma, 2023) Previous to the 2023 ruling, the court had blocked restrictions by applying federal precedent of Burns v. Cline (U.S., 1992)</td>
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</tbody>
</table>
Shifting the focus of abortion litigation from the U.S. Supreme Court to state supreme courts presents opportunities for state judges to step into the spotlight and issue rulings protecting abortion rights. However, the structure of state judicial selection and retention processes limits the prospects that state judges may take advantage of these opportunities (Dinan, 2023). In selecting judges, fourteen states rely on gubernatorial or legislative selection, seventeen states rely on a Missouri-plan whose distinctive feature is that judges are initially appointed but stand for periodic retention elections if they wish to extend their time on the bench, and twenty-one states rely on competitive elections (Dinan, 2023). Differences between state and federal selection and retention processes render state judges less inclined than their federal counterparts to invalidate policies supported by the public and public officials, whether abortion policies or other policies. Because of this, it is not uncommon for state supreme courts to be reflective of public preferences in their decisions.

State supreme courts have shown both ability and willingness, before Dobbs, to invalidate restrictive abortion policies by drawing on state constitutional provisions, and they can be expected to continue issuing rulings. Nevertheless, compared with the U.S. Supreme Court, state courts are less inclined to invalidate policies supported by the public and public officials because of the prevalence of judicial elections (Dinan, 2023). The heavy reliance on partisan and nonpartisan elections also attributes to state courts following popular sentiments, and because judges in all but one state lack life tenure, and may be removed from their judgeship based on their decisions. When judges rule on the constitutionality of abortion protections or restrictions, they rely on interpretations of their state constitutions. Because
many state constitutions were written more than a century ago, courts must decide whether to view them through the eyes of their framers, or in a present-day context (Zernike, 2023). Bringing history and context of the drafting of state constitutions can help explain why on the same day the courts in South Carolina ruled for the right to an abortion, and why the Idaho court ruled against it. In South Carolina, the committee that revised the Constitution in the mid-1960s made no specific reference to a right to abortion. But this committee included no women. And the justices in the majority opinion said the state’s high court had since ruled in another decision that the constitutional right to privacy extended to “bodily autonomy” (Zernike, 2023). In Idaho, there is no explicit right to privacy, and the court rejected arguments that a right to abortion was fundamental in constitutional guarantees of the “inalienable rights” to life, liberty and property (Zernike, 2023). The court chose to interpret the state’s Constitution based on the plain and ordinary meaning of its text, as intended by its framers. The court argued there was no evidence that the right to an abortion was rooted in the state’s inalienable rights clause in 1889. These diverging decisions show how state courts and state constitutions are increasingly arenas for the fight over abortion rights, and to most permanently secure the right to an abortion, advocates should look to explicitly enshrine the right to an abortion in their state constitution.

**Through the Constitution: A Concrete Right to an Abortion**

The push to amend state constitutions to guarantee the right to abortion has garnered significant attention following the Supreme Court ruling in *Dobbs*, as such amendments offer the most durable and steadfast protection compared to laws or state supreme court decisions recognizing abortion rights. Laws and executive orders are relatively easy to amend or repeal if there is a change in the make-up of the state legislature. For states where neither party has a stronghold on the majority of the legislature, it is difficult to ensure that abortion protections or restrictions will not be repealed if there is a change in party control. Additionally, state
supreme court rulings recognizing a right to abortion — or stating that there is no such right — in the state constitution may be overruled when there are subsequent changes in the make-up of the court. When the scope of abortion rights recognized by state supreme courts rests largely on the meaning of state constitutional provisions, groups looking to influence abortion policy devote significant attention to amending state constitutions, aiming, at times, to provide more explicit textual grounding for abortion rights (Dinan, 2023). Many of the legal arguments seeking to overturn abortion bans rely on positive rights enumerated in the states’ constitution, and how they are interpreted by their state supreme courts (Zernike, 2023). Thus, enshrining the right to an abortion in the state constitution is one of the strongest actions that can be taken to establish long-term protections for abortion rights and access (Nash, 2023).

State constitutions offer substantially broader and more comprehensive lists of rights compared to the United States Constitution, and throughout history, state courts have frequently utilized these provisions to pioneer expansive rights, including the protection of abortion access while also nullifying restrictive measures. State constitutions offer a way around gerrymandered state legislatures that are pushing stricter laws. States have the opportunity to influence the level of protection for abortion rights not only by filing lawsuits, passing laws, and executive orders, but also by enacting constitutional amendments in a way that does not occur at the federal level. The tool of state constitutional amendment is an accessible and meaningful one. This stands in contrast with the federal level, where the rigidity of the federal amendment process discourages groups and officials from trying to amend the U.S. Constitution and leads them to focus nearly their entire attention on influencing the U.S. Supreme Court (Dinan, 2023). Furthermore, every state constitution is amended more often than the U.S. Constitution, including Vermont’s constitution, which is the least frequently changed constitution and is still amended on average once every four years (Kincaid, 2013). As advocates look to permanently protect abortion rights, their focus is shifted to the amendment process of their state constitution.
When the scope of abortion rights rests largely on the meaning of the state constitutional provisions and the high courts’ interpretations, abortion policy can be successfully influenced by devoting attention to amending state constitutions to provide explicit textual grounding for abortion rights. At the time that *Dobbs* was decided, no state constitution contained language explicitly protecting a right to abortion or reproductive autonomy (Dinan, 2023). Prior to *Dobbs*, amendment processes were not vehicles for abortion–rights. Since *Dobbs*, six states – California, Kansas, Kentucky, Michigan, Vermont, and Ohio – have voted on abortion related constitutional amendments, and the side favoring access to abortion prevailed in every state (see Figure 3.3)(Felix, 2024). And there are further efforts underway to put constitutional amendments regarding abortion on the 2024 ballot in as many as thirteen states: Arizona, Arkansas, Colorado, Florida, Iowa, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, Pennsylvania, and South Dakota (Felix, 2024).
State constitutional amendment processes are seen as accessible, leading to regular consideration and approval of amendments for various rights. As previously discussed, these amendments often require approval by a simple majority of voters, either through legislatively-referred or citizen-initiated initiatives. Legislatively-referred initiatives involve drafting by state legislators, requiring approval from both chambers of the state legislature before being placed on a ballot. The approval threshold varies by state but typically requires voter endorsement. Citizen-initiated proposals allow citizens in seventeen states to propose amendments. After submitting a draft and ballot title to a government official, groups must gather signatures, meeting distribution requirements across congressional districts. If enough
signatures are validated, the measure appears on the ballot, requiring a simple majority to 60% of the vote for approval.

Citizen-initiated constitutional amendments are the most democratic tool available to enact permanent policy change. However, not every state has a pathway for it. In twelve states that currently ban abortion or have early gestational limits in effect, there is no process for a citizen-initiated ballot measure (Felix, 2024). Advocates in these states must rely on their state legislatures to enshrine abortion rights in their constitution. Wyoming, Iowa, and Utah have abortion bans currently blocked by courts, but also have no process for citizen-initiated constitutional change (Felix, 2024). In these fifteen states, unless legislatures repeal their bans, the only avenue to secure the legality of abortion, other than electing pro-choice policymakers, is to challenge these bans in court. If the state supreme court upholds the ban, they will remain in place. Alternatively, the supreme court could also find that the constitutionality of the ban is questioned by the rights enumerated within the state’s constitution. In Louisiana, Tennessee, and West Virginia, there are abortion bans in place and no process for a citizen-initiated ballot measure. They also have explicit state constitutional amendments that state their constitutions do not protect the right to an abortion (Felix, 2024). In these states, individuals cannot rely on courts to rule in favor of abortion rights, instead the only way for the legal status of abortion to change in these states is for their legislatures to repeal their bans or pass a new constitutional amendment protecting the right to abortion.

The significance of successful ballot measures securing the right to abortion should encourage advocates and policymakers to recognize the effectiveness of such measures as a viable strategy for advancing progress. In 2022, a Kansas ballot measure went to the citizens to negate the state supreme court’s ruling that the state constitution protects the right to an abortion. This measure failed (Felix, 2024). If the ballot measure had passed and the Kansas constitution had been amended to explicitly state that nothing in it creates a right to an abortion, that would have opened doors for the state legislature to ban or severely restrict
abortion rights in Kansas. Kentucky voters also voted against a similar ballot measure. When voters are polled, overwhelmingly voters say abortion should be legal in all or most circumstances, with 7 in 10 Americans stating that abortion should always be legal in the first trimester (“Where Do Americans Stand on Abortion?”, 2023). The overwhelming popular support of abortion rights has made effective change in California, Michigan, Vermont, and Ohio where voters approved constitutional amendments to explicitly protect the right to an abortion. These constitutional amendments enshrine the right to reproductive autonomy and the right to an abortion. Only Vermont’s amendment does not use the word abortion (See Image 4.3). Ballot measures are a significant way to enshrine constitutional rights through direct democratic practices. In the coming years, abortion will be on the ballot in many states, with voters directly deciding the degree of reproductive autonomy will be protected or restricted in their respective states.

Conclusion

States have always been the default setting of American democracy, with federal abortion protections removed, the state’s role will now be even more so exaggerated. With abortion policy making at the state level done primarily through state elected officials, the policies that are produced are typically more responsive to public opinion and the electorate. More so than at the federal level, the public can exert direct influence in state policy making through direct democratic institutions and practices because state governmental processes operate in a majoritarian rather than a counter-majoritarian or super-majoritarian fashion (Dinan, 2023). Therefore, ensuring accountability of state elected officials to policy preferences and safeguarding abortion rights can carry significant weight. This could involve the issuance of executive orders, the passage of laws, the appointment of judges who interpret the constitution to protect abortion rights. Or the most impactful protection is to amend the state constitution to explicitly guarantee the right to abortion. When the Supreme Court’s decision
in *Dobbs* gave states the ability to ban or limit abortion, the legal landscape at the state level was activated as never before.

State constitutions are the key to permanently securing the right to an abortion and reproductive autonomy. Abortion can be protected in different ways. In California, Michigan, Vermont, and Ohio it is protected through an explicit amendment. In other states, it finds protection through supreme court decisions on the basis of rights of privacy, equal protection, and natural rights enumerated within the state constitution. With the right to an abortion now entirely determined by states, these divergent decisions will ultimately be determined by voters and who they elect at the local and state level. In choosing state legislators, state supreme court judges, and how to vote on ballot measures, voters have a direct influence on how reproductive autonomy is interpreted and secured. State constitutions are a critical part of the strategy to overturn bans that have cut off access to abortion in a wide swath of the country and to secure the right to an abortion. These documents provide much longer and more generous enumerations of rights than the federal constitution, and are much more dynamic. In shifting abortion policy to the states, the state legal landscape has been electrified like never before, increasing the importance of lawmaking through legislatures or through the initiative and referendum processes, through the supreme courts interpreting the right to reproductive autonomy within the state constitution, and through the viable and plausible measure of amending state constitutions to permanently secure the right to an abortion.
Environmental Rights Case Study

Environmental and human health challenges are all too prevalent. Pollution, deforestation, biodiversity loss, ocean dead zones, melting polar ice caps, rising sea levels, explosive population growth, lack of access to safe and clean drinking water and sanitation, and climate change are undeniable. Given today’s environmental and climate crises, the global environmental movement has turned towards the highest governmental protections and standings available: constitutions. Environmental protections are firmly entrenched in constitutions worldwide, reflecting the profound understanding of the environmental movement. This understanding recognizes that safeguarding the inalienable human rights to clean water and air, a stable climate, and a healthy environment demands the utmost constitutional prominence. This ensures resilience against misguided government actions, unfavorable court rulings, and hostile political agendas. Already, environmental statutory protections are already widespread at both the federal and state levels.

This chapter will argue that in addition to existing environmental laws and their implementing regulations, environmental constitutionalism, especially at the state level, is a viable mechanism to address environmental and human health challenges. The addition of these environmental rights amendments will ensure that states and governments help prevent climate change, and state judicial systems will help to actualize this right. The case study of environmental rights is relevant for understanding the role of state constitutions in securing progressive rights that have never been actualized at the federal level. Environmental rights and protections will be enshrined through state court jurisprudence and constitutional amendments.

The Push for Green Constitutionalism

Starting in the late nineteenth century, reformers began to be concerned with the quality, conservation, and protection of our environment. As America expanded west, these
early conservationists fought to protect America’s natural beauty, especially in the West, from the encroachment and modernization of industrial expansion. In 1872, Congress created the National Park System which began with the establishment of Yellowstone National Park. However, the continued grassroots mobilization for environmental protection would be a long one. Nearly a decade later, in 1970, America celebrated the first Earth Day after over a century of efforts to politically and socially address the contamination of water, air, and land caused by industrialization and urbanization.

At first, environmentalists pushed to achieve this new right through judicial interpretation. In 1965, when Justice Goldberg wrote his concurring opinion of *Griswold v. Connecticut*, he noted that "the concept of liberty protects those personal rights [i.e. the right to marital privacy] that are fundamental, and is not confined to the specific terms of the Bill of Rights"(case). Justice Goldberg established the Ninth Amendment as a source of previously unenumerated rights. Armed with the *Griswold* decision, environmentalists marched into federal courts and asked that *Griswold* be extended in order to secure a constitutional right to a decent environment. In all cases to date, however, these efforts to achieve constitutional protection of the environment have failed (Tobin, 1974). There are many obstacles to a judicial pronouncement of a right to a decent environment on the federal level, and the Supreme Court has denied case after case to establish such a right.

When a significant number of individuals care deeply enough about an issue, they seek to grant it constitutional recognition through the amendment process. However, as previously shown, this is difficult to achieve. In 1970, Wisconsin Senator Gaylord Nelson proposed a federal amendment “Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right” (Howard, 1972). The Senator argued that “If we have any right that is more important than any other right, it is the right to live in a clean and decent environment...” (Howard, 1972). Despite the popularity of the environmental movement, obstacles to a federal amendment are all too well known.
State constitutional provisions pertaining to conservation and the environment are by no means of recent origin. There are state constitutions, restating ancient rights with origins as early as the Magna Carta which provided that the people shall enjoy the rights of fishery or of free access to shore (Howard, 1972). Globally, more than three quarters of the world’s national constitutions (149 out of 193) currently include explicit references to environmental rights and/or environmental responsibilities (Boyd, 2013). This includes the majority of nations in Africa, Central and South America, Asia-Pacific, Europe, and the Middle East/Central Asia. Environmental rights and provisions are deeply rooted in both global patterns and American history.

State Constitutions have historically served as vital instruments for environmental rights and protections, albeit initially focusing on access to natural resources such as land, hunting, and fishing. These environmental rights did not start off as positive right protections, they typically guaranteed access to land, hunting, and fishing. Rights to hunt and fish first appeared in the Vermont Constitution of 1777. Rights to fish were included in the constitutions of Rhode Island in 1844 and California in 1910 (Kincaid, 2013). Citizens have used their state amendment process to enshrine their rights to hunt and fish in Alabama (1996), Arkansas (2010), Georgia (2006), Louisiana (2004), Minnesota (1998), Montana (2004), North Dakota (2000), Oklahoma (2008), South Carolina (2010), Tennessee (2010), Virginia (2000), and Wisconsin (2003) (Kincaid, 2013). By leveraging the state amendment process, and utilizing their state constitutions, citizens have demonstrated a commitment to upholding environmental rights within their respective states.

Since the federal push for a federal amendment, states took action into their own hands, refusing to wait for meaningful action at the federal level. Now more than 21 state constitutions have environmental protection provisions and seven guarantee some environmental rights (Kincaid, 2013). As established, what distinguishes most state constitutions from the federal Constitution is their relative ease of amendment and their
immense number of substantive provisions. Recognizing that more needed to be done to protect the environment, many states in the 1960s began to add a policy statement concerning environmental protection or a legislative mandate to protect the environment. All state constitutions written since 1959 contain provisions either directing the legislature to protect the environment or guaranteeing public rights to a clean and healthy environment (Tarr, 2022). The first environmental rights amendments were added to state constitutions in the 1970s, coinciding with the undeniable political rise of the environmental movement (Davis, 2023). Today, most state constitutions contain provisions expressly addressing natural resources and the environment. In total, research has uncovered 207 state constitutional provisions relating to natural resources and the environment in 46 state constitutions (Adams, 2002). For example, some provisions may be written as general policy statements, or expressions of public values, while other provisions may explicitly direct the legislature to act. Seven states adopted environmental rights provisions: Hawai‘i, Illinois, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island (See Table 5.1).

(Table 5.1): States with Positive Environmental Rights Provisions in their State Constitutions

<table>
<thead>
<tr>
<th>State</th>
<th>Text</th>
<th>Year Adopted</th>
<th>Location in State Constitution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawai‘i</td>
<td>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.</td>
<td>1978</td>
<td>Art. XI (Conservation, Control, and Development of Resources), § 9</td>
</tr>
<tr>
<td>Illinois</td>
<td>Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.</td>
<td>1970</td>
<td>Art. XI (Environment), § 2</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.</td>
<td>1972</td>
<td>Art. 97</td>
</tr>
<tr>
<td>State</td>
<td>Provision</td>
<td>Year</td>
<td>Citation</td>
</tr>
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</tr>
<tr>
<td>Montana</td>
<td>All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.</td>
<td>1972</td>
<td>Article II (Declaration of Rights), § 3</td>
</tr>
<tr>
<td>New York</td>
<td>Each person shall have a right to clean air and water, and a healthful environment.</td>
<td>2021</td>
<td>Art. I (Bill of Rights), § 19</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.</td>
<td>1971</td>
<td>Article I (Declaration of Rights), § 27</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>The powers of the state and of its municipalities to regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of the natural environment, and in furtherance of the protection of the rights of the people to enjoy and freely exercise the rights of fishery and the privileges of the shore, as those rights and duties are set forth in Section 17, shall be an exercise of the police powers of the state, shall be liberally construed, and shall not be deemed to be a public use of private property.</td>
<td>1986</td>
<td>Art. 1 (Bill of Rights), § 16</td>
</tr>
</tbody>
</table>

These positive right provisions were different from the previously adopted policy statements, they had potential to be much more far-reaching constitutional provisions, recognizing a public right to a quality environment. These states express this right in different ways, these differences are likely due to decisions by drafters. Environmental positive rights allow citizens to defend their human right to clean water, clean air, and clean land. Five of these states treat their right to a certain quality environment as judicially enforceable, two (Illinois and Massachusetts) do not (Dernbach, 2023). Among the states with a judicially enforceable right, Hawai‘i and Montana have the most well developed bodies of case law, as will be analyzed further in this chapter. Three states declare this right in their bill of rights or declaration of rights (Montana, New York, Pennsylvania). They see this right as akin to other rights (Dernbach, 2023). This means, among other things, that the constitutional right authorizes lawsuits against the state to redress violations. The right can also authorize legislative action. The Hawai‘i constitution (Art. XI, § 9) explicitly authorizes the legislature to
define the meaning of its right to a quality environment. This provision, the state’s Supreme Court has explained, gives “flexibility to the definition of the right over time,” enabling it to be “reshaped and redefined through statute, ordinance and administrative rule-making procedures” (Dernbach, 2023). These provisions recognize the fiduciary obligation which those who today inhabit the earth owe to those who will come after, and allow constituents of their respective states to enforce the actualization of this right through statutory and judicial action.

**Court Interpretation and Actualization of Green Amendments**

The absence of explicit constitutional protection for environmental rights and protections in most U.S. states perpetuates their vulnerability to political processes, undermining the stability and efficacy of environmental regulation efforts. The United States has a system of state and federal laws and regulations that strive to address environmental regulation. However, it does so without explicit constitutional protection, absent the seven states above. That makes environmental rights and protections continuously contingent and at the mercy of a political process that seeks the lowest common denominator of agreement, often casting out environmental concerns or at best working to minimize and legalize pollution rather than prevent it. The vast bulk of the environmental protection work in the U.S. is accomplished under statutes and regulations designed and administered by the federal government as well as state and local governments for that purpose.

The presence of environmental policy and environmental rights is of utmost importance to maintain a safe climate and a healthy environment. Statutory rights and policies enshrined in state constitutions are often not enough. A court enforcing a statutory right—even if it is the same wording as a constitutional provision—can always be overruled by subsequent legislation (Tobin, 1974). Nearly all environmental declarations adopted to date specifically call for legislative implementation, such statutory supplementation can also be overturned (Tobin, 1974). The various state rights and constitutional provisions to a quality environment
supplement statutory work; they do not replace them. Ultimately, these environmental amendments are given power by the interpretations of state courts.

Constitutional rights empower courts to enforce and uphold environmental policies, providing a sense of permanence and importance to environmental protection efforts. Through constitutional provisions, environmentalists gain access to the legal system, where they can advocate for environmental rights and hold polluters accountable, leveraging the advantages of litigation to level the playing field against political and corporate interests opposed to regulation and protection. Legislatures cannot overrule court decisions grounded on constitutional norms except, perhaps, through complicated amendment proceedings, and thus, a constitutional amendment secures a sense of permanence and importance to environmental policy. Constitutional provisions also allow environmentalists to go to court to secure their rights. In court, environmentalists can lay the matters of pollution and climate change before the conscience of the community in a forum where the conflict can be resolved and evidence tested in cross-examination before an impartial arbiter (Tobin, 1974). Ultimately these decisions have profound precedent and implication for the further governance of the state. Advantages of litigation include that the judicial process is less amenable than the legislature to political pressures, courts generally guarantee access, defendants must respond to questions and justify their actions, and courts help to equalize the political and administrative leverage of the adversaries (Tobin, 1974). These advantages ensure that environmentalists are playing at an equal playing field as the politicians and big businesses who may try to prevent environmental regulation and protections to advance. State constitutional provisions establish a legal framework for how individuals and the government interact with their environment.

The seven rights-based environmental amendments, understood to be Green Amendments, rely on state supreme court interpretations for the creation of enforceable rights. Initial interpretations of these Green Amendments were restrictive, but more recent
supreme court cases have helped to overturn these narrow interpretations. The late twentieth century saw the public trust doctrine establish that certain natural and cultural resources are preserved for public use, and expanded the scope and power of Green Amendments (Williams, 2021). In Pennsylvania, for example, a series of state supreme court cases in 2013, 2017, and 2021 overturned narrow court interpretations of the state’s Green Amendment to impose robust requirements on government to honor the public trust and to confirm that individuals can sue directly under the amendment (Robinson Township v. Pennsylvania, Pennsylvania Environmental Defense Foundation v. Pennsylvania). Reliance on the public trust doctrine in these decisions led to the proceeds of state leases allowing private companies to extract natural resources from public lands must be allocated to specifically restoring the environment rather than be added to the state’s general fund (Davis, 2023).

State Green Amendments have evolved through supreme court interpretations to become as progressive as they are today. Initial cases under Montana’s Green Amendment were also restrictive; but in 1999, the state’s supreme court permitted an environmental group to sue a private mining company for contaminating groundwater with arsenic (Montana Environmental Information Center v. Department of Environmental Quality, 1999). Not only did the court find that the environmental activists had standing but it concluded that the standing could be based on the mere anticipation of harm (Davis, 2023). Montana has gone further than just awarding relief in cases where individuals and organizations have challenged state action for violation of the state’s right to a “clean and healthful environment.” The Montana Supreme Court has described their environmental right as “fundamental.” They further held that, as an agent of the state, the court lacks the authority to issue an order that would violate the right to a clean and healthful environment (Dernbach, 2023). In a 2001 Montana supreme court case, Cape–France Enterprises v. Estate of Peed, the court set precedent that the constitutional provision could provide a basis for lawsuits against private parties that violated the state’s right to a clean and healthful environment (Cape–France Enterprises v. Estate of Peed,
2001). These court precedents have set the stage for Held v. Montana, a groundbreaking constitutional claim to be successfully brought against the state, one which will be analyzed in a subsequent section. The presence of these constitutional rights alter the balancing technique which courts use to weigh the social and economic benefits of the defendant’s activity against the harm which that activity is doing to the plaintiff. It is one thing to balance the value of the complained activity against private harm, it is quite another to make that balancing judgment when a constitutional right is involved.

Authorizing suits against the state is a powerful way to hold the government’s actions against the environment accountable; however, not all state courts have read their amendment as authorizing suits against the state. Even though the Illinois constitution declares a positive right to a healthful environment, the state’s Supreme Court has held that this provision “does not create any new causes of action” (Dernbach, 2023). Thus, the clause does not provide a right of action against the environment. The statutory and policy provisions outlined in other state constitutions also do not provide a right of action against the government or of private parties. An enunciation of public policy, unlike a rule of conduct laid down by legislation, is not aimed at the private citizen and imposes no duty on him (Howard, 1972). Rather it is a mandate for and restraint on governmental activity, but creates no impetus for the agencies to follow through on the proposed policy, and citizens cannot enforce it through litigation. This is why Green Amendments as positive rights are of utmost importance. A constitution, whether state or national, is the greatest repository of a people’s considered judgment about basic matters of public policy. When environmental quality is elevated to the statute of a constitutional postulate, then officials, courts, and citizens alike are held responsible to maintain and repair that standard.

In the United States, and around the world, the constitutional developments appear to reflect a rapid evolution of human values to embrace environmental protection. This may be inspired by a 2019 UN report that found that “it is imperative that environmental laws are
widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet” (Williams, 2019). As American citizens are increasingly aware of the harms of climate change, and the inaction of the national government, advocacy organizations are realizing that state constitutions are easier to change and establish detailed rights. With the recent New York Green Amendment passed in 2021, and a host of major environmental state supreme court cases breaking headlines, Green Amendments and state constitutions are growing in popularity. Regardless of why environmental protection litigation and constitutional amendments are profoundly popular, it is imperative that such rights be actualized through positive right enshrinement and through supreme court interpretation. The right to clean water and air, a safe climate and healthy environment are considered fundamental, inherent, and indefensible from many countries and communities across the world. Given today’s environmental and climate crises, environmental rights demand a positive constitutional foundation, a backstop that guides government action, and a mechanism for accountability that can check both government and private overreach when necessary.

Current Litigation and Implications

The groundbreaking expansion of state Green Amendments through past court rulings has catalyzed a wave of recent landmark cases both at state and federal levels, heralding a pivotal shift in environmental jurisprudence nationwide. These cases are primarily championed by a non-profit organization called Our Children’s Trust. “Our Children’s Trust is a non-profit public interest law firm that provides strategic, campaign-based legal services to youth from diverse backgrounds to secure their legal rights to a safe climate” (Our Children’s Trust). This organization has launched youth-led climate lawsuits and legal action based on the public trust doctrine in all fifty states over the past decade. They have current pending state legal actions in Florida, Hawai’i, Montana, Utah, and Virginia, as well as two federal cases:
Juliana v. United States and Genesis v. Environmental Protection Agency. This section will look at the legal and constitutional jurisprudence of Held v. State of Montana and its legal implications to emphasize the importance of Green Amendments and judicial interpretation that supports it.

**Held v. State of Montana**

In 2020, sixteen young people, then between two and eighteen years old, filed a lawsuit challenging a provision under the Montana Environmental Policy Act (MEPA). Specifically, they challenged the “MEPA limitation” which forbids state agencies from considering the impacts of greenhouse gas emissions or climate change in their environmental reviews. Plaintiffs brought their suit under Montana’s Green Amendment. Importantly, Montana has developed significant jurisprudential history, declaring the right as “fundamental,” as aforementioned. Despite actions by the defendant’s to dismiss the case, including the passage of Senate Bill 557, which amended MEPA and specifically barred courts from being able to “vacate, void, or delay” permits or authorizations for proposed projects for reasons related to climate change, both the district court and the state supreme court denied the dismissal (Bookman, 2023).

The courtroom served as a battleground where the power of state constitutions to safeguard environmental rights stood prominently on display. The plaintiffs alleged that they were harmed by the state’s energy and environmental policies that encouraged the use of fossil fuels, thereby increasing greenhouse gas emissions and worsening climate change. In the summer of 2023, Held v. Montana went to trial. At the First Judicial District Court in Helena, MT, Judge Kathy Seeley heard from world-renowned experts on how Montana is experiencing the effects of climate change, how climate change disproportionately impacts the physical and mental health of youth, how the government has been actively exacerbating the climate crisis in their state, how Montana’s greenhouse gas emissions are substantial and make the climate
emergency worse, and more ("Youth v. Gov: Montana"). The Court also heard the stories of the youth plaintiffs, as they took the stand to share the devastating ways in which they have each been impacted by the climate crisis, from when the lawsuit was first filed three years before, and what they needed from the court and state to rectify these harms. As the courtroom bore witness to the human cost of climate change, it became clear that state constitutions must take center stage in safeguarding environmental rights and holding governments accountable for their actions, especially with newfound understandings of climate change and the collapse and inaction of federal institutions. By elevating the prominence of state constitutions, environmental justice remains at the forefront of our legal discourse and empower citizens to defend their rights in the face of environmental crises.

In a historic first, on August 14, 2023, Judge Kathy Seeley ruled wholly in favor of the plaintiffs in Held v. Montana. The court declared that the state of Montana violated the youth’s constitutional rights, including rights to equal protection, dignity, liberty, health and safety, and public trust, which are all predicated on their right to a clean and healthful environment (Held v. Montana, 2023). The court further invalidated as unconstitutional and enjoined Montana laws that promoted fossil fuels and required turning a blind eye to climate change. The court ruled the youth plaintiffs had proven their standing to bring the case by showing significant injuries, the government’s substantial role in causing them, and that a judgment in their favor would change the government’s conduct (Held v. Montana, 2023). The following month, the state filed an appeal to the state supreme court which will be heard in the following years. By declaring the state's actions unconstitutional and enjoining laws that perpetuated environmental harm, the court sent a resounding message about the indispensable role of state constitutions in curbing governmental overreach and protecting the public interest.

Held v. Montana stands as a pivotal example of how state constitutions can serve as potent tools for advancing environmental justice and shaping future legal landscapes. While the case may appear confined in scope, its ramifications are far-reaching and hold profound
implications for both ongoing litigation and states yet to adopt similar constitutional provisions. The case is based on a constitutional provisions found only in a handful of states; however, as recently witnessed in New York, Green Amendments can be adopted by citizens and their legislature through ballot initiatives, these positive rights provisions give litigants stronger grounds for making their case as constitutional claims are much stronger and more permanent than statutory claims and restrictions. Further, the Montana decision offers some important lessons for future and current climate suits. This case helps advance the notion that state constitutional law provides a useful basis for suits in states that have environmental rights provisions and an already established jurisprudence which allows for suits to be brought by citizens. The outcome may be an incentive for states with Green Amendments to start suits of similar nature, or an incentive for other states to adopt Green Amendments.

By navigating through traditionally formidable obstacles such as standing and causation, *Held v. Montana* has illuminated a clear pathway for future litigants to pursue environmental claims with confidence and efficacy. Previously, standing and causation hurdles were very difficult to overcome in previous climate litigation cases across the country (Bookman, 2023). The court’s findings of fact depict a clear causal pathway from the state’s authorization of fossil fuel projects to concrete injuries suffered by the plaintiffs. The plaintiffs proved, and the court affirmed that the injuries of each individual plaintiff derived from global fossil fuel emissions, the share of those emissions caused by Montana fossil fuels was significant, and that the MEPA Limitation made is more likely that the state would continue to be a significant source of emissions, thus aggravating the injuries of the plaintiffs. This final step in the causal chain helped to show that the plaintiffs’ injuries were redressable, unlike those of plaintiffs in the federal suit, *Juliana v. United States*. Important to the success of *Held*, was the narrowness of the plaintiffs’ claim. While this does mean the decision has a more limited impact, it also made it more likely that the court could accept the claim and provide the requested remedy. As other states hope to address environmental challenges, the *Held v.*
Montana decision serves as a beacon of hope, showcasing the potency of state constitutional claims in advancing environmental justice and holding governments accountable for their actions.

Held’s innovative legal rationale and recognition of harms caused by climate change offers a promising avenue for overcoming such barriers and advancing environmental justice.

For the other states that already have Constitutional provisions that mirror Montana’s, Illinois, Pennsylvania, and New York are among the top ten carbon dioxide–polluting states. If courts find Held’s logic applicable to those analogous provisions, and potential GHG emissions are restricted, Held can have an impact immediately. Furthermore, for almost 40 pages of the 103 page opinion, Held explicitly connected climate change to human health. This simple, powerful, and novel legal logic is not only helpful on its face, but more immediately helpful in jurisdictions that limit the reach of Constitutionally-enshrined environmental rights to human health impacts (Grabianski, 2023). This could help Illinois overcome the state’s Supreme Court decision that this provision “does not create any new causes of action” (Dernbach, 2023).

The groundbreaking legal principles established in Held v. Montana will catalyze the environmental legal landscape, setting a powerful precedent for the prominence of state constitutions in safeguarding environmental rights. In Our Children’s Trust case in Hawai‘i, Navahine F. v. Hawai‘i Department of Transportation (DOT), the youth plaintiffs claim that their state DOT’s operation of a transportation system that results in high levels of greenhouse gas emissions violates their state constitutional rights, causing them significant harm and impacting their ability to “live healthful lives in Hawai‘i now and into the future” (“Youth v. Gov: Hawai‘i”). Because the Hawai‘i legislature determines what their Green Amendment means, and has created a goal to decarbonize the economy and achieve a zero emissions economy by 2045, the youth seek to ensure that their DOT steps up to achieve this goal instead of actively working against it. Trial will occur this summer, where it is expected that the
plaintiffs will once again draw a clear causal pathway in hopes to have their constitutional rights recognized and their claims redressed.

**Conclusion**

Environmental rights and access clauses have found their way into even the earliest state constitutions. Amidst the environmental and climate challenges of our time, as well as the federal government’s unwillingness to commit to anything, states are stepping up to enshrine environmental rights and protections into their state constitutions. Recognizing the inherent human rights to clean air, water, and a sustainable environment, this approach fortifies resilience against governmental missteps, adverse judicial decisions, and partisan interests which are all too prevalent at the federal level.

Environmental constitutionalism at the state level is proving to be an accessible method to address environmental and human health challenges. These Green Amendments are more permanent than already existing environmental laws and the coinciding regulations. Furthermore, these Green Amendments are being given life through state court jurisprudence as seen in *Held v. State of Montana*. Environmental constitutionalism and subsequent state court interpretation can have great ramifications on other states through processes of horizontal federalism via adopting similar amendments, or courts following established legal frameworks.

Decisions like the one issued in *Held* have given the climate justice movement more ammunition in making that case to state agencies, legislators, and the public at large. This Montana lawsuit is a prime example of people turning to state constitutions to establish legal frameworks and achieve progress not available at the federal level. *Held* has already become a beacon of hope, and environmental activists should take advantage of the immediate potential it revealed both by using courts to actualize their environmental rights, and to push more states to enshrine substantive environmental rights within their constitutions.
Conclusion

With the federal government broken and inactive due to partisan polarization, public distrust in institutions, and democratic norms unraveling, state constitutions become a beacon of hope to create meaningful change. Though they are often a second thought, state constitutions provide an alternative arena where constitutional governance and jurisprudence can be altered by the political will of its citizens. State constitutions are distinct from their federal counterpart in that they are much longer, retain plenary power, and can enshrine positive rights. State supreme courts can rule on cases within their jurisdiction on rights enumerated in their respective constitutions. This process, called the new judicial federalism, has put state constitutions back into the spotlight and into the headlines across the nation. Interpreting state constitutions is crucial because they often extend more rights than the federal government, due to their thorough and expansive nature.

Today, state constitutions are more important than ever. Dobbs has overturned the national protection of the right to an abortion, and has thus left the extent of protection up to each respective state. The right to abortion is now being considered by state legislatures and state supreme courts nationwide. In some states, supreme courts are reading the right to an abortion into the rights provisions granted by state constitutions; in others, legislatures are passing amendments overturning their supreme courts’ interpretations of that right. Ultimately, and overwhelmingly, the right to an abortion has won in every election since Roe v. Wade was overturned (Terkel, 2023). As the next election cycle approaches, abortion activists across the nation are already looking to capitalize on this energy and work with local politicians and voters to enshrine the right to an abortion in state constitutions. This can be achieved through the highest level of legal protection— a state-by-state constitutional right.

State constitutions play a crucial role in addressing federal inaction on combating climate change. The seven states with Green Amendments, which encompass provisions
safeguarding environmental rights, have witnessed a surge in litigation and jurisprudence compelling the state to prioritize environmentally conscious actions. Furthermore, the recently enshrined Green Amendment in New York was approved by over seventy percent of the population, once again underscoring the notion that advocates have an opportunity to capitalize on the political and environmental energy to lock in environmental rights, and prevent further inaction and damage to our environment. State level jurisprudence is imperative in bringing actualization of these rights. Held v. Montana is significant because it provides a framework for overcoming standing and causation hurdles in applying state constitutional law to environmental and injury claims. Environmental constitutionalism has proven to be an effective avenue for embedding environmental safeguards, fostering a culture of environmental consciousness across private enterprises, governmental bodies, and other stakeholders.

As the abortion and environmental rights case studies have shown, state constitutions are a prime mechanism to enact progressive change and constitutionally enshrine rights. State constitutions are highly democratic, as they derive much of their legitimacy from the popular vote needed for ratification. Further, citizens can use state constitutions as a direct avenue for democratic change. Seventeen states have a citizen-initiated ballot amendment process in which citizens can propose constitutional amendments, thereby passing the legislative process. This democratic right can be expanded to other states. Through the state constitutional amendment process, citizens can enhance their democratic rights by empowering themselves to propose citizen-initiated constitutional amendments, thereby changing the way constitutions are amended. In the other thirty-three states, amendments must be passed by state legislatures then ratified by popular vote. The process of constitutional amendment underscores the importance of state elections. As state legislators are ultimately responsible for whether or not amendments are proposed to the public. State constitutions and
state court interpretation will be critical in the next decade as advocates look to capitalize on political fervor surrounding abortion rights or Green Amendments.

States have been and continue to be the default settings of American democracy. Through policy innovation, states can create models of positive governance, which can then be replicated in other states through horizontal federalism, either through the influence of sister courts or by adopting similar amendments. States can also provide hope for the federal government, that their democratic successes can trickle up and impact Washington. This thesis aims to underscore the fact that state constitutions have always been important – but in the modern context of democratic norm erosion and mistrust – they will be even more important in generating progressive change that Americans wish to see, and in shoring up trust in the American experiment of representative democracy.
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I hope that my work motivates voters to take their local elections seriously, prompts individuals to learn their respective rights granted to them by their state constitution, and inspires the next generation of policy makers to make change within their own state.
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