CONTESTING STATE CAPTURE

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State capture poses a distinctive challenge to democracy in the United States. As well-resourced individuals and interest groups exert ever-increasing influence over public policymaking, the American legal system loses its moorings in majority will and democratic faith. The costs of this process are borne by the poor and working classes. Unlike most public-law scholarship concerned with state capture, this Article surfaces potential remedies in the underutilized tools of state constitutional law. Drawing on state constitutional history and political-economic scholarship, it argues that when confronted with legislation suspected of capture, state courts should abandon rational basis scrutiny in favor of more searching forms of anticapture review. Their authority to do so may be located in restraints on legislative power common to every state constitution. State constitution-makers created these restraints in the nineteenth century in order to empower courts to check their captured legislatures. Still very much good law, they can and should be mobilized to contest state capture today.

TABLE OF CONTENTS

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INTRODUCTION

Within the past decade, Americans' faith in their democratic institutions has dipped to an all-time low.[1] When asked why, many confirm that money now has too much influence in politics and that elected officials are not responsive to the concerns of ordinary people.[2]

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1 *See, e.g.*, Jeffrey M. Jones, *Record Low in U.S. Satisfied with Way Democracy Is Working*, GALLUP (Jan. 5, 2024), https://news.gallup.com/poll/548120/record-low-satisfied-democracy-working.aspx [https://perma.cc/4M36-PXS4] (reporting that 28% of American adults are satisfied with their democracy—a measure significantly down from the 35% that expressed satisfaction when asked shortly after the January 6, 2021, attack on the United States Capitol by rioters seeking to prevent presidential certification); *see also* TOM GINSBURG & AZIZ HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 30 (2018) ("Survey evidence from around the globe concerning attitudes to democracy—in particular, data from Europe and the United States—supports the view that democracy is under corroding pressure.").

2 *See, e.g.*, *New Survey: Voters View the Influence of Money in Politics as a Threat to Democracy, Want Constitutional Amendment to Limit Spending*, AM. PROMISE (Oct. 30, 2024), https://americanpromise.net/new-survey-voters-want-constitutional-amendment-to-limit-spending [https://perma.cc/YXH8-PVDY] (reporting new survey research finding that 82% of registered voters regard the influence of money in politics as a threat to democracy); *Americans' Views on Money in Politics*, N.Y. TIMES (June 2, 2015), http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html [https://perma.cc/FW83-FALB] (reporting survey data finding that Americans, regardless of party, "agree that money has too much influence on elections, the wealthy have more influence on elections, and candidates who win office promote

Tending to corroborate these views, research shows that the rich are spending at record levels to influence electoral outcomes[3] and that elected officials are mostly unaccountable to the desires of the non-wealthy.[4] "[W]hen preferences between the well-off and the poor diverge," as political scientist Martin Gilens has found, "government policy bears absolutely no relationship to the degree of support or opposition among the poor."[5]

Political scientists are increasingly converging on term for the mechanism underpinning this democratic decline: *state capture*.[6] State capture occurs when particular individuals or groups attain levels of control over state institutions so decisive that they can use government to advance their particular interests against those of the public.[7]

State capture can be achieved in many ways; for example, it may involve explicit forms of quid pro quo, or it may be achieved by

policies that help their donors"). For a more detailed account of these sentiments and their implications for conservative Americans, see generally ARLIE RUSSELL HOCHSCHILD, STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT (2016).

3 ZACHARY TASHMAN & WILLIAM RICE, AM. FOR TAX FAIRNESS THEY'VE COME TO COLLECT: BILLIONAIRES BUYING ELECTIONS (2025), https://americansfortaxfairness.org/wp-content/uploads/BBE-March-2025-3.pdf [https://perma.cc/EBS3-BQK7] (finding that billionaires spent more money in the 2024 federal election than ever before ($2.6 billion), which accounted for one sixth of total expenditures). For an in-depth treatment of the mechanism billionaires use to influence in the democratic system, see generally BENJAMIN I. PAGE, JASON SEAWRIGHT & MATTHEW J. LACOMBE, BILLIONAIRES AND STEALTH POLITICS (2018).

4 *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2 (1st ed. 2008); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 12 (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 565 (2014).

5 GILENS, *supra* note 4, at 81.

6 Recent, in-depth treatments of the phenomenon of state capture in the United States include SAMUEL ELY BAGG, THE DISPERSION OF POWER: A CRITICAL REALIST THEORY OF DEMOCRACY (2024) (elaborating a theoretical account of state capture); and ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES AND THE NATION (2019) (applying the concept of state capture to analyze how wealthy individuals and special interest groups shape state law).

7 The definition of state capture in this Article is the conventional one that is common across virtually all recent scholarship on state capture. *See, e.g.*, BAGG, *supra* note 6, at 80 ("[S]tate capture refers to a diverse range of ways that state power can be used to advance the partial or private interests of a faction or group, at the expense of a broader public interest or common good."); Pamela J. Clouser McCann, Douglas M. Spencer & Abby K. Wood, *Measuring State Capture*, 2021 WIS. L. REV. 1141, 1145 (developing an empirical standard to measure state capture and testing their theory at the state level and defining state capture as "the degree to which industry steers government actors' policy agenda and decisions in a way that benefits private actors rather than the public, particularly when industry dominance is repeated or durable").

establishing relatively informal networks of control and influence.[8] Moreover, its effects may be felt at any level of state legislative or administrative decision-making, from the Congress to state to local school boards.[9] Regardless of how or where it transpires, however, state capture is a patently anti-democratic phenomenon. Democracy, of course, is a relatively open-ended concept, and it does not always require public policy to track the interests of the majority or the preferences of the median voter.[10] But a common view is that democracy, if it means anything, refers to collective self-rule, or at least rule by the majority—not a small network of wealthy elites. As such, it might well be expected that when a society systematically ignores the priorities of the non-wealthy, its democratic bona fides will come into question.

In the past, much of the scholarship on state capture focused on South Africa and the post-Soviet states.[11] Today, however, scholars and popular commentators alike are struck by its prevalence in the United States.[12] This should not be surprising: Some of the more attention-drawing news items in recent months have included the Trump administration's appointment of the world's richest man to oversee the

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8 *See, e.g.*, BAGG, *supra* note 6, at 28 (noting that state capture may involve "everything from blatant bribery of elected and appointed officials, to a range of subtler career-driven incentives and cultural influences"). In recent years, these different forms of influence have also been theorized in terms of the difference between venal and systemic corruption. *See* LAWRENCE LESSIG, REPUBLIC LOST: HOW MUCH MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 7–8 (2015) (focusing on how the wealthy apply the latter to capture congressional decision-making).

9 *Compare, e.g.*, LESSIG, *supra* note 8 (focusing on Congress), *with, e.g.*, HERTEL-FERNANDEZ, *supra* note 6 (focusing on state legislatures). *See also* Julia Manchester, *Schools Boards Become Ground Zero for Country's Culture Wars*, HILL (Aug. 8, 2021), https://thehill.com/homenews/campaign/568428-school-boards-become-ground-zero-for-countrys-culture-wars/?rl=1 (discussing the recent polarization of local school boards).

10 For recent scholarship exploring the varied meanings typically attributed to the term "democracy," see, for example, BAGG, *supra* note 6, at 13–76; JACOB EISLER, THE LAW OF FREEDOM: THE SUPREME COURT AND DEMOCRACY 1–28 (2023); and HÉLÈNE LANDEMORE, OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY 1–24 (2020); JAMES LINDLEY WILSON, DEMOCRATIC EQUALITY 1–14 (2019). For the view that democracy requires that public policy be at least reasonably responsive to the preferences of the non-wealthy, see sources cited *supra* note 4.

11 *See, e.g.*, JOHN CRABTREE & FRANCISCO DURAND, PERU: ELITE POWER AND POLITICAL CAPTURE 2 (2017); Rod Alence & Anne Pitcher, *Resisting State Capture in South Africa*, 30 J. DEMOCRACY 5, 6 (2019).

12 *See, e.g.*, Tyler McBrien, *What Is "State Capture"? A Warning for Americans*, N.Y. TIMES (Feb. 5, 2025), https://www.nytimes.com/2025/02/05/opinion/elon-musk-donald-trump-government.html; *see also* Zenobia Ismail, *Is State Capture Coming to the United States? Americans Can Learn to Recognise It from the Experiences of Other Countries*, APPLIED KNOWLEDGE SERVS. (2025), https://gsdrc.org/is-state-capture-coming-to-the-united-states-americans-can-learn-to-recognise-it-from-the-experiences-of-other-countries [https://perma.cc/4G4N-XBWY]; John Prendergast & Damon Wilson, *To Challenge State Capture, the US Needs a Strategy of State Retrieval*, JUST SEC. (Sept. 10, 2024), https://www.justsecurity.org/99964/challenging-state-capture [https://perma.cc/SA6Z-EMZR].

nation's finances and its blatant attempts to establish quid pro quo relationships with New York City Mayor and leading Big Law firms.[13]

But state capture in the United States is by no means limited to the relatively notorious excesses of the second Trump presidency. In an influential, 2019 book, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States and the Nation*, political scientist Alexander Hertel-Fernandez argued that wealthy conservatives had largely captured state legislative decision-making by applying an effective yet seemingly legal set of tactics.[14] Central to these efforts was the American Legislative Exchange Council (ALEC), a 501(c)(3) nonprofit founded by Koch Industries.[15] Working in conjunction with key associates, ALEC supplies conservative legislators with model bills keyed to the policy preferences of its funders.[16] Today, evidence of this strategy's success is unmistakable: A disproportionate number of states now sport right-to-work, stand-your-ground, and voter ID laws—all of which began as ALEC model bills.[17]

There is a voluminous public law scholarship concerned with protecting American democratic institutions and norms against state capture and it can be referred to here.[18] Most of its focus thus far has been on stopping the flow of money into politics, strengthening the political influence of nonwealthy majorities, and leveraging the anticapture potentiality of federal judicial review.[19] However, what remains an open question, and thus what this Article seeks to clarify, is the role that state courts and state constitutional litigation might play in contesting state capture and allaying its considerable harms.

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13 *See, e.g.*, McBrien, *supra* note 12; Hurubie Meko & Michael Rothfeld, *"Quid Pro Quo": The Phrase That Could Have Major Ramifications for Adams*, N.Y. TIMES (Feb. 20, 2025), https://www.nytimes.com/2025/02/19/nyregion/eric-adams-quid-pro-quo.html; Atinuke Adediran, *Law Firms' Quid Pro Quo Pro Bono Work on Tariffs Is Unethical*, BLOOMBERG L. (Apr. 15, 2025), https://news.bloomberglaw.com/us-law-week/law-firms-quid-pro-quo-pro-bono-work-on-tariffs-is-unethical.

14 *See generally* HERTEL-FERNANDEZ, *supra* note 6.

15 *See generally id.*

16 *See id.* at 64–77 (analyzing ALEC's model bills).

17 *See id.* at 2.

18 In particular, this Article would instead turn readers to examine the literature reviews provided in Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 550–54 (2021) (emphasizing the importance of developing labor as a countervailing power against capital); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 44–48 (1991) (summarizing the rich body of literature on anticapture judicial review produced by public law scholars in the 1980s); and Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 38, 112 (2016) (identifying public law approaches to balancing power within American society).

19 The sources listed in *supra* note 16 contain excellent overviews of these strands of anticapture public-law scholarship.

The potential importance of state courts as venues for anticapture litigation may be explained with reference to four interlocking factors. First, any prospect of a federal solution to contemporary state capture must contend with severe constitutional and political roadblocks. For the foreseeable future, First Amendment law will prevent most attempts—legislative or otherwise—to regulate political spending or lobbying,[20] and partisan hyperpolarization will likely stop Congress from acting within its existing authority.[21] Furthermore, while the idea of federal anticapture review under the Equal Protection Clause might sound promising in theory, its doctrinal commitments to footnote four of *United States v. Carolene Products Co.* limits judges to upholding most potentially captured legislative and administrative decisions as constitutionally valid under rational basis review.[22]

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20 *See, e.g.*, United States v. Harriss, 347 U.S. 612, 625 (1954) (stating that "the freedoms guaranteed by the First Amendment—freedom to speak, publish, and petition the Government" are involved in the assessment of lobbying regulation); Citizens United v. FEC, 558 U.S. 310, 365 (2010) (securing corporations the right, under the First Amendment, to spend unlimited amounts on "independent" campaign expenditures). In addition, recent developments in First Amendment law pose obstacles to reforms focused on limiting state capture by cultivating labor power as a countervailing force against capital. *See, e.g.*, Janus v. Am. Fed'n State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 884–86 (2018) (holding that a public sector employer cannot, under the First Amendment, require employees to pay union dues).

21 *See, e.g.*, JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS 9 (2022) ("As the parties polarize, gridlock in Congress becomes more likely, and policy action moves down to the state level, with profound consequences."); *see also* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010) (arguing that "the institutional structure of American government"—e.g., its separation of powers, system of federalism, and supermajority hurdles—"allows organized and intense interests—even quite narrow ones—to create gridlock and stalemate" at the federal level).

22 304 U.S. 144, 152 n.4 (1938) (suggesting that heightened scrutiny should be limited to three contexts: when a law appears on its face to violate fundamental rights, when it restricts access to the political process by which the law might be repealed, and when it discriminates against "discrete and insular minorities"); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (elaborating footnote four's suggested theory of judicial review); EISLER, *supra* note 10 (extensively reviewing debates that evolved after and in response to Ely's foundational work).

It may, of course, be debated whether the *Carolene Products* footnote four political process theory justifies heightened scrutiny for legislation suspected of capture. *Compare, e.g.*, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 395 (2015) (contending that judicial intervention to equalize special interest influence in administrative decision-making fits naturally within the Carolene Products theory that "the judicial role should be heightened when politically vulnerable groups are at risk"), *with, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts.") (quoting Munn v. State of Illinois, 94 U.S. 113, 134 (1876)); Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (quoting Adkins v. Children's Hospital, 261 U.S. 526, 570 (1923) (Holmes, J., dissenting)). I thank Rebecca Zietlow for highlighting this point.

By contrast, and second, state judicial power—and thus the prospect of effective anticapture litigation in the states—is currently on the rise.[23] Political gridlock at the federal level has reoriented parties, interest groups, and activists to the states as venues to realize their political preferences.[24] As a result, money increasingly pours into state and local election at levels never before seen in U.S. history,[25] and state judges are increasingly being called to decide on issues of weighty, national concern.[26]

Institutionally speaking, and third, state courts today are in some ways ideally positioned to review legislation suspected of capture. States and localities—spaces in which state courts have primary jurisdiction—are likely more susceptible to capture than the federal government.[27] While ALEC's success may be taken as representative of this vulnerability, the point may also be expressed in more abstract terms. Historically, the comparatively muted levels of political spending and participation in state and local elections has made state policymaking easy prey to well-resourced individual activists and interest groups.[28] Moreover, states are

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23 MICHAEL KANG & JOANNA SHEPHERD, FREE TO JUDGE: THE POWER OF CAMPAIGN MONEY IN JUDICIAL ELECTIONS 6 (2023) (reporting that state courts currently "handle more than 90 percent of judicial business in America" and that "state courts are becoming more important than ever as an increasingly conservative U.S. Supreme Court abdicates a federal constitutional role in critical policymaking areas like redistricting and abortion").

24 *See, e.g.*, GRUMBACH, *supra* note 21, at 9.

25 *See, e.g.*, KANG & SHEPHERD, *supra* note 23, at 2, 5 (noting that political spending in 2010 state judicial elections was greater in total than the entire previous decade and identifying the 2015 to 2016 campaign cycle as the highest to date); *see also* Ian Vandewalker & Douglas Keith, *Wisconsin Supreme Court Race Breaks Spending Record, Fueled by Out-of-State Money*, BRENNAN CTR. (Mar. 24, 2015), https://www.brennancenter.org/our-work/analysis-opinion/wisconsin-supreme-court-race-breaks-spending-record-fueled-out-state [https://perma.cc/9V9E-V5NZ] (discussing the unprecedented spending levels of a recent Wisconsin state supreme court election).

26 Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1857 (2023) ("From abortion to voting, state constitutions are defining the content and scope of rights across the nation.").

27 Local government scholars note that states and localities are even more responsive to elite preferences than federal. *See, e.g.*, GRUMBACH, *supra* note 21, at 73–96 (contending, contrary to common belief, that state and local governments today are in fact *less* responsive to the preferences of non-wealthy and nonwhite constituents than Congress); BRIAN F. SCHAFFNER, JESSE H. RHODES & RAYMOND J. LA RAJA, HOMETOWN INEQUALITY: RACE, CLASS, AND REPRESENTATION IN AMERICAN LOCAL POLITICS 13–14 (2020) ("Whites and wealthier people receive substantially more ideological representation both from local government officials and from municipal policy outputs than do nonwhites and less wealthy individuals. The inequities in representation we identify are frequently shocking in their magnitude.").

28 GRUMBACH, *supra* note 21, at 76–78; SCHAFFNER ET AL., *supra* note 27, at 31, 84–102 ("[F]ind[ing] that whites, wealthy people, and those with more extreme attitudes are more likely to vote in local elections and contact local elected officials" and concluding "that these biases in local political participation . . . translate to racial and class biases in the composition of municipal elected officials.").

highly sensitive to the changing demands of private industry, both because their legislatures tend to be resource-poor and because they must constantly compete to attract highly mobile capital.[29] These are problems, in sum, that state courts can oversee.

Fourth, and as this Article shall repeatedly emphasize, the specific constitutional authorities and unique institutional position of state courts situate them as powerful bulwarks against state capture, should we choose to use them. While state judges must adhere to federal doctrine when applying federal law, they must also abide by their own idiosyncratic state-constitutional traditions.[30] When it comes to reviewing legislation suspected of capture, state constitutions offer judges and litigants a broader range of principles and tests than typically appear under the *Carolene Products* footnote four paradigm.[31] Unlike their federal counterparts, moreover, state judges are not bound to the presumption of extreme legislative deference.[32] While state courts must, of course, give some respect to legislative will, state constitutions situate state judges as involved participants in the democratic process, as indicated by the fact that the vast majority are elected officials.[33]

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29 GRUMBACH, *supra* note 21, at 73–84 (identifying these and other reasons as central to states' special susceptibility to capture); HERTEL-FERNANDEZ, *supra* note 6, at 78–111 (contending that states with fewer legislative resources have been more prone to adopt ALEC model bills than those with more); *see also 2024 State Legislator Compensation*, NAT'L COUNCIL STATE LEGIS. (Apr. 10, 2025), https://www.ncsl.org/about-state-legislatures/2024-legislator-compensation [https://web.archive.org/web/20250417170612/https://www.ncsl.org/about-state-legislatures/2024-legislator-compensation] (reporting that 2024 salaries for state legislators averaged $44,320 and ranged from $100, in New Hampshire, to $142,000, in New York).

30 William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (contending that "decisions of the [Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law"). Justice Brennan's influential argument has been widely debated by scholars of the "new judicial federalism." *Compare* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17–18 (contending that state constitutional interpretation should turn on state-specific traditions), *with* Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1311 (2019) (disputing Sutton's claim). *See also* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997) (defining the "new judicial federalism" as "the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution").

31 *See infra* Section I.A; Part II.

32 *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 26, at 1882, 1884–91 ("Federal rational basis review is too deferential to state legislatures and executives, whom state constitutions sharply distinguish from the people themselves, while strict scrutiny is often too absolutist in its conception of rights and fails to situate the individual within the community as state constitutions require."); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842 (2001) (disputing state courts' deference to federal justiciability doctrine).

33 KANG & SHEPHERD, *supra* note 23, at 39 ("As a result of this long evolution in judicial selection and retention methods, approximately 90 percent of current state judges must be elected or re-elected by voters."); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118–28 (1977) (discussing the institutional differences between state and federal courts).

Virtually all of these indices of state judges' unique authority and positioning in the federal system have been alluded to in previous state constitutional law scholarship.[34] Yet public law scholars have yet to extend a complete account of their implications to the problem of state capture. The aim of this Article is to address this lacuna: to set out a preliminary case for state anticapture judicial review and, in so doing, reorient public law scholars' longstanding concern with state capture toward states and localities.

Specifically, the discussion to follow applies the tools of legal history and political economic scholarship to demonstrate that state constitutions uniquely empower state judges to function as brakes on state legislative capture. It locates this anticapture authority in the restraints on legislative power that were entered into virtually every state's constitution during the nineteenth century. Across those long and tumultuous decades, states weathered a series of harsh economic crises, events they came to understand as the consequences of endemic legislative corruption. As such, nineteenth-century state constitution-makers amended their constitutions to place substantive and procedural limits on state legislative power, provisions that in turn expanded state court authority to review legislative enactments for signs of capture and potentially strike them down on that basis.[35]

Though established well over a century ago, these restraints on legislative power remain part of virtually every state's constitution today, and state courts regularly enforce them.[36] Some of these provisions set forth procedural guidelines for passing bills into law, like the requirement that every bill contain no more than one subject and have a clear and accurate title.[37] Others place substantive limits on the kinds of laws that state assemblies can enact, like prohibitions on special legislation (laws that apply only to specific locations, individuals, or groups) and the principle that every law serve a valid public purpose.[38]

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34 There have, of course, been notable exceptions to this general trend. *See, e.g.*, Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 974–84 (1988) (analyzing the potential for interest-group capture of state legislatures and plebiscites); Hershkoff, *supra* note 32, at 1927 (contending that "[a] reconfigured state justiciability doctrine . . . could serve as an important filtering device against special-interest, rent-seeking behavior at the state and local levels").

35 *See infra* Part I. Throughout this Article, the term "constitution-makers" is used in an inclusive and capacious sense and can refer to anyone plausibly involved in debating, drafting, and ratifying state constitutional amendments. In so doing, it follows the approach developed by leading state constitutional scholar G. Allen Tarr. *See generally* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS (2018) (applying this term to similar effect).

36 *See infra* Part II.

37 *See infra* Section I.A.2.

38 *See infra* Section I.A.2.

While occasionally aware of these restraints' nineteenth-century origins, the vast majority of state courts do not at present enforce them against state capture.[39] Notwithstanding their unique institutional qualifications and constitutional authorities, many state courts gloss these otherwise powerful mechanisms with enforcement doctrines akin to exceedingly deferential, federal-style rational review.[40] In turn, state judges find themselves pressured to treat even the most obviously captured legislative enactments as presumptively constitutional.

In so far as this Article encourages state judges to abandon this practice, it contributes a unique perspective to a growing chorus of voices.[41] Unlike much of the existing state constitutional scholarship, however, it does so by suggesting that toothless rational basis tests can prevent states' constitutional restraints on legislative power from effectively performing their intended anticapture function.[42] And rather than simply criticizing state courts for not adequately enforcing their constitutions' legislative restraints, moreover it highlights that some states have already developed alternative doctrines that better animate their original, anticapture purposes. In states like Arizona, Pennsylvania, and Maryland, courts enforce these constraints using innovative forms of anticapture review.[43] Instead of simply applying rational basis review, these courts apply heightened forms of scrutiny and multifactor assessments to determine whether to uphold legislation suspected of capture. In so doing, they offer battle-tested models to be considered, adopted, and even improved upon by other jurisdictions. There are, as it turns out, many ways in which state courts may engage in anticapture review.[44]

If more courts were to take their cue from the likes of Maryland and Arizona, it would become considerably harder for wealthy individuals and interest groups to determine the course of state and local policymaking. As will be discussed, applying the approaches offered by

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39 Discussion of some recent important examples appears *infra* Section II.A.

40 *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 26, at 858–59, 1881, 1885 (discussing typical ways in which state courts engage in substantive and methodological "lockstepping"); JEFFERY SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 36-38 (2008) (explaining the derivation of state doctrines surrounding their constitutions' special legislation prohibitions from federal equal protection jurisprudence, but noting that state courts in recent years have increasingly applied more searching forms of review when enforcing their constitutions' equality provisions).

41 Bulman-Pozen & Seifter, *supra* note 26; Hershkoff, *supra* note 32; Sutton, *supra* note 31.

42 *See infra* Part II.

43 *See infra* Section II.A.

44 By "anticapture review," this Article refers to forms of judicial review that a judge might exercise when ruling on legislation suspected of capture and, typically, tests that are less deferential to legislative will than federal-style rational basis scrutiny. For an example of recent scholarship applying this term to similar effect, see, e.g., Levinson, *supra* note 18, at 85–86.

these jurisdictions could place in question the constitutionality of many commonplace state laws, from extreme partisan gerrymandering to the right-to-work acts that ALEC has pushed throughout the nation.[45] These, and many other existing state laws, exhibit signs of capture—either in their purposes, their formal structures, or their effects—and thus may be subject to various applications of anticapture review.[46]

To be clear, state capture is a problem that now infects virtually every level of the federal system. It should not be expected that improving state constitutional enforcement will save American democracy. State constitutional litigation is neither foolproof nor costless, and this piece devotes significant discussion to its potential shortcomings.[47] Imperfections notwithstanding, however, state courts offer a crucial site of democratic defense and renewal. Even a few prominent anticapture decisions could interrupt the ongoing spread of capture, and this in itself could help interrupt the current trend toward democratic erosion. Judges, activists, and ordinary Americans committed to democracy would thus do well to heed the anticapture potentiality of their states' constitutions. Indeed, should they choose to do so, their political system might one day merit a modicum of their democratic faith.

This Article proceeds as follows: Part I outlines our state constitutions' restraints on legislative power, calling upon resources of nineteenth-century legal history to illuminate their original, anticapture purposes. Part II argues that giving these restraints legal effect requires state courts to do more than apply toothless, rational basis review when considering legislation suspected of capture. Drawing on recent state case law, this Part also shows how some states have already taken up this practice by constructing more probing models of anticapture review and it considers how applying such approaches could shift the legal landscape in some hotly contested areas. Part III explores some of the concerns that enlisting state courts in the project contesting state capture might raise. A brief conclusion offers a summary of the arguments developed throughout.

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45 *See infra* Section II.B.

46 *See generally infra* Part II.

47 *See infra* Part III.

I. CONTESTING STATE CAPTURE THEN: A LOST NINETEENTH-CENTURY APPROACH

Americans have long been suspicious of their legislators and anxious about the role of money in politics.[48] When they come to believe that a legislative enactment has been the result of capture, they may choose to bring suit under their state constitutions' restraints on legislative power. If so, they may try to convince courts that a potentially captured enactment is without a valid "public purpose," that it amounts to "class legislation," or that the legislature violated constitutionally mandated procedures, like the requirement that it be printed and read aloud before being voted upon.[49]

Despite the ubiquity of state capture in the contemporary United States, however, prevailing on these kinds of claims can prove to be an extremely daunting task. Overtime, most state courts have come to gloss their state constitutions' limits on legislative power with doctrines basically amounting to federal-style rational review.[50] As such, most reviewing courts will simply ask whether the challenged legislation can be said to have a legitimate purpose and, if so, whether its classificatory scheme is rationally related thereto.[51] Encouraged by the belief that legislatures deserve a high degree of deference, they may thus be hesitant to ask whom the enactment benefits or burdens or to peer into the legislative record to see whether its main proponents stood to exact rents upon the rest of the population.

But this pattern of judicial practice, as this Part argues, stands in deep tension with the original purposes of these legislative restraints. Specifically, it shows that these restraints were once understood to empower courts to review, and potentially invalidate, legislation suspected of capture.[52] In the nineteenth century, virtually all existing states amended their constitutions to restrict legislative power with the aim of insulating their governments against the threat of capture.[53] The amendments were constitutional responses to economic crisis, which became linked, in popular imagination, to the corruption of state legislatures by special interest politics.

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48 *See, e.g.*, THE FEDERALIST NO. 10, at 49–50 (James Madison) (identifying the "unequal distribution of property" as a source of factional strife and, thus, one of the reasons that "our governments" so often fail to pursue the "public good").

49 *See infra* Part II.

50 *See infra* Section I.B.2.

51 *See infra* Section I.B.2.

52 *See infra* Sections I.A.1–2.

53 *See infra* Sections I.A–B.

To develop this claim, this Part draws on the text, history, and structure of state constitutional law. Methodologically, it follows the widely shared premise that is both possible and productive to discuss and analyze state constitutions as a group.[54] Indeed, the fact that each state's constitution is unique must not obscure their significant commonalities, which often emerged in response to issues of nationwide concern.[55] Most importantly, no nineteenth-century state was left untouched by the experience of rapid industrialization and the new forms of political and economic competition it engendered.[56] Pressured on all sides by special interests, virtually all states during this period overextended themselves by taking on burdensome debts and none were immune to the financial crises that intermittently punctured the century.[57] Moreover, the state constitutional reform movements that emerged as a result of these complex conditions could not but have been deeply affected by the era's predominating political ideologies: The mass appeal of Jacksonian democracy and populism cast the century's ills as incidents of elite privilege and political corruption and catalyzed mass distrust toward the political class.[58]

Understanding the anticapture potential of our state constitutions requires submerging oneself in this bygone era of state constitutional history. Accordingly, this Part begins by providing an overview of some of the restraints on legislative power that nineteenth-century reformers added to their state constitutions and identifying the anticapture concerns that animated their creation. It then outlines some of the historical and structural evidence indicating that these mechanisms were intended to be enforced through judicial review.

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54 For a description of this method and citations to scholars responsible for its development, see Bulman-Pozen & Seifter, *supra* note 26, at 1862–63, 1862 & n.32, 1863 & nn.33–34.

55 *See, e.g.*, *id.*

56 *See, e.g.*, TARR, *supra* note 35, at 109–17.

57 *See, e.g.*, Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911–12 (2003); Felipe Cole, *Unshackling Cities*, 90 U. CHI. L. REV. 1365, 1379 (2023).

58 *See, e.g.*, RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 854–55 (8th ed. 2016) (describing how states constitutionalized limits on state spending, lending, and borrowing in response to the fiscal crises of the 1830s and 1840s); TARR, *supra* note 35, at 99 (noting that the state constitutional reform agenda was shaped by "Jacksonian democracy and Populism" as well as "campaigns for . . . restrictions on the power of railroads and other corporations"); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 241 (1976) ("In the 19th century, the reaction to legislative recklessness, ignorance, logrolling, and corruption led to constitutional strictures on the forms and procedures of enactment, some of which we now find inappropriate.").

A. *Restraints on Legislative Power*

This Section provides an overview of the two main forms of restraint that nineteenth-century reformers added to their state constitutions in order to rein in the perceived excesses of their captured legislatures. These included substantive restraints, which limit the kinds of policies that lawmakers may enact, as well as procedural ones, which define the process through which every bill must pass en route to becoming law.[59] Through a high-level examination of these mechanisms' shared histories, texts, and structures, this Part reveals that they shared at least one common-purpose: to better insulate state legislatures against the threat of capture.

1. Substance

A key feature of nineteenth-century constitution-making was the addition of new, substantive restraints on legislative power.[60] In the 1820s and 1830s, reformers amended their constitutions to prohibit state-operated lotteries; in the 1840s, they diminished the authority of their legislatures to charter and invest in private corporations, incur debt, and lend or gift public dollars for nonpublic purposes; and in the 1850s, a wave of states barred their legislatures from passing special laws.[61] These wide-ranging limits shared in common the purpose of preventing state capture. They were motivated by the conceit that "legislatures are by nature hopelessly corrupt" and sought, accordingly, "to transfer powers from state legislatures to other officials or to the people directly."[62]

Specifically, this Section explores the operation and anticapture purposes of two such mechanisms. It begins by analyzing special law prohibitions, which limit the authority of legislatures to pass laws pertaining to specific individuals, groups, or geographic areas,[63] and then proceeds to consider public purpose requirements, which hold that every public policy must serve a valid, public (as opposed to private) purpose.[64]

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59 *See, e.g.*, Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103 (2001) (contrasting procedural restrictions and substantive limitations); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 PUBLIUS 91, 91–93 (1987) (same).

60 TARR, *supra* note 35, at 119.

61 JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 40, 154 (2018).

62 *See, e.g.*, TARR, *supra* note 35, at 119, 117.

63 *See infra* Section I.A.1.a.

64 *See infra* Section I.A.1.b.

The respective texts, structures, and adoption histories of these restraints offer a uniquely lucid depiction of the developing, nineteenth-century understanding that preventing state capture is a key purpose of state constitutional law.[65] As Professor Melissa Saunders has helpfully put it, that it is unconstitutional for any state to "single out any person or group of persons for special benefits or burdens without an adequate 'public purpose' justification."[66]

a. Special Legislation Prohibitions

Because of amendments enacted in the nineteenth century, virtually every state constitution contains some statement or combination of provisions barring special legislation.[67] Since 1871, the Constitution of the State of Nebraska has set forth the following set of guidelines in its legislative articles:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
>
> [1] For granting divorces.
>
> [2] Changing the names of persons or places.

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65 On the Madisonian and Jacksonian roots of this theory, see especially HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 10, 30 (1993) (contending that a general principle of Jacksonian Era state judicial review was the Madisonian notion that any law promoting the interests of factions over those of the public "was to be considered the most vivid and authoritative example of illegitimate and unrepublican government" and that nineteenth-century state courts established this view through the "public purpose" doctrine, which distinguished between valid economic regulation and illegitimate forms of state power); THE FEDERALIST NO. 10, at 49 (James Madison) (defining a "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community"); Melissa Saunders, *Equal Protection, Class, Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 249 (1997) (distinguishing this Jacksonian state constitutional tradition from the "vested rights" doctrine, and contending that it came to form the basis of the Republican Party's antithesis to slavery and the Black Codes); see also WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 9 (1996) ("Nineteenth-century America was a *public* society in ways hard to imagine after the invention of twentieth-century privacy. Its governance was predicated on the elemental assumption that public interest was superior to private interest. Government and society were not created to protect preexisting private rights, but to further the welfare of the whole people and community."); TARR, *supra* note 35, at 126 ("[S]tate constitutions characteristic of the late nineteenth century reflected a desire to assert a public interest against ordinary politics.").

66 Saunders, *supra* note 65, at 247–48; *see also* GILLMAN, *supra* note 65, at 33–45.

67 For a record and discussion of the precise ways in which such provisions appear in state constitutions today and a collection of citations to these provisions, see Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 48 nn.38–41 (2014).

> [3] Laying out, opening altering and working roads or highways.
>
> [4] Vacating roads, Town plats, streets, alleys, and public grounds.
>
> [5] Locating or changing County seats.
>
> [6] Regulating County and Township offices.
>
> [7] Regulating the practice of Courts of Justice.
>
> [8] Regulating the jurisdiction and duties of Justices of the Peace, Police Magistrates and Constables.
>
> [9] Providing for changes of venue in civil and criminal cases.
>
> [10] Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City, or Village.
>
> [11] Providing for the election of Officers in Townships, incorporated Towns or Cities.
>
> [12] Summoning or empaneling Grand or Petit Juries.
>
> [13] Providing for the bonding of cities, towns, precincts, school districts or other municipalities.
>
> [14] Providing for the management of Public Schools.
>
> [15] The opening and conducting of any election, or designating the place of voting.
>
> [16] The sale or mortgage of real estate belonging to minors, or others under disability.
>
> [17] The protection of game or fish.
>
> [18] Chartering or licensing ferries, or toll bridges, remitting fines, penalties or forfeitures, creating, increasing and decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed.
>
> [19] Changing the law of descent.
>
> [20] Granting to any corporation, association, or individual, the right to lay down railroad tracks, or amending existing charters for such purpose.
>
> [21] Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise . . . .[68]

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68 NEB. CONST. art. III, § 18. Nebraska directly imported this language contained in article IV, section 22 of the Illinois Constitution of 1870, which, in turn, replicated the constitutions of Indiana and Iowa. Schutz, *supra* note 67, at 46 n.35.

While many states began to adopt provisions of this kind in the 1850s,[69] their origins lie in the state constitutions of the late-eighteenth century.[70] These constitutions plainly manifested the principles that state legislatures may not grant any member of the community special privileges and that state action might be thought legitimate only if it was of some benefit to the public.[71] For instance, Massachusetts's first and only constitution states that the "[g]overnment is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men."[72] Similarly, Section IV of the 1776 Virginia Bill of Rights asserts that "no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."[73]

From the beginning, however, these principles stood more or less at odds with established legislative practice.[74] Of course, there is the well-known fact that racial slavery, property qualifications for political participation, and extreme wealth inequality were the order of the day.[75] But less commonly acknowledged is the reality that the vast proportion of state legislation passed in that early period singled out particular individuals or groups for the receipt of peculiar advantages, and for that reason was understood to be "special" (or "private") in nature.[76]

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69 DINAN, *supra* note 61, at 154.

70 Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 296 (2004); *see, e.g.*, Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 725 (2012) ("The earliest state constitutions insisted that legislatures could act only for the public benefit, but their language reflects the framers' sense that they were merely memorializing an inescapable principle of natural law."); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1196 (1985) ("[M]ost states have generally applicable provisions prohibiting special and local laws, the grant of special privileges, or discrimination against citizens in the exercise of civil rights or on the basis of sex.").

71 *See, e.g.*, Long, *supra* note 70, at 725; Williams, *supra* note 70, at 1196.

72 MASS. CONST. art. VII (1780).

73 VA. CONST. of 1776, Bill of Rights § 4.

74 *See* Long, *supra* note 71, at 726 ("[L]egislatures simply could never rightly allocate communal resources to private parties, almost as a matter of definition."); *see also* Williams, *supra* note 71, at 1199 (identifying "a great gap between their rhetoric and reality" in the fact that "[s]lavery and great disparities in wealth and political participation were the order of the day" and contending that "[e]quality among colonists was not the point of this early political argument; rather, the effort was to attain equality of colonists with their British contemporaries").

75 *See, e.g.*, Williams, *supra* note 71; TARR, *supra* note 35, at 84–85 (discussing the ubiquity of property-based voter qualifications in eighteenth-century state constitutions).

76 *See, e.g.*, Ireland, *supra* note 68, at 272 ("A delegate to the 1872–1873 Pennsylvania constitutional convention asserted that between 1866 and 1872, the Pennsylvania legislature enacted 475 general laws and 8,755 special laws, while the *New York Times* reported in the same

The process by which this legislation came to be reflects some of the prominent indices of nineteenth-century state capture. Individuals and groups seeking personalized bills would flood their state representatives with hundreds of special legislation requests.[77] Since the representatives had neither the time nor resources to review these petitions, let alone debate them with one another, state officials tended simply to "enact" them into law.[78] This was made possible, as Professor Anthony Schutz has explained, by the general practice of "logrolling," or "legislative courtesy"—a tacit "understanding . . . among legislators that the proposing legislator's peers would not resist the proposed legislation, so long as the proposing legislator would not resist similar bills from [their] peers."[79]

In time, special legislation came to be seen as a "perennial fountain of corruption."[80] At the 1872 to 1873 Pennsylvania Constitutional

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year that almost ninety percent of the New York legislative output for the previous four years had been special statutes." (first citing 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 592 (1873) (remarks of Mr. Mantor); and then citing *The Constitutional Amendments—Special Legislation*, N.Y. TIMES, Mar. 26, 1873, at 4)). The concept of a "special" law, as an important commentator from the era has explained, was akin to that of a "private" one, and equivalent in its difference from "public" or "general" laws, which "were binding upon all of the public who might happen to be affected by them." Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in the United States*, 41 U. PA. L. REV. 721, 726–27 (1893). As such, data attesting to the ubiquity of private legislation in the nineteenth century is informative as to just how much special legislating was going on. *See, e.g.*, Long, *supra* note 71, at 726 ("In Indiana . . . nearly 90%[ ]of the legislative output of 1849–50 was private laws." (citing Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty., 849 N.E.2d 1131, 1135 (Ind. 2006)); Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 8 (2020) ("[I]t was not unusual [in the early nineteenth century] for the number of private [or special] acts to vastly outstrip the number of public acts in a given state-legislative session.").

77 *See, e.g.*, John C. Teaford, *Special Legislation and the Cities, 1865–1900*, 23 AM. J. LEGAL HIST. 189, 191 (1979) (explaining that "city councils, city attorneys, chambers of commerce, good-government groups, and lawyers serving urban contractors or real estate speculators drafted special legislation for the urban areas," with the result that "[h]arried state solons [were] confronted by eight or nine hundred bills during a sixty-day session," and thus "did not make law so much as enact it").

78 *See id.*

79 Schutz, *supra* note 67, at 59 ("'[L]egislative courtesy' or 'logrolling' was common in the nineteenth century and was one of the primary reasons why constitutional drafters decided that special lawmaking was problematic."); *see also* Ireland, *supra* note 68, at 275 ("The tradition of legislative courtesy and log-rolling meant that the process of special legislation was basically undemocratic. The general public seldom received notification of pending special legislation and often learned of such legislation only after it had been enacted."); Teaford, *supra* note 77, at 192 ("It was an unwritten rule that the member from the locality affected introduced local bills, and amendments or suggestions from members residing elsewhere were rare.").

80 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 512 (1888); *see also* Ireland, *supra* note 68, at 276 ("[A] newspaper charged that Louisville city officials and corporations had secured privileges by special legislation enacted without notice to the public. A Maryland constitutional

Convention, for instance, participant Francis Jordan charged that "[b]ribery, or the buying and selling of votes" grew out of and was "inseparately [sic] connected with special legislation."[81] Under the special legislation regime, he insisted, his state's legislature had become infested by a lobby of "selfish and mercenary men."[82] Intent on "mercenary traffic in legislation," he warned, these men were after "special privileges and valuable rights" and were willing to "pay for them."[83]

Other constitution-makers from the era channeled similar sentiments. An Illinoisian argued that special legislation would "fill the lobbies of our State Capitol with corruptionists," a Californian labeled it as "the greatest source of corruption in our legislative halls," and an Alabamian constitution-maker at his state's 1901 constitutional convention contended that special legislation practices had "been in the past and [would] continue to be in the future the prolific sources of corruption."[84]

Charges of this sort may well have had some basis in fact. As Philadelphia lawyer Charles Chauncy Binney would later recall in his 1894 treatise on special legislation, one of the consequences of the practice was that "private schemes were often pushed through the legislatures by unscrupulous men, to the sacrifice of public interests, each separate locality was liable to unwise interference in its affairs, and distracting changes of its governmental system, and the law, as to many matters, was thrown into confusion."[85]

Private interests also often resorted to creative means to influence their state officials. "Anticipating demand for particular types of charters," as the political scientist Rosalind Lorraine Branning writes,

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reformer charged in 1864 that influential persons routinely secured special legislative privileges without notice to those parties who were injured by such enactments. The secret nature of the process of special legislation threatened representative government and smacked of monarchical dictatorship, in the opinion of a delegate to the Illinois Constitutional Convention of 1869–1870.").

81 Ireland, *supra* note 68, at 277 (second alteration in original) (quoting Francis Jordan, *Evils of Special Legislation*, *in* 1 PROCEEDINGS OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION, at 37 (1873)).

82 *Id.*

83 *Id.*

84 *Id.* (first quoting 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS 576 (1870) (remarks of Mr. Merriam); then quoting 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 803 (1878) (remarks of Mr. Burt); and then quoting 2 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 1780 (1901) (remarks of Mr. O'Neal)).

85 Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in State Constitutions*, 41 U. PA. L. REV. 613, 618 (1893); *see also* Long, *supra* note 71, at 726 ("[T]he quantity of 'private bills' and the easy advantages they offered to well-connected supplicants attracted pernicious influences to the state houses.").

> [L]obbyists [in Pennsylvania] not uncommonly put through the charters, then offered them for sale to the interested parties. Since it was often cheaper for the charter applicant to purchase the charter from a lobbyist than to push it through the legislative gauntlet, lobbyists were able to collect their "blackmail." . . . The legislature at times helped these hucksters of "floating" charters by refusing to enact charters for persons wishing to incorporate so that they would have to purchase at enhanced prices charters already authorized.[86]

Very much like today, thus, private interests in the nineteenth century mobilized strategies like lobbying, bribery, and model bills to derive rents from the state legislative process. In that century, however, popular antipathies thereunto led most states to affirmatively exclude them from legislative practice.[87] Michigan became the first to adopt explicit, special legislation prohibitions in 1850, when it passed an amendment prohibiting special laws for the construction of roads.[88] The following year, Indiana would become the first state to institute a "wide-ranging" special legislation bar, one approximating the version Nebraska would pass in 1871.[89] Over the subsequent decades, Indiana's model became the norm as state after state drew up clauses extensively enumerating areas in which special legislation would no longer be permitted.[90] Thus, and with the aim of preventing the capture of their legislative bodies,[91] the constitutions of most states in the Union came expressly to limit special legislation.[92]

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86 ROSALIND LORRAINE BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 42 (1960).

87 *See* Schutz, *supra* note 67, at 45; TARR, *supra* note 35, at 119.

88 DINAN, *supra* note 61, at 40 (citing MICH. CONST. of 1850, art. IV, § 23).

89 *Id.* (citing IND. CONST. of 1851, art. IV, § 22).

90 *Id.*

91 To be clear, rationales for limiting special legislation are also relatively wide-ranging. *See, e.g.*, *id.* at 40 (arguing that these prohibitions were primarily intended to protect city power against overbearing state legislatures); Charles C. Little & James Brown, *Special Legislation*, 25 AM. JUR. & L. MAG. AM. 317, 318 (1841) (contending that these prohibitions are meant to relieve legislatures from having to investigate private claims, an activity to which they are not "not favorably constituted"); Schutz, *supra* note 67, at 59–60 (identifying the four primary rationales for special legislation prohibition appearing in the scholarly literature as: (1) remedying a lack of "legislative scrutiny" and preventing "logrolling," (2) promoting legislative legitimacy, (3) making the legislative process more efficient, and (4) promoting predictability). Further, some commentators who acknowledge that state capture may have been an important purpose of these provisions do not think that it was their primary purpose. *See, e.g.*, *id.* at 57 (arguing that the primary problem these prohibitions sought to remedy was a deficit in "the legislature's ability to identify objects in legislation" and that "legislative favoritism is more properly characterized as one consequence of the legislature's power to provide individuals with legislation").

92 *See, e.g.*, ALA. CONST. art. IV, §§ 104–111; MINN. CONST. art XII, §§ 1–2; TENN. CONST. art. XI, § 8. For a comprehensive account of these provisions as they appear in state constitutional law, see Schutz, *supra* note 67, at 48 nn.38–41 (collecting citations).

b. Public Purpose Requirements

Beyond prohibiting special laws, nineteenth-century reformers added a variety of provisions to their state constitutions to require that all legislative enactments serve a valid public purpose.[93] A major focus of these additions was to limit how states could provide financial assistance to private businesses.[94] Representative in this regard, the New York constitution holds that "[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking,"[95] and that "[n]o county, city, town, village or school district shall give or loan any money or property or in aid of any individual, or public or private corporation or association or private undertaking."[96] Many states also elected to supplement general public purpose requirements with specific restrictions on gift-giving,[97] borrowing,[98] lending,[99] and other specific forms of financial assistance.[100] As a consequence of these nineteenth-century amendments virtually all existing state constitutions place at least some limits on public finance,[101] and where they do not, state courts have held that their constitutions still

93 *See, e.g.*, Briffault, *supra* note 57, at 911–12; TARR, *supra* note 35, at 111–12.

94 Briffault, *supra* note 57, at 908–09, 913.

95 N.Y. CONST. art. VII, § 8, para 1.

96 *Id.* art. VIII, § 1.

97 *See* Matthew D. Mitchell, Jonathan Riches, Veronica Thorson & Anne Philpot, *Outlawing Favoritism: The Economics, History, and Law of Anti-Aid Provisions in State Constitutions* 38 n.160 (Mercatus Ctr., George Mason Univ. Working Paper, 2020), https://www.mercatus.org/research/working-papers/outlawing-favoritism-economics-history-and-law-anti-aid-provisions-state [https://perma.cc/CZ4V-LD6J] (noting that all state constitutions contain Gift Clause provisions, except for Alaska, Connecticut, Illinois, Kansas, and Vermont); *see also* Timothy Sandefur, *The Origins of the Arizona Gift Clause*, 36 REGENT U. L. REV. 1, 1 (2023) (identifying these provisions as "Anti-Gift Clauses").

98 *See* Nadav Shoked, *Debt Limit's End*, 102 IOWA L. REV. 1239, 1251 (2017) ("Mostly in state constitutions, but sometimes in statutes, states place a cap on the amount of debt a municipality may assume, or set special procedures for debt issuance."). *See generally id.* at 1251–52 (summarizing the ways in which these limits appear in state constitutions).

99 *See, e.g.*, Briffault, *supra* note 57, at 910–11, 911 n.20.

100 *See, e.g.*, COLO. CONST. art. XI, §§ 1–2 (prohibiting state and local governments from giving or lending credit to private firms or from becoming shareholders in public or private corporations); N.Y. CONST. art. VII, § 8 (same); *see also* ROBERT S. AMDURSKY & CLAYTON P. GILETTE, MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE 84 (1992) (explaining that state constitutions also commonly require that any public debts incurred serve a public purpose).

101 *See, e.g.*, Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 143 n.1 (1993) (reporting that every state except Kansas, Maine, South Dakota, and Wisconsin have such provisions); BRIFFAULT & REYNOLDS, *supra* note 58, at 677 (noting that states not containing explicit public purpose provisions in their constitutions "employ judicial doctrines that require that taxpayer funds be spent only for public purposes").

require them to enforce public purpose doctrines accomplishing basically the same effect.[102]

On the whole, these public purpose requirements first began to be constitutionalized in response to financial crises arising from states' overinvestment in economic development in the 1820s and 1830s.[103] The massive economic success of New York's Erie Canal, which was completed in 1825, inspired a wave of public internal improvement projects across the states as governments over the ensuing decades attempted to boost their local economies by subsidizing private industry to develop turnpikes, canals, and railroads.[104] The severe contraction of the economy during the Panic of 1837 led states that had borrowed heavily to fund these projects to default, with four states—Arkansas, Florida, Michigan, and Minnesota—repudiating their debts either partially or in full.[105] Disturbed by these developments, reformers amended their states' constitutions to restrain legislatures from spending, gifting, or lending public money, from extending lines of credit, and from investing public funds in business corporations without a valid public purpose.[106]

For much of their history, however, public purpose requirements have not prevented state legislatures from funding private industry.[107] For one, states quickly discovered that they could circumvent the first round of public purpose amendments by simply delegating the power to assist private enterprise to local governments.[108] Once established, this ad hoc workaround undoubtedly contributed to subsequent governmental overspending, fiscal crisis, and a second round of public purpose amendments extending aid limitations to localities.[109]

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102 *See* BRIFFAULT & REYNOLDS, *supra* note 58, at 677. To gloss them somewhat crudely, it may be said that these provisions and doctrines function to mirror states' "takings" clauses: where the latter prohibit the appropriation of private property absent a valid public purpose, the former require that any gift, loan, or expenditure of public property must be justified under the same principle. *See, e.g.*, Long, *supra* note 71, at 721 (comparing takings clauses and special legislation prohibitions). It is worth mentioning that the parallel between state constitutional public purpose requirements and their eminent domain powers under the federal Constitution has become especially poignant since *Kelo v. New London*, when the Court expanded the Fifth Amendment's "public use" requirement to include any use that would benefit the public. 545 U.S. 469, 484 (2005) (holding that because an economic development "plan unquestionably serve[d] a public purpose, the takings challenged [t]here satisf[ied] the public use requirement of the Fifth Amendment").

103 Briffault, *supra* note 57, at 911; TARR, *supra* note 35, at 111–12.

104 Briffault, *supra* note 57, at 911.

105 *Id.*

106 *Id.* at 911–12.

107 *See id.* at 912 ("The public purpose requirement was never a complete bar to government financial assistance to the private sector.").

108 *See id.*

109 *See id.*; *see also* TARR, *supra* note 35, at 114.

Second, state courts did their own part to ensure that public spending would mostly continue unabated. This tendency is evidenced in the most important mid-nineteenth-century case establishing the public purpose doctrine, *Sharpless v. Mayor of Philadelphia*.[110] *Sharpless* concerned a state constitutional challenge to several legislative acts authorizing the City of Philadelphia to buy stock in specific railroad corporations with funds raised by issuing bonds.[111] In his opinion for the Pennsylvania Supreme Court, Chief Justice Jeremiah Sullivan Black noted that no specific provision within the state's constitution expressly forbade the legislature's actions.[112] Rather than resting his argument there, however, he went on to hold that legislative power could never be constitutionally exercised in the private interest:

> Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere *private* purpose. No such authority passed to the Assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for *public* purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder.[113]

Notwithstanding these specifications, however, the Chief Justice ultimately held that Philadelphia's railroad aid ultimately served a public purpose.[114] As he explained, the court's ruling hinged "not on the nature or character of the person or corporation whose intermediate agency is to be used," but "on the ultimate use, purpose, and object for which the fund is raised."[115] In this case, he went on, "[t]he public has an interest in such a road" because it provides "comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth."[116]

Sharpless also held that it was in no way the court's duty to ascertain whether—or police the extent to which—private interests had influenced the legislature's enactments.[117] Justice Black was by no means oblivious to

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110 21 Pa. 147 (1853); *see also* Briffault, *supra* note 57, at 909 ("Judicial interpretations have effectively nullified the public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors.").

111 *Sharpless*, 21 Pa. at 149; *see also* Rubin, *supra* note 101, at 148–49 (discussing this landmark ruling as the origin of the public purpose doctrine).

112 *Sharpless*, 21 Pa. at 172–75.

113 *Id.* at 168–69.

114 *Id.* at 169.

115 *Id.*

116 *Id.*

117 *Id.* at 159.

the fact that legislative power would "be used under the influence of those who [were] personally interested, and who [did] not see or care for the ultimate injury it may bring upon the people at large."[118] It his view, however, such dangers were properly addressed by "the masses of the people" and thus were "entitled to no influence."[119] In the court's ultimate decision: "However clear our convictions may be, that the system is pernicious and dangerous, we cannot put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it."[120]

Importantly, however, the Supreme Court of Pennsylvania's decision to ignore the evident threat of capture is not representative of all nineteenth-century public purpose adjudication. The next major state case developing the public purpose doctrine, *People v. Township of Salem*, came out the opposite way on an almost identical fact pattern.[121] The author of *Township of Salem* was one of the most influential legal minds of the time, Michigan Supreme Court Chief Justice Thomas McIntyre Cooley.[122] In striking down the Township Board of Salem's scheme to issue and execute bonds to aid in the construction of a privately owned and operated railroad, Chief Justice Cooley asserted plainly that "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[123] He then found the township's plan to "tax its citizens to make a donation to a railroad company" to be unconstitutional because it could reasonably be inferred that the ultimate benefits incurred by the public would be "incidental."[124] In the wake of *Sharpless*, thus, *Township of Salem* established the public purpose doctrine could just as easily be enforced to uphold state-subsidized economic development as it could to prevent state capture. It was not the public purpose doctrine but the courts enforcing it that would determine just what it would do.

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118 *Id.* (also noting that the "ultra-enterprising spirit" of the era had only recently "carried the state to the verge of financial ruin" and "produced revulsions of trade and currency in every commercial country," and that it was "tending . . . to the bankruptcy of cities and counties").

119 *Id.*

120 *Id.*

121 20 Mich. 452, 489 (1870), *abrogated by* Advisory Opinion on Constitutionality of 1976 PA 295, 259 N.W.2d 129 (Mich. 1977).

122 *See id.*; GILLMAN, *supra* note 65, at 55–59 (explaining Cooley's "major influence over late-nineteenth-century constitutional jurisprudence" in terms of his elaboration of a police power theory grounded in Jacksonian republicanism).

123 *Id.* at 487.

124 *Id.* at 489.

2. Procedure

In addition to placing specific, substantive limits on legislative power, nineteenth-century reformers sought to reign in their wayward state legislatures by constitutionalizing additional restraints on legislative process.[125] These required, inter alia, that all bills be referred to committee, read three times before being voted upon, have clear titles that actually reflected their contents, pertain to no more than one subject, and retain their original purposes throughout the legislative process.[126] This Section focuses on single-subject and clear title rules. Like their substantive counterparts, it argues, these procedural restraints were part of a broader state constitutional movement to address legislative excess by protecting the policymaking process against potential capture by private interests.

Chronologically speaking, Illinois and Michigan became the first states to constitutionalize procedural limits of this kind, adding subject-specific single-subject and clear title rules to their constitutions in 1818 and 1843 respectively.[127] In 1844, New Jersey became the first state to adopt a general single-subject requirement, precipitating an era in which "the idea spread quickly" across the states.[128] Consequently, forty-three states—all except North Carolina and the New England states—have at least some form of a single-subject rule in their constitutions.[129]

Language typical of such provisions may be found, for instance, in the Minnesota constitution of 1857, which stipulates that "[n]o law shall embrace more than one subject, which shall be expressed in its title."[130] The plain stipulation, here, is that any bill introduced must be limited to one subject, though the text may also be interpreted as requiring that bill

125 *See generally* Dragich, *supra* note 59; Williams, *supra* note 59.

126 TARR, *supra* note 35, at 119.

127 Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 389–90 (1958); *see also* Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 app. A at 1005 (noting that forty of forty-three states' single-subject rules also contain clear title requirements, with Arkansas, Illinois, and Indiana as the exceptions).

128 Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALB. L. REV. 1629, 1633 (2019).

129 *Id.*; *see* Ruud, *supra* note 127, at 390. The "New England states" referenced here are Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Denning & Smith, *supra* note 127, at 1025.

130 MINN. CONST. art. IV, § 17.

titles be sufficiently clear, or at least accurately reflective of their contents.[131]

Nineteenth-century reformers adopted these and other procedural restraints to address the same problems that drove their substantive counterparts.[132] They were, as Professor Robert F. Williams puts it, "response[s] to perceived state legislative abuses," including, inter alia, "[l]ast-minute consideration of important measures, logrolling, mixing substantive provisions in omnibus bills, low visibility and hasty enactment of important, and sometimes corrupt, legislation, and the attachment of unrelated provisions to bills in the amendment process."[133]

As discussed previously, nineteenth-century constitution-makers associated logrolling with the generally disreputable special legislation paradigm.[134] It should be recognized, of course, that logrolling does not inherently reflect capture.[135] Since its practice essentially facilitates the passage of legislation with minority support, it functions mostly to augment the influence of whichever underlying interests are already in play.[136] The perception that logrolling enforces state capture thus makes sense primarily in contexts where there is reason to believe that these interests are exerting undue influence over the political process and pushing it in directions that sacrifice public interest for private gain.

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131 *See* Briffault, *supra* note 128, at 1633 (noting that single-subject provisions almost always include clear-title requirements in the same sentence). In other jurisdictions, single subject and clear title requirements may be outlined in more perspicuous terms. *See, e.g.*, MO. CONST. art III, § 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title, except bills enacted under the third exception in section 37 of this article[, which limits the issuing of bonds,] and general appropriation bills, which may embrace the various subjects and accounts for which moneys are appropriated.").

132 *See, e.g.*, Williams, *supra* note 59, at 92.

133 *Id.* Western legal history also reflects longstanding antipathies toward practices of this kind. *See, e.g.*, ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 548–49 (1922) (noting that early examples of single-subject requirements may be found in Roman law). Contemporary commentators express similar sentiments. *See, e.g.*, Briffault, *supra* note 128, at 1629 (remarking that contemporary critics of omnibus legislation in Congress often point out that state constitutions prohibit such legislation).

134 *See supra* note 79 and accompanying text.

135 *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 51–57 (2000) (contending that logrolling can promote majority representation); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 172 (2000) (same); JAMES N. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 132–34 (1965) (same).

136 *See, e.g.*, Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 836 (2006) ("If legislators accurately represent all of their constituents, then . . . legislators and citizens will generally experience the same effects from vote trading. But this is unrealistic. Preferences vary, and among the constituents of a given legislator, some will benefit from a particular vote trade while others will suffer harm. At the extreme, legislators may trade votes in order to curry favor with powerful interest groups but leave most of their constituents—and society as a whole—worse off.").

Riders, by contrast, do not even have the potential to enforce majoritarian rule.[137] When minorities attach riders to popular legislation, they pursue their interests without having to engage in logrolling.[138] Ideas of this kind find direct expression in the text of New Jersey's path-setting 1844 single-subject rule.[139] Its purpose, as it states, is ultimately "[t]o avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other."[140]

As Professor Martha Dragich has argued, clear title rules likewise "reflect a widespread concern with special interest legislation in the nineteenth century."[141] Indeed, these requirements originally date back to Georgia's experience with the so-called "Yazoo Land Fraud" of 1795.[142] In 1783, Georgia's extensive territory included most of what is now Alabama and Mississippi.[143] In 1795, however, four companies managed to bribe the Georgia legislature to sell them about thirty million acres of the state's western lands at the fire-sale price of one and one-half cents per acre.[144] Part of the reason that the legislature had managed to slip the land transfer past the public's watchful eye was that it had buried it in a deceptively and confusingly titled act.[145] As a result of the public's ire when it realized what had occurred the constitution of Georgia was amended in 1798 to include the nation's first clear title requirement: "[No] law or ordinance [shall] pass, containing any matter different from what is expressed in the title thereof . . . ."[146]

B. *Anticapture Judicial Review in the States*

The previous Section demonstrated that a key purpose animating our states' constitutional restraints on legislative power was the prevention of state capture.[147] But this raises an important question: Who

137 *See* Gilbert, *supra* note 136, at 837, 839–40.

138 *See id.*

139 *See* N.J. CONST. art 4, § 7, cl. 4.

140 *Id.*

141 Dragich, *supra* note 59, at 116.

142 *See, e.g.*, Denning & Smith, *supra* note 127, at 966.

143 *Id.*

144 *Id.*

145 *Id.* at 966 n.39 (characterizing the title of the Yazoo Act as "intentionally misleading"); WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA § 75, at 90 (1912) (providing that the title of the Yazoo Act was "[a]n Act supplementary to an Act, entitled an Act for appropriating a part of the unlocated territory of this State, for the payment of the late State troops, and for other purposes therein mentioned; declaring the right of this State to the unappropriated territory thereof, for the protection of the frontiers, and for other purposes").

146 GA. CONST. of 1798, art. I, § 17; *see* Denning & Smith, *supra* note 127, at 966 & n.38.

147 *See supra* Section I.A.

should enforce? As Part II will explore, almost all state courts assume at least some authority to enforce these provisions today. But this assumed prerogative is not strictly grounded in the texts of these provisions themselves, which do not specify an enforcement mechanism. As such, it could be argued that they were simply meant to identify ways in which state legislatures should police themselves.[148] As Part III elaborates, moreover, it cannot simply be assumed ex ante that depending on state courts as a bulwark against state capture will necessarily result in best-case outcomes once all is said and done.[149] To foreground these ensuing discussions, this Section argues that the history and structure of these provisions indicate a preference for judicial enforcement.[150]

1. Historical Indications

In the sweep of state constitutional history, constriction of state legislative power accomplished in the nineteenth century represents something of a sea change.[151] In and of itself, this fact tends to militate

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148 *See, e.g.*, Schutz, *supra* note 67, at 50 n.49 (noting the possibility the special legislation prohibitions may simply "prevent the legislature from naming objects in legislation" even though "nearly all courts have decided that . . . [they] include some limit on legislative classifications that is judicially enforceable"). It also cannot be presumed—especially when interpreting state constitutional law—that enforcement will necessarily fall to the courts. *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 26, at 909 ("[T]he state constitutional tradition is one that empowers the people of the states directly."); Williams, *supra* note 59, at 113 ("State constitutional restrictions are aimed in the first instance at the law-makers themselves, who are bound by their oath of office to uphold the constitution."). *But see* W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 156–57 (1919) (noting that state courts traditionally took themselves to be obliged constitutionally to exercise judicial review); Bulman-Pozen & Seifter, *supra* note 26, at 908 (contending that state courts were traditionally seen as bulwarks against state officials' overreach); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1121 (1976) (explaining the Federalists' belief that installing life tenure for federal judges in the federal Constitution would permit the latter to function as an independent check on the excesses of the political branches); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 207 (1983) (observing the longevity of state judicial review).

149 *See infra* Part III; *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995) (contending that judicial elections pose a distinctive "majoritarian difficulty" insofar as "the rights of individuals and unpopular minority groups may be compromised by an elective judiciary" and "the impartial administration of 'day-to-day' justice may be compromised"); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 278 (2008) ("If judicial selection is the most heavily discussed topic in the entire legal literature, the outstanding theme of the discussion may be disdain for elective judiciaries." (footnote omitted)).

150 *See infra* Sections I.B.1–2.

151 *Cf.* TARR, *supra* note 35, at 82–87, 112, 115, 125, 160 (discussing how, while late-eighteenth-century state constitutions regarded legislative power as a republican antidote to aristocratic governance, nineteenth-century constitutional reform was infused by an ethos of legislative distrust).

against the idea that the constitution-makers of the era would have sought to prevent state capture by directing legislatures to keep themselves in check. Moreover, it would seem unreasonable indeed to conclude that, absent some supervening enforcement authority, the century's new limits on legislative power would have been thought capable of dislodging longstanding traditions of bribery, lobbying, and special legislation. By contrast, there are strong indications that constitutional reformers believed courts use these restraints to check the legislative branches. This may be inferred from the fact that the same state constitutional conventions that reined in state legislative power also expanded state judicial authority[152] and inferred from views expressed by the reformers themselves.[153]

Perhaps the most noteworthy way in which nineteenth-century state constitutional developments augmented state judicial power was through the establishment of elected judiciaries.[154] Across an important body of scholarship, Professor Jed Shugerman has documented how these reforms were aimed both at increasing judicial independence and at augmenting the authority of state judges to monitor and check their wayward legislatures.[155] The theory advanced by various nineteenth-century proponents of judicial elections was that as "representatives of the people," elected judges would ultimately be better positioned than legislators to protect individual rights.[156]

Even at the time, some constitution-makers suggested that elected judges would be no less susceptible to capture than legislators.[157] For the Ohioan constitution-maker Archibald Williams, for example, redistributing power from lawmakers to judges would by no means

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152 *See infra* notes 154–163 and accompanying text.

153 *See infra* notes 164–172 and accompanying text.

154 *See* Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1070–75 (2010) [hereinafter Shugerman, *Economic Crisis*] (describing how, beginning in the early nineteenth century, states substantially forswore the practice of judicial selection by gubernatorial appointment for popular elections).

155 *See, e.g.*, Jed Handelsman Shugerman, *Countering Gerrymandered Courts*, 122 COLUM. L. REV. F. 18, 24–25 (2022) [hereinafter Shugerman, *Gerrymandered Courts*]; Shugerman, *Economic Crisis*, *supra* note 154, at 1070–75; JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 8 (2012) [hereinafter SHUGERMAN, THE PEOPLE'S COURTS] (explaining the importance of popular anticapture sentiments for the establishment of elected judiciaries, and emphasizing that "[i]n various combinations, economic elites, political insiders, the dueling parties, and the general public distrusted each other more than they distrusted judges, so they were willing to entrust judges with more power and independence as a hedge against the other groups and the political branches of government").

156 SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 109–11 (quoting and discussing debates at constitutional conventions in Ohio, Massachusetts, and New York).

157 For a discussion of the shortcomings of this theory, see *infra* Section III.A.

prevent the fact that "giv[ing] a few men . . . power" could lead them to "become corrupt."[158]

But as the historical record reflects, such views did not generally prevail. State constitutional amendments requiring judicial elections first began to appear in the early nineteenth century in response to public corruption in states like Georgia, Indiana, Mississippi, and New York.[159] Georgia, for instance, constitutionalized judicial elections in 1812 in direct response to the Yazoo Land Fraud.[160] Similarly, Indiana's 1816 adoption of elections for its intermediate appellate judiciary originated as part of the efforts of "poor frontiersman," a group who saw themselves as redistributing political power away from their states' "Aristocrats."[161] In Mississippi, the 1832 adoption of elections for its supreme court—the first policy of its kind in the nation—had similar origins.[162] And in New York, the 1846 adoption of judicial elections—an event spurring their incorporation en masse into state constitutions throughout the nation—was seen as a measure that would combat "national economic depression, state overspending, and insider corruption."[163]

Unsurprisingly, thus, records from many nineteenth-century state constitutional conventions suggest that participants were keenly interested in elevating state courts as bulwarks against legislative hubris.[164] Exemplary in this respect were the Illinois and Ohio

158 SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 106 (quoting THE CONSTITUTIONAL DEBATES OF 1847, *supra* note 165, at 466 (remarks of Del. Archibald Williams)).

159 *See, e.g.*, Shugerman, *Gerrymandered Courts*, *supra* note 155, at 24 (describing Georgia's adoption of judicial elections in response to the Yazoo Land Fraud and Mississippi's adoption as the outcome of a successful campaign led by a group known as the "Poor Frontiersman" to take power away from the state's "Aristocrats"); SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 66 (explaining that Mississippi's adoption of a judicial-elected supreme court in 1832—the first policy of its kind in the nation—was impelled by a populist group, the "Whole Hogs," who were seeking to rest power from their own state's economically dominant "Aristocrats").

160 SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 60–61.

161 *Id.* at 63–64.

162 *Id.* at 66 (explaining that elections for the Mississippi Supreme Court had been pushed by the "Whole Hogs," another group seeking to wrest power from their state's dominant "Aristocrats"); MISS. CONST. art. IV, § 2 (repealed 1868) ("The high court of errors and appeals shall consist of three judges, any two of whom shall form a quorum. The legislature shall divide the state into three districts, and the qualified electors of each district shall elect one of said judges for the term of six years.").

163 Shugerman, *Gerrymandered Courts*, *supra* note 155, at 25.

164 *See* SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 105 ("The conventions offered powerful mandates for more judicial review: a mandate for creating new substantive and procedural limits on legislative power, and a mandate for creating a new institution (the elected judiciary) to make those paper limits a reality.").

constitutional conventions of 1847 and 1850 to 1851 respectively.[165] At the Illinois convention, for example, future Supreme Court Justice David Davis suggested that establishing judicial elections would enable state courts to intervene more comfortably because they "would always receive the support and protection of the people."[166]

Similar views find expression in *The New Constitution*, an influential series of pamphlets that populist Democrat Samuel Medary published in 1849 to encourage a constitutional convention in Ohio.[167] These essays, as Shugerman emphasizes, focused on electoral judiciaries' "relative independence from the legislature" and "railed against legislative excesses."[168] Medary believed that elevating the judicial role in constitutional enforcement would specifically treat the special-legislation-adjacent problem of "over-legislation," which he called "the great evil of all free governments."[169] By expanding and popularizing judicial review, he further explained, "the people" would gain a powerful avenue by which to "prevent the Legislature from heaping debts upon us" and combat a system predicated upon private individuals "bribing men to become hypocrites, and to rob us, as has been done in our public works, where knaves have made fortunes in a few years out of the tax-ridden, oppressed people."[170]

When Ohio held its 1850 to 1851 constitutional convention, at least one delegate prominently channeled these views in his proposal for an elected judiciary:

> Whereas, There is a deep and just dissatisfaction amongst the people in regard to appointments to office—especially by the legislative department of government; converting that body, as they do to some extent, into a mere political arena, embittering the feelings of party spirit, and corrupting the pure fountain of legislation; Therefore—
>
> *Resolved*, That the new Constitution provide for the election of all State, County, and Township officers immediately by the people.[171]

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165 *See* THE CONSTITUTIONAL DEBATES OF 1847 (Arthur Charles Cole ed., 1919); 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51 (J.V. Smith ed., 1851).

166 THE CONSTITUTIONAL DEBATES OF 1847, *supra* note 165, at 461–62 (remarks of Del. David Davis).

167 *See* SAMUEL MEDARY, THE NEW CONSTITUTION (Columbus, Ohio, Samuel Medary 1849).

168 SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 107.

169 MEDARY, *supra* note 167, at 268.

170 *Id.*

171 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, *supra* note 165, at 86 (remarks of Del. J. Milton Williams).

The new Ohio constitution resulting from the 1850 to 1851 convention simultaneously established an elected state judiciary and imposed new restraints on legislative powers in the form of special legislation prohibitions and limits on economic regulation.[172]

2. Structural Considerations

For decades, public law scholars have pointed out that state constitutional structure grants state judges substantial leeway to check their legislative counterparts.[173] Perhaps the most prominent commentator in this respect has been Professor Helen Hershkoff. In a series of influential articles, Hershkoff encouraged state courts to detach themselves from deferential, federal-style judicial review by exploiting their unique status as democratically elected wards of state common law.[174] Situated alongside the anticapture agenda of nineteenth-century state constitutional reform, the structure of states' constitutional restriction on legislative power suggests that Hershkoff's argument for heightened scrutiny might be extended to the enforcement of states' constitutional restraints on legislative power.[175]

The application of heightened scrutiny to policies challenged under these provisions finds support in the fact that they almost certainly cannot be adequately enforced under a rational basis approach. Indeed, scholars of state constitutions routinely opine that rational-basis enforcement of these provisions largely condemns them to symbolic redundancy.[176] First, state courts have largely converted their constitutions' special legislation prohibitions into state-level recapitulations of the federal Equal Protection Clause.[177] In treating cases

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172 SHUGERMAN, THE PEOPLE'S COURTS, *supra* note 155, at 109.

173 *See, e.g.*, Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from the Federalist Papers*, 61 S. CAL. L. REV. 1669, 1669 (1988) (suggesting it makes sense to "think that judges subject to periodic election may be justified in using relatively free wheeling methods of interpretation, while life tenured judges should use more stringent ones," such as "majoritarian constraints up, interpretive constraints down; or, conversely, majoritarian constraints down, interpretive constraints up").

174 *See, e.g.*, Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999) [hereinafter Hershkoff, *Positive Rights*]; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1842 (2001) [hereinafter Hershkoff, *Passive Virtues*] (disputing state courts' deference to federal justiciability doctrine).

175 *See id.*; Hershkoff, *Passive Virtues*, *supra* note 174.

176 *See, e.g.*, Long, *supra* note 71, at 722, 732.

177 *See, e.g.*, Long, *supra* note 71, at 722; Conor D. Woodfin, *Preserving the Virginia Constitution's Prohibition on Special Legislation*, 27 GEO. MASON L. REV. 905, 906 (2020) (noting

arising under these provisions as "conventional economic-classification equal protection problems," as Professor Justin R. Long argues, state courts have blinded themselves to the crucial task of "think[ing] seriously about remedies."[178] That is, modeling special legislation prohibition doctrine after the Equal Protection Clause may render courts unable, or unwilling, to consider questions falling outside the federal paradigm, like whether challenged legislation may provide some "rare benefit for the plaintiff's adversary or an unjustly particularized burden on the plaintiff."[179]

Similarly, when it comes to enforcing their constitutions' public purpose requirements, state courts have adopted a path modeled after Chief Justice Black's opinion in *Sharpless*, thus foregoing the less deferential alternative charted out by Chief Justice Cooley in *Township of Salem*.[180] The general approach, as Professor Richard Briffault has argued, has been to proceed under "a posture of extreme deference to state legislatures, finding that a broad range of goals fall under the rubric of public purpose, and that legislative determinations . . . are to be accepted as long as they are 'not . . . irrational.'"[181] This has entailed, on the one hand, judicial exploitation of the fact that creative lawyers can virtually always imagine some conceivable public purpose under which a statute may be sheltered and, on the other, the abnegation of any judicial authority to evaluate how well challenged policies actually pursue their stated aims. Thus, states' public purpose requirements have become "largely rhetorical": "State legislatures define what public purposes are and receive great deference when they determine that a particular program promotes the public purpose."[182]

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the absence of existing judicial will to adopt more "activist" interpretations of special legislation prohibitions and that this tendency in Virginia has "effectively nullifie[d] independent Virginian rights"). This approach has also affected many of the other equality guarantees lodged in each state's constitution. *See, e.g.*, SHAMAN, *supra* note 40, at 3–4 (observing that state courts tend to interpret their Constitutions' "emoluments or privileges" prohibitions, equal rights amendments, and segregation prohibitions "in ways that directly mimic the federal Equal Protection Clause" (quoting CONN. CONST. art. I, §§ 1, 20 (1974)); Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1247 n.3 (1996) (collecting cases that equate judicial review under Washington constitution's ban on special privileges and immunities with review under the Equal Protection Clause); Williams, *supra* note 71, at 1197 (noting that while most states equate their constitutions' equality guarantees with federal equal protection doctrine, some courts have developed their own analyses).

178 Long, *supra* note 71, at 732.

179 *Id.*

180 Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853); People v. Township of Salem, 20 Mich. 452 (1870); *see supra* notes 110–124 and accompanying text.

181 Briffault, *supra* note 57, at 914 (second alteration in original) (quoting Delogu v. State, 720 A.2d 1153, 1155 (Me. 1998)).

182 *Id.*

Procedural restraints have fared little better. Over the previous half century or so, courts have usually "given a liberal interpretation" to these provisions and "rejected most single-subject challenges to state legislation."[183] Here, the basic approach has again been to apply what is essentially a version of rational basis scrutiny.[184] To assess whether an enactment's various provisions fall within a single "subject," courts test for "germaneness";[185] that is, they ask whether its potentially disparate subject matters are rationally related to one another or whether there is a "general subject" to which they all apply.[186] The chief danger inhering in this approach, of course, is that it risks rendering the single-subject rule a "dead letter"[187] on the seeming presumption that its purpose was to "leave enforcement of the requirement to the legislature itself."[188]

Compounding this tendency, as Dragich points out, is the fact that even when plaintiffs use their state constitutions to bring distinct procedural claims—for example, separate single-subject and clear title challenges—courts often treat them "as if they were the same," often by using the statute's title to make inferences about the potential unity of its subject matter.[189] Of course, subordinating clear title analyses to a single-subject test amounts to the same thing as collapsing the former into the rational basis approach that is definitive of the latter.

At least in practice, the suggestion thus seems to be constitutional restraints on legislative power can do very little as long as they are enforced under extremely deferential levels of judicial review. This, in turn, implies that rather than enforcing these provisions against capture, judges too often use them to enshrine special legislation under the protective mantle of state constitutional law. This tendency, if unfortunate, is by no means compulsory. If anything, this brief examination of some of the historical tendencies of nineteenth-century state constitutional law seems to point in a different direction; to suggest, rather, that state courts should step up and provide for popular majorities and their chosen representatives to strike down special interest legislation as unconstitutional.

The foregoing has shown that nineteenth-century state-level reformers installed powerful restraints on legislation and that they did so

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183 Briffault, *supra* note 128, at 1630–31.

184 *See* Dragich, *supra* note 59, at 123.

185 Briffault, *supra* note 128, at 1640–42.

186 *Id.* at 1640 (quoting *Ex parte* Jones, 442 S.W.3d 628, 632 (Tex. Crim. App. 2014)).

187 Porten Sullivan Corp. v. State, 568 A.2d 1111, 1118 (Md. 1990).

188 Briffault, *supra* note 128, at 1644 (suggesting that it is "odd" to think that the single-subject requirement was intended to call upon legislatures to police themselves).

189 Dragich, *supra* note 59, at 123 (looking, in particular, at the Missouri Supreme Court decisions *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. 1994) (en banc), and *Akin v. Director of Revenue*, 934 S.W.2d 295 (Mo. 1996) (en banc)).

in order to elevate state courts as venues in which state legislative capture could be contested. What remains to be seen, and what the following Parts consider, is what those restraints may imply for legal practice in our own era of endemic special interest politics.

II. CONTESTING STATE CAPTURE NOW: CONTEMPORARY APPLICATIONS

Especially in recent decades, state judges have tended to disfavor the idea that state constitutions authorize them to intercede against legislative enactments.[190] Despite a sustained tradition of constitutional scholarship contending that state courts and constitutional jurisprudence are different from their federal counterparts, state-level judges often insist that they must proceed with extreme deference, a value they tie closely to the notion that they should mainly be implementing federal-style rational review.[191] As this Part demonstrates, however, not all states have taken that approach. Freeing themselves of the sclerotic hold of the federal lockstep, states including Arizona, Pennsylvania, and Maryland have advanced innovative doctrinal mechanisms promising better enforcement of their constitutions' restraints on legislative power.[192] In the Sections that follow, this Article uses recent case law from these and other jurisdictions to discuss such approaches and indicate how they might be extended to some current state-level policy debates.

A. *Recent Examples of State Anticapture Review*

Even today, it is not uncommon for state courts to note that protecting against state capture is an important purpose of their constitutions' legislative restraints. More importantly still, some courts have intentionally constructed doctrinal mechanisms to give them effect, like tests requiring the consideration of multiple, relevant factors or heightened scrutiny. Still more the exception than the norm, these state court practices matter for what they exemplify: that state judges may enforce their constitutions' legislative restraints and that various models exist to inform future state-constitutional adjudication.

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190 *See* Bulman-Pozen & Seifter, *supra* note 26, at 1858.

191 *See, e.g.*, *id.* at 1885 (noting that "[s]tate litigants and courts frequently invoke this framework" even though "[i]t is too deferential to state legislatures and executives, whom state constitutions task state courts with monitoring on behalf of the people, and too absolutist in its conception of individual rights, which must be understood in the context of other rights and communal welfare").

192 *See infra* Section II.A.

1. Heightened Scrutiny

Public law scholars have argued that judges might apply heightened forms of scrutiny when reviewing potentially captured legislation or agency decisions.[193] Meanwhile, state constitutional scholars have pointed out that deferential rational basis scrutiny may not give sufficient effect to state constitutional rights.[194] Yet the existing public law literature has not fully explored the fact that the judicial enforcement of state constitutional restraints on legislative power may also require elevated forms of review.[195] Indeed, as this Section shows, this insight has already found practical manifestation in the constitutional case law of a few noteworthy states.

In recent years, for example, the Arizona Supreme Court has concluded that enforcing the Arizona constitution's public purpose requirements requires that it take a more searching look at legislation challenged under its Gift Clause.[196] Take, for instance, *Turken v. Gordon*, a case concerning the constitutionality of the City of Phoenix's agreement to pay a private corporation as much as $97.4 million to assist it in the development of a commercial hub in a master-planned community. In *Turken*, the Arizona Supreme Court concluded that the agreement likely violated the public purpose requirement it attaches to the Gift Clause and other provisions of the Arizona constitution.[197] Phoenix had entered into the agreement in order to secure future sales tax revenue from the future retail space, and structured the subsidy as a payment for parking access.[198] In 2007, several Arizona business owners and taxpayers, including Meyer Turken, filed suit against both the city and the developer alleging that the agreement violated their constitution's Gift Clause, Equal Privileges and Immunities Clause, and Special Laws Clause.[199]

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193 *See* Sunstein & Vermeule, *supra* note 22; Elhauge, *supra* note 18; .

194 *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 26, at 1885–88; Hershkoff, *Positive Rights*, *supra* note 174, at 1137.

195 In recent scholarship, perhaps the closest instantiation of this view is Bulman-Pozen and Seifter's contention that state constitutional restraints on legislative power instantiate a basic, judicially enforceable principle of democracy. *See* Bulman-Pozen & Seifter, *supra* note 26, at 875–76, 893–94.

196 *See, e.g.*, Turken v. Gordon, 224 P.3d 158 (Ariz. 2010) (en banc); ARIZ. CONST. art. IX, § 7. Recent local government scholarship has highlighted this case as exemplary of the fact that state courts may give the public purpose doctrine teeth without usurping legislative power. *See* BRIFFAULT, REYNOLDS, DAVIDSON, SCHARFF & SU, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 720–21 (9th ed. 2022).

197 224 P.3d at 342, 344.

198 *Id.* at 160–61.

199 *Id.* at 161; ARIZ. CONST. art. IX, § 7; *id.* art. II, § 13; *id.* art. IV, pt. 2, § 19.

While, in Arizona, each of these anticapture mechanisms implicated the public purpose doctrine,[200] the court focused its attention on the Gift Clause.[201] To interpret the clause, the court began by recalling its original anticapture purpose:

> [The Gift Clause] represents the reaction of public opinion to the orgies of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the construction of railways, canals, and other like undertakings during the half century preceding 1880, and it was designed primarily to prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.[202]

After taking account of its Gift Clause's anticapture purpose, the court then proceeded to apply the clause using a test that is certainly more searching than federal-style rational basis review.[203] Specifically, the court held that the Gift Clause should be enforced using a two-pronged test involving: (1) a deferential look at whether the program serves a public purpose, and (2) a more searching inquiry into the directness of the benefits that would flow back to the city.[204] Under this test, the legislature receives a wide berth to decide the purposes of its enactments, but authority is also reserved for courts to assess the relationship between ends and means.[205] Prong two, the court thus explained, means that the benefits flowing back to the city, as "compared to the expenditure,"[206] may not be "so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity."[207] Applying this test, the court then ruled that the agreement should fail under prong two's more challenging standard for two reasons: first, the "indirect benefits" that the city hoped to recoup through anticipated sales tax revenues could

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200 *See, e.g.*, Sandefur, *supra* note 97, at 43–58 (explaining Arizona's Gift Clause public purpose jurisprudence); Williams, *supra* note 71, at 1217–18 (noting that, back in the nineteenth century, state constitutions' equality provisions were generally seen as preventing "class legislation," and courts required that enactments that "include or exclude persons from a statute's reach be rational in light of the legislative purpose").

201 *Turken*, 224 P.3d at 162 (alteration in original) (quoting Day v. Buckeye Water Conservation & Drainage Dist., 237 P. 636, 638 (Ariz. 1925)).

202 *Id.* (alteration in original) (quoting *Day*, 237 P. at 638).

203 *Id.* at 161 (discussing the superior court's reasoning based on *Wistuber*'s provision that "a governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that 'is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity'" (quoting Wistuber v. Paradise Valley Unified Sch. Dist., 687 P.2d 354, 357 (Ariz. 1984))).

204 *Id.* at 161, 164.

205 *See id.*

206 *Id.* at 165.

207 *Id.* (quoting *Wistuber*, 687 P.2d at 357).

not be taken as consideration; and second, since the value of the parking spaces was not equal to the subsidy it had granted the developer, the agreement ultimately constituted an unconstitutional "gift."[208]

The idea that state courts should strike a balance between preventing capture and deferring to legislative will has also been part of recent case law arising in the procedural restraint context. One recent example is the Pennsylvania Supreme Court's evolving single-subject doctrine.[209] Like courts in many states, the Pennsylvania Supreme Court enforces this provision with reference to the standard of "germaneness," or the idea that there must be a "commonality between the provisions contained in the legislation, such that the various parts of the bill can be fairly regarded as working together to accomplish a singular purpose."[210] In 2003, in *City of Philadelphia v. Commonwealth*, the Pennsylvania Supreme Court observed that its current germaneness test had been too deferential to give the Pennsylvania constitution's single-subject requirement adequate effect.[211] Up until then, its test singly required that challenged legislation be "assessed according to whether the court can fashion a single, overarching topic to loosely relate the various subjects included in the statute under review."[212] Since virtually any enactment could be justified under such a standard, it explained, the test effectively rendered the single-subject requirement "impotent to guard against the evils that [the requirement] was designed to curtail."[213] Only two years later, however, in *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth* ("*PAGE*"), the court tacked sharply in the opposite direction, concluding that its germaneness test was not in need of revision

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208 *Id.* at 166–67.

209 PA. CONST. art. III, § 3.

210 Weeks v. Dep't of Hum. Servs., 302 A.3d 678, 696 (Pa. 2023). The case first setting out this standard in Pennsylvania constitutional law is *Payne v. School District of Borough of Coudersport*, wherein the court set forth the following reasoning:

> Few bills are so elementary in character that they may not be subdivided under several heads; and no two subjects are so wide apart that they may not be brought into a common focus, if the point of view be carried back far enough . . . Those things which have a "proper relation to each other," which fairly constitute parts of a scheme to accomplish a single general purpose, "relate to the same subject" or "object." And provisions which have no proper legislative relation to each other, and are not part of the same legislative scheme, may not be joined in the same act.

31 A. 1072, 1074 (Pa. 1895). For a recent discussion of other states' versions of the germaneness test, see Briffault, *supra* note 128, at 1640–42.

211 838 A.2d 556, 587 (Pa. 2003).

212 *Id.*

213 *Id.* at 588; *see also id.* at 586–87, 586 & n.18 (defining these evils as "logrolling" and riders, practices that result in deceptive legislation and negate the governor's veto powers).

as it accorded appropriately with its "extremely deferential" approach to constitutional challenges.[214]

More recently, in a 2023 decision entitled *Weeks v. Department of Human Services*, the Pennsylvania Supreme Court's 2023 decision to establish a "middle-course framework" that incorporates elements of *City of Philadelphia*'s skepticism with *PAGE*'s deference.[215] The court's ruling was sharply divided, reflecting the fact that Pennsylvania's article III jurisprudence has yet to settle.[216] What matters for our purposes, however, is what the Pennsylvania Supreme Court's attempts to grapple with and implement its constitution's anticapture potentialities can teach. Like the Arizona and, as the following Section describes, Maryland supreme courts, the Pennsylvania Supreme Court's decisions in past decades appear to be demonstrative of a desire to balance two important constitutional commitments: contesting state capture and legislative deference.[217]

2. Multifactor Review

A second way in which state courts might give doctrinal effect to their constitutions' legislative restraints is by developing historically grounded multifactor tests. Compared to other modes of anticapture judicial review, approaches of this kind have received comparatively less attention in public law scholarship.[218] What makes these tests unique is that they guide courts to search the legislative record for not one but several possible indicators of state capture, thus permitting them a degree of flexibility in determining the constitutionality of challenged legislation.[219]

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214 877 A.2d 383, 393 (Pa. 2005).

215 302 A.3d 678, 697 n.19 (Pa. 2023) (quoting Weeks v. Dep't of Hum. Servs., 222 A.3d 722, 727 (Pa. 2019) (attributing this "middle-course" approach to its earlier decision in *City of Philadelphia*, 838 A.2d 566)).

216 In *Weeks*, the majority sought to establish a "middle-course framework" for its germaneness test, one that would permit it to balance its commitment to legislative deference against these provisions' anticapture purposes. *Weeks*, 302 A.3d 697; *see also id.* at 697 n.19.

217 *See Weeks*, 302 A.3d at 719 (Wecht, J., dissenting).

218 Of course, anticapture judicial review theories may assert that heightened scrutiny will be justified primarily in the presence of certain factors. *See, e.g.*, Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1699–700 (1984) (contending that heightened scrutiny may be triggered by a finding that a legislative enactment was motivated by impermissible naked preferences).

219 *See, e.g.*, Cities Serv. Co. v. Governor, 431 A.2d 663, 672–73 (Md. 1981) (applying a multifactor test to find that a divestiture law's mass merchandiser exception violated the Maryland constitution's ban on special legislation).

A good example of this is Maryland's unique approach to reviewing subsidies for economic development under its constitution's prohibition on special legislation.[220] In the 1981 case of *Cities Service Co. v. Governor*, the Court of Appeals of Maryland established what stands as the current multifactor test for enforcing the Maryland constitution's ban on special legislation.[221] *Cities Service* concerned the constitutionality of an exception for mass merchandisers that the Maryland legislature had included in a "Divestiture Law" prohibiting petroleum producers and refiners from operating in the state.[222] There, the Court of Appeals of Maryland unanimously found the exemption to be violative of article III, section 33 of the Maryland constitution, which provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law."[223]

In his opinion for the court, Judge John Cole Eldridge broke with the test for special legislation previously established in Maryland case law on the conceit that it had culminated in a dead end.[224] In its stead, he created a two-pronged purposes-and-factors-based test that remains good law in Maryland today.[225] Under prong one, courts must begin by recalling that the original purpose of this prohibition was "to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others."[226] Under prong two, Judge Eldridge then

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220 *See, e.g.*, Howard County v. McClain, 270 A.3d 1062, 1066–70 (Md. Ct. Spec. App. 2022) (applying the test set forth in *Cities Service* to find that a zoning regulation amendment was a form of impermissible special legislation); Trs. of Walters Art Gallery, Inc. v. Walters Workers United, No. 2070, 2024 WL 4500973, at *28–29 (Md. App. Ct. Oct. 16, 2024) (Getty, J., dissenting) (contending that, under *Cities Service*, an ordinance incorporating a body of trustees to control a private donor's art collection did not violate the Maryland constitution's prohibition on special laws).

221 431 A.2d at 672–73.

222 *Id.* at 665–66 (explaining Maryland's "Divestiture Law") (first citing MD. CODE ANN., art. 56, § 157E(b)–(c), (g)–(i) (1957, 1979 Repl. Vol., 1980 Cum. Supp. (repealed 1996); and then citing *id.* § 157E(c)(2))).

223 *Id.* at 675 (citing MD. CONST. art. III, § 33).

224 *Cities Serv.*, 431 A.2d at 671–72 (noting that the special legislation tests established in previous Maryland case law were "not particularly helpful" and "provide[d] no mechanical rule for deciding cases").

225 *See, e.g.*, *Trs. of Walters Art Gallery, Inc.*, 2024 WL 4500973, at *28–29 (Getty, J., dissenting) (pointing out that the majority had failed to consider the validity of a charter under the Maryland constitution's ban on special legislation, which would have required that they apply the multifactor test established in *Cities Service*).

226 *Cities Serv.*, 431 A.2d at 672 (quoting City of Baltimore v. United Rys. & Elec. Co., 94 A. 378, 382 (Md. 1915)). Prong one may also be interpreted as one of the nonconclusive factors that Pennsylvania courts consider when determining whether the special legislation ban has been violated. *See, e.g.*, *Trustees of Walters Art Gallery, Inc.*, 2024 WL 4500973, at *28 (Getty, J., dissenting) (contending that the Maryland General Assembly did not enact a special law when it chartered a private corporation to manage real property and art willed to the City of Baltimore by

explained, courts must consider a series of nonindividually conclusive "considerations and factors,"[227] which he enumerated as follows: (1) whether the underlying purpose of the legislative enactment "was actually intended to benefit or burden a particular member or members of a class instead of an entire class"; (2) "[w]hether particular individuals or entities are identified in the statute"; (3) "[t]he substance and 'practical effect' of an enactment"; (4) whether "a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation"; (5) "[t]he public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest"; and (6) whether the legislative enactment is "arbitrary and without any reasonable basis."[228]

Applying this test, the court found the mass merchandiser exemption to be a clear case of unconstitutional special legislation.[229] Because, in its view, the legislative record showed clear evidence that "the exemption was sought" by the very business that stood to become its "sole beneficiary," the exemption contradicted the special legislation prohibition's anticapture purposes, as well as factors (1), (3), (4), (5), and (6).[230]

The approaches developed by Arizona, Pennsylvania, and Maryland are exemplary of the fact that not all state courts have abandoned their constitutions' restraints on legislative power to redundancy. To the contrary, the heightened scrutiny and multifactor tests that these state courts routinely apply show that courts may not only use these provisions to check special interest legislation but also do so while leaving existing legislative authority largely intact.

B. *Contemporary Debates*

In the past two decades, American politics has experienced a dramatic subnational shift.[231] As partisan deadlock rendered Congress infertile, interest groups turned their attentions to the states as venues to pursue their policy agendas.[232] Take, for example, the enormous success

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a private individual because it "did not benefit any specific individual" and did not "risk granting '[an individual] with sufficient influence . . . an undue advantage over others'" (alteration in original) (quoting *Cities Serv.*, 431 A.2d at 672)).

227 *Cities Serv.*, 431 A.2d at 672–73.

228 *Id.* (citations omitted).

229 *Id.* at 673.

230 *Id.*

231 *See, e.g.*, GRUMBACH, *supra* note 21, at 10.

232 *See, e.g.*, *id.*

of ALEC, a private nonprofit dedicated to promoting conservative, pro-business policy across the states. Since 2010, the organization and its associates have successfully convinced state legislatures to redraw voter districting maps and establish strict voter ID laws,[233] preempt progressive employment laws,[234] and enact right-to-work acts ("RTWAs") across much of the Union.[235]

ALEC's endeavors have not gone unopposed. Though with little success, progressive litigants in states like Wisconsin, Ohio, and Kentucky, have challenged their validity under their states' constitutional restraints on legislative power.[236] Should these progressive litigants have prevailed or should ALEC's agenda remain good law? How should courts have ruled in these and similar controversies? How should they approach those arising under their states' constitutional restraints on legislative power in the future? With these questions in mind, this Section considers how litigation of this kind might fare if more state courts were to apply the kinds of anticapture review advanced in states like Arizona and Maryland.

1. Partisan Gerrymandering

How should state courts navigate the present-day phenomenon of extreme partisan gerrymandering? In the 2018 case *Rucho v. Common Cause*, the Supreme Court held that while partisan gerrymandering is not justiciable as a federal matter, it might be so at subnational levels, where "state constitutions can provide standards and guidance for state courts to apply."[237] Since then, however, state courts have taken *Rucho*'s advice in contradictory directions. Consider the flip-flopping comportment of the Supreme Court of North Carolina. In 2022, when Democrats held a

233 *See, e.g.*, HERTEL-FERNANDEZ, *supra* note 6, at 2–3 ("Of the 62 ID laws states considered during the 2011 and 2012 legislative sessions, more than half were proposed by [ALEC] lawmakers . . . ."); *id.* at 23 ("If it's voter ID, it's ALEC." (quoting Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012))).

234 *See, e.g.*, *id.* at 239–41 ("[T]he combination of state power over preemption, coupled with the troika's cross-state reach, severely curtails the ability of blue cities located within red states to take action on their own.").

235 *See, e.g.*, *id.* at 143–46.

236 *See, e.g.*, Zuckerman v. Bevin, 565 S.W.3d 580, 600 (Ky. 2018) (applying rational basis scrutiny to uphold the Right to Work Act as a reasonable mechanism for "promot[ing] economic development . . . [and] job growth, and . . . remov[ing] Kentucky's economic disadvantages in competing with neighboring states").

237 588 U.S. 684, 719 (2019).

four to three majority,[238] the court built on *Rucho* to find that partisan gerrymandering was both cognizable and unconstitutional under a host of state constitutional provisions enshrining North Carolinians' right to "substantially equal voting power" in a case called *Harper v. Hall*.[239] A year later, however, Republicans flipped the court, achieving a five to two Republican majority that would rehear the case and issue a blanket reversal.[240] To do so, the new court contended that *Rucho* offered anything but a narrow, federal exception to the general justiciability of partisan gerrymandering claims.[241] Instead, they found, *Rucho* was best read as "insightful and persuasive" precedent for its view that state courts were just as unable to field such claims as their federal counterparts.[242]

Which of these decisions was correct? Arguably, the legislative restraints enshrined in the North Carolina constitution weigh in favor of the former, or, at least, the view that partisan gerrymandering is justiciable. The North Carolina constitution's limitations on special legislation forbid private-purpose driven enactments;[243] and its Public

238 *See, e.g.*, *North Carolina Supreme Court Elections*, BALLOTPEDIA (2022), https://ballotpedia.org/North_Carolina_Supreme_Court_elections,_2022 [https://perma.cc/38C3-SAZR] (noting the North Carolina Supreme Court's 2022 composition).

239 868 S.E.2d 499, 551 (N.C. 2022) (locating this right in the North Carolina constitution's "free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights"), *overruled*, 886 S.E.2d 393, *aff'd sub nom.* Moore v. Harper, 600 U.S. 1 (2023).

240 *See* Harper v. Hall, 886 S.E.2d 393, 409 (N.C. 2023); *id.* at 450 (Earls, J., dissenting) ("To be clear, this is not a situation in which a Democrat-controlled Court preferred Democrat-leaning districts and a Republican-controlled Court now prefers Republican-leaning districts. Here, a Democratic-controlled Court carried out its sworn duty to uphold the state constitution's guarantee of free elections, fair to all voters of both parties. This decision is now vacated by a Republican-controlled Court seeking to ensure that extreme partisan gerrymanders favoring Republicans are established."); Hansi Lo Wang, *A North Carolina Court Overrules Itself in a Case Tied to a Disputed Election Theory*, NPR (Apr. 28, 2023, 12:55 PM), https://www.npr.org/2023/04/28/1164942998/moore-v-harper-north-carolina-supreme-court [https://perma.cc/7J7N-SL6H] (explaining the decision's relationship to the Supreme Court of North Carolina's rightward swing).

241 *See Harper*, 886 S.E.2d at 409.

242 *Id.*

243 *See, e.g.*, Mitchell v. N.C. Indus. Dev. Fin. Auth., 159 S.E.2d 745, 750 (N.C. 1968) ("The initial responsibility for determining what is and what is not a public purpose rests with the legislature, and its findings with reference thereto are entitled to great weight. If, however, an enactment is in fact for a private purpose, and therefore unconstitutional, it cannot be saved by legislative declarations to the contrary.").

Purpose Clause[244] and Exclusive Emoluments Clause[245] require that legislation explicitly promote the general welfare as opposed to private interests.[246] As they do in virtually every state in the union, provisions of this kind restrict North Carolina's legislature to enacting measures that serve a valid public purpose.[247]

Had the *Harper* litigants challenged their legislature's partisan gerrymandering under these provisions, they would have forced the North Carolina Supreme Court to confront a difficult question: To what extent, if at all, can partisan gerrymandering be said to serve a public purpose? While public purpose justifications can be extremely wide-ranging, they are not unlimited in scope.[248] Indeed, both the former Supreme Court Justice John Paul Stevens and Professor Michael Kang have argued that partisan gerrymandering cannot be so justified.[249] Indeed, as Justice Stevens emphasized in a dissenting opinion in the 2004 case of *Vieth v. Jubelirer*, partisan gerrymandering should not even survive rational basis scrutiny because "an acceptable rational basis can be neither purely personal nor purely partisan."[250]

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244 N.C. CONST. art. V, § 2(1), (7) ("The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away. . . . The General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association, or corporation for the accomplishment of public purposes only.").

245 *Id.* art. I, § 32 ("No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.").

246 *See, e.g.*, Blinson v. State, 651 S.E.2d 268, 277–78 (N.C. 2007) (noting that its charge is not to determine the "primary motivation" of a statute but to assess whether it will "promote the welfare of a state or local government and its citizens" (first quoting Maready v. City of Winston-Salem, 467 S.E.2d 615, 626 (N.C. 1996); and then quoting *id.* at 724)); Peacock v. Shinn, 533 S.E.2d 842, 848 (N.C. 2000) (explaining that, under the Exclusive Emoluments Clause, "a court must determine whether the benefit was given in consideration of public services, intended to promote the general public welfare, or whether the benefit was given for a private purpose, benefitting an individual or select group").

247 *See, e.g.*, *Maready*, 467 S.E.2d 615 (discussing the Public Purpose Clause); *Peacock*, 533 S.E.2d 842.

248 *See, e.g.*, Briffault, *supra* note 57, at 912 (noting that "[d]uring its heyday" in the late-nineteenth century, "the public purpose requirement operated to constrain the scope of state and local government").

249 Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 354 (2017) (contending that "[p]artisanship simply does not count . . . as a legitimate government interest to justify official government decisionmaking" and that "[i]f the government cannot offer a legitimate state purpose beyond partisanship, then the redistricting should be unconstitutional under equal protection, even under rational basis, irrespective of how extreme the gerrymander's partisan effects"); Vieth v. Jubelirer, 541 U.S. 267, 333 (2004) (Stevens, J., dissenting) ("[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose.").

250 *Vieth*, 541 U.S. at 338 (Stevens, J., dissenting).

To find that partisan gerrymandering is not justiciable under state constitutions is to hold that certain public acts may be purely and exclusively private regarding. Such a conclusion would be logically questionable (for how could something public be purely private?). And it would also run contrary to the entire thrust of nineteenth-century state constitutional reform,[251] as well as its living legacy as it exists in state common law courts' tendency, as Professor Hershkoff puts it, "to hear an array of [political] questions that would be nonjusticiable under federal law."[252] Indeed, as she notes, state courts routinely "inquire into the propriety of legislative enactment" and "participate in decisions involving fiscal matters [and] budget practices."[253]

Of course, the fact that partisan gerrymandering should almost certainly be justiciable does not mean that state-level district drawing—or even district drawing that redistributes partisan advantages—would be per se invalid under state constitutional law. It may well be possible to find public-purpose justifications for certain instances of partisan gerrymandering.[254] Moreover, even in more extreme instances, courts will still face the difficult, if familiar, task of determining burdens of proof. Here, however, they will have much to draw upon, including the standards established in their public purpose doctrines and existing racial gerrymandering case law. They may also look to the innovative steps that states are already taking with respect to this question, like the Fair Districts Amendment (FDA)[255] that Floridians added to their state's constitution in 2010 with the "goal of . . . requir[ing] the Legislature to redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations."[256]

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251 *See supra* Part I.

252 Hershkoff, *Passive Virtues*, *supra* note 174, at 1863.

253 *Id.* at 1863–65.

254 *See, e.g.*, Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859, 863 (arguing that "congressmen who rely on the state legislatures to draw their districts have an incentive to be responsive not only to their electorate, but also to state and local interests more generally while governing because state officials wield a tremendous amount of power over the prospect of reelection"); *cf.* Note, *A New Map: Partisan Gerrymandering as a Federalism Injury*, 117 HARV. L. REV. 1196, 1198 (2004) (contending that partisan gerrymandering violates federalism principles).

255 FLA. CONST. art. III, § 21.

256 *Advisory Op. to Att'y Gen. re Standards For Establishing Legis. Dist. Boundaries*, 2 So. 3d 175, 181 (Fla. 2009). According to *Rucho v. Common Cause*, 584 U.S. 684, 719 (2019), the FDA was somewhat exceptional. Read in light of the anticapture protections shared across state constitutions, however, the amendment was largely declarative: its statement that "[n]o apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent" basically explains how the principles of legislative power that nineteenth-century reformers had already made sure to constitutionalize should apply in election law. FLA. CONST. art.

2. Voter ID Laws

A second major state-level policy debate that is still playing out surrounds the explosive growth of restrictive voter ID statutes.[257] Proponents of these laws argue that they are necessary to prevent voter fraud.[258] Opponents, by contrast, point out that in-person voter fraud is incredibly rare and that voter ID laws unnecessarily burden the administration of local elections.[259] Moreover, opponents commonly stress that voter ID laws suppress political participation,[260] especially amongst Black, Native, student, and older voters.[261]

How should state courts rule on the constitutional validity of voter ID laws? Consideration of our state constitutions' anticapture legislative restraints would seem to cast these enactments in a highly critical light. Perhaps most straightforwardly, their self-evident partisan nature would seem to suggest that they run into the same kinds of public-purpose problems as partisan gerrymanders. Indeed, evidence of voter ID laws' partisan nature appears not only in statements made by the officials who sponsor them,[262] but also in the fact that they did not emerge and begin to proliferate until 2010, when the Republican Party seized control of both houses in twenty-six state legislatures and twenty-nine governorships.[263]

III, § 21(a). As such, the litigation battles that have since been waged under the FDA are of immense importance for state judges across the nation. *Cf.* Jordan Lewis, *Fair Districts Florida: A Meaningful Redistricting Reform?*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 189, 223–25 (2015) (comparing the FDA with other models for redistricting reforms).

257 As of 2024, thirty-six states request or require that voters show at least some form of identification at the polls. *See Voter ID Laws*, NAT'L CONF. STATE LEGISLATURES (Feb. 2, 2024), https://www.ncsl.org/elections-and-campaigns/voter-id [https://perma.cc/H2KB-XCMD].

258 *See, e.g.*, *id.*

259 *See id.*

260 *See, e.g.*, Justin Grimmer & Jesse Yoder, *The Durable Differential Deterrent Effects of Strict Photo Identification Laws*, 10 POL. SCI. RSCH. & METHODS 453 (2022).

261 *See, e.g.*, Brady Horin, *What's So Bad About Voter ID Laws?*, LEAGUE OF WOMEN VOTERS (May 23, 2023), https://www.lwv.org/blog/whats-so-bad-about-voter-id-laws [https://perma.cc/N88U-6XWR]; John Kuk, Zoltan Hajnal & Nazita Lajevardi, *A Disproportionate Burden: Strict Voter Identification Laws and Minority Turnout*, 10 POL. GRPS. & IDENTITIES 126, 126 (2022) (using nationwide county-level data on voter turnout to demonstrate that the racial turnout gap grew when states enacted strict voter ID laws).

262 *See, e.g.*, Aaron Blake, *Republicans Keep Admitting that Voter ID Helps Them Win, for Some Reason*, WASH. POST (Apr. 7, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win [https://perma.cc/XBM2-WVGK] (including examples of conservative lawmakers expressing their partisan interests in voter ID laws).

263 Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 647 (2019) ("[T]he history

Furthermore, political scientists have identified strong empirical data attesting to voter ID laws' pro-Republican effects.[264] In a pathbreaking 2016 study, political scientists Zoltan Hajnal, Nazita Lajevardi, and Lindsay Nielson used data from the Cooperative Congressional Election Study to demonstrate that voter ID laws passed between 2006 and 2014 strongly correlated with racial gaps in voting participation.[265] In general elections, they reported, the turnout gap between Latinos and whites was more than twice as large in strict voter ID states (13.5%) as in non-strict states (4.9%).[266] Similarly, the Asian-white turnout gap in strict states was almost twice as large (11.5%) as in non-strict states (6.5%), while the Black-white gap was 5.1% in strict ID states and 2.9% in non-strict ID states.[267] Especially in close elections, as Professors Bertrall L. Ross II and Douglas M. Spencer have argued, these racial gaps may be enough to tip elections in favor of Republicans with mostly white supporters running against Democratic candidates supported by voters of color.[268]

Insofar as voter ID laws may be said to "to guard against fraud, the perception of fraud, and to otherwise protect the integrity of elections," litigants and courts will perennially find it easier to justify them under state constitutions' public purpose requirements than they will in the case of partisan gerrymandering.[269] Still, as seen in the approach articulated by the Arizona Supreme Court in *Turken*, acknowledging that a law may be justified as serving a public purpose need not, in and of itself, result in a finding of constitutionality.[270] By applying devices like the second prong of the *Turken* test, courts may ask whether the benefits of voter ID laws

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of these new voter suppression laws suggests that lawmakers had partisan electoral advantage as their primary goal."); *id.* at 648–52 (explaining how the history and circumstantial evidence surrounding voter ID laws demonstrates their partisan nature).

264 *See, e.g.*, William D. Hicks, Seth C. McGee, Mitchell D. Sellers & Daniel A. Smith, *A Principle or a Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 POL. RSCH. Q. 18, 18 (2015) (finding, in a comprehensive analysis of voter ID laws enacted between 2001 and 2012, that they were motivated both by the aim of partisan control and by their specific electoral contexts); Zoltan Hajnal, Nazita Lajevardi & Lindsay Nielson, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017) (using validated voting data from the Cooperative Congressional Election Study to demonstrate that voter ID laws' disadvantages skew toward racial minorities and that they enforce the Republican Party's agenda).

265 Hajnal et al., *supra* note 264, at 365.

266 *Id.* at 369.

267 *Id.*

268 Ross & Spencer, *supra* note 263, at 646–47.

269 *Id.* at 647; *see also* Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 741, 743–46 (2015) (explaining the anti-fraud defense of voter ID laws).

270 *See* Turken v. Gordon, 224 P.3d 158 (Ariz. 2010) (en banc).

flow directly to the public, or whether, instead, they only do so indirectly.[271]

Or, state courts may, in the future, elect to take inspiration from the multifactor test used by the Supreme Court of Maryland to enforce its constitution's ban on special legislation in *Cities Service*.[272] In so doing, they might ask such questions as whether a challenged voter ID law was "actually intended to benefit or burden" a particular political party (factor (1)); "[w]hether particular individuals or entities are identified in the statute" (factor (2)); what its "substance" and "practical effect" actually was (factor (3)); whether "a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation" (factor (4)); whether there was a "public need and public interest underlying the enactment" (factor (5)); and whether the legislative enactment was "arbitrary and without any reasonable basis" (factor (6)).[273]

Factor (d) of the *Cities Service* decision is especially important in light of the now well-documented fact that virtually all recent voter ID laws may be attributed to ALEC and its associates.[274] ALEC's principal strategy, as Hertel-Fernandez has painstakingly documented, has been to offer conservative state legislators a deep library of model bills, whose enactment they and their cohort organizations support with research, lobbying, grassroots mobilization, and lavish professional networking opportunities.[275]

Minnesota's 2010 voter ID enactment is representative of ALEC's basic script. In the wake of that year's election cycle, Minnesota Representative and ALEC state chairwoman Mary Kiffmeyer introduced new voter ID legislation.[276] *Associated Press* reporting revealed that her bill shared striking similarities with ALEC's signature model voter ID legislation.[277] But, in interviews, Kiffmeyer balked at the proposition that

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271 *See id.*

272 Cities Serv. Co. v. Governor, 431 A.2d 663, 672–73 (Md. 1981); *see supra* notes 224–230 and accompanying text.

273 Howard County v. McClain, 270 A.3d 1062, 1067 (Md. Ct. Spec. App. 2022) (quoting *Cities Serv.*, 431 A.2d at 672–73); *id.* ("No one factor is conclusive.").

274 For a detailed account of ALEC's "model bill" strategy as applied to the enactment of voter ID, RTWAs, and stand-your-ground laws, see HERTEL-FERNANDEZ, *supra* note 6.

275 *See id.* at 4–5 (explaining how ALEC and its sister organizations, Americans for Prosperity and the State Policy Network, collude to support the passage of conservative, pro-business legislation at the state level).

276 Alexandra Tempus, *Voter ID Drive Part of Quiet, Well-Funded National Conservative Effort*, MPR NEWS (Mar. 5, 2012, 4:01 AM), https://www.mprnews.org/story/2012/03/04/voter-id-alec [https://perma.cc/P7YJ-DTU3].

277 *Id.*

it might have been written by the organization, and an ALEC legislative analyst insisted that ALEC "never campaigned to promote these policies in the states."[278] Of course, ALEC's assertion was in significant part a splitting of hairs: As Hertel-Fernandez has noted, it is precisely through supplying "model bills" en masse that ALEC lobbies state legislatures.[279] The point, however, is that the factual record establishing ALEC's involvement in the passage of these policies is now extremely robust, and thus available as a tool in litigation for proving the involvement of special interests in legislation of this kind.

Overall, finally, Arizona and Maryland's approaches to special interest legislation may be particularly impactful in this issue area because litigants still commonly push state courts to review voter ID regulations under the federal test established in *Burdick v. Takashi* and *Anderson v. Celebrezze*.[280] A basically "toothless" form of rational basis review,[281] this test asks courts to weigh these laws' burdens to electoral participation against their purported benefits.[282] The problem, however, is that voter ID laws may effect systemic changes to American democracy while, in each instant case, appearing to do very little. As Professor Jacob Eisler recently argued in *The Law of Freedom*, voter ID laws may "impose a relatively trivial administrative requirement on individual voters," "modulate which groups participate in elections," and, insofar as election results shape law, "indirectly determine . . . substantive policies."[283] Arizona and Maryland's model approaches ask courts to do more than deferentially balance costs and benefits, and, in so doing, offer alternative—potentially stronger—protections against capture.

3. Right-to-Work Acts

In addition to voter ID laws, scholars now recognize the expansion of RTWAs as yet another example of ALEC's success in capturing state-

278 *Id.*

279 HERTEL-FERNANDEZ, *supra* note 6, at 13.

280 *See* Burdick v. Takashi, 504 U.S. 428, 441 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983). For an example of recent state constitutional litigation demanding the application of this standard, see Mont. Democratic Party v. Jacobsen, 545 P.3d 1074, 1084 (Mont. 2024) ("[T]he Secretary urges us to adopt the federal Anderson-Burdick balancing test when deciding cases under the Montana Constitution's right to vote Montana.").

281 Bulman-Pozen & Seifter, *supra* note 26, at 1891.

282 *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008); Pamela S. Karlan, *Undue Burdens and Potential Opportunities in Voting Rights and Abortion Law*, 93 IND. L.J. 139, 149 (2018).

283 EISLER, *supra* note 10, at 31–32.

level policymaking.[284] Perhaps the most notorious example of these laws—which authorize employees to work without joining a union[285]—has been Wisconsin's "Act 10,"[286] which then-Wisconsin Governor and longtime ALEC affiliate Scott Walker signed into law in 2011.[287] As RTWAs have proliferated—they are, as of 2024, enacted in twenty-six states and Guam[288]—labor and civil rights groups have repeatedly brought challenges asking state courts to rule on their constitutionality.[289] Here, too, giving effect to the anticapture aims of state constitutional restraints on legislative power could have important implications for the future of these enactments.

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284 *See, e.g.*, HERTEL-FERNANDEZ, *supra* note 6, at 144–46 (explaining how ALEC, State Policy Network, and Americans for Prosperity coordinate to push for the enactment of RTWAs across the states); Ariana R. Levinson, Alyssa Hare & Travis Fiechter, *Federal Preemption of Local Right-to-Work Ordinances*, 54 HARV. J. ON LEGIS. 401, 404 (2017) (noting that ALEC's state-level push for RTWAs "would require unions and employers to navigate a tapestry of right-to-work and non-right-to-work municipalities").

285 *See Right-to-Work Resources*, NAT'L CONF. ST. LEGIS. (Dec. 19, 2023), https://www.ncsl.org/labor-and-employment/right-to-work-resources [https://perma.cc/M2TA-T4UA].

286 A.B. 11, 2011 Leg., Jan. 2011 Spec. Sess. (Wis. 2011).

287 *See* Ed Pilkington, *Scott Walker, First Alec President? Long Ties to Controversial Lobby Raise Concern*, GUARDIAN (Aug. 4, 2015), https://www.theguardian.com/us-news/2015/jul/22/scott-walker-alec-2016-election [https://perma.cc/W6DQ-MJAP]; Clay Barbour & Mary Spicuzza, *Gov. Walker Signs Budget Bill Limiting Bargaining Rights, Rescinds Layoff Notices*, WIS. ST. J. (Mar. 11, 2011), https://madison.com/news/state-regional/government-politics/madison.com/tncms/admin/action/main/preview/site/news/local/govt-and-politics/gov-walker-signs-budget-bill-limiting-bargaining-rights-rescinds-layoff-notices/article_cef20214-4bff-11e0-b67d-001cc4c03286.html [https://perma.cc/W8A2-Q5PK]. Itself a large bill based in part on existing state employment and labor laws, the Center for Media and Democracy revealed that Act 10 closely tracked anti-union mechanisms proposed in ALEC's model Public Employee Freedom Act and Public Employer Payroll Deduction Policy Act. CTR. FOR MEDIA & DEMOCRACY, ALEC EXPOSED, WISCONSIN: THE HIJACKING OF A STATE 5 (2012), https://www.alecexposed.org/w/images/c/cd/ALEC_Exposed_in_Wisconsin.pdf [https://perma.cc/AU5Y-X2X8].

288 *See* NAT'L CONF. ST. LEGS., *supra* note 285; *see Right to Work States*, NAT. RT. WORK LEGAL DEF. FOUND. (2024), https://www.nrtw.org/right-to-work-states [https://perma.cc/ZGF3-6PQ8] (identifying the twenty-seven current right-to-work jurisdictions as Alabama, Arizona, Arkansas, Florida, Georgia, Guam, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, and Wyoming).

289 *See, e.g.*, *Summary of Recent Litigation Against Right to Work Laws*, NAT. RT. WORK LEGAL DEF. FOUND. (Oct. 29, 2020), https://www.nrtw.org/wp-content/uploads/2020/11/CONCISE-SUMMARY-OF-LITIGATION-AGAINST-ltrhd.pdf [https://perma.cc/A62E-THU9]. Unions have challenged the constitutionality of their states' RTWAs in several states—mostly without success—and litigation in Kentucky and Wisconsin has explicitly involved state constitutional anticapture protections. *See id.* (summarizing legal challenges to RTWAs and finding that, as of October 2020, none had been successful); Michael Sainato *"We Were Demonized": Labor Unions Win Big in Ruling on Wisconsin's Act 10*, GUARDIAN (Dec. 8, 2024), https://www.theguardian.com/us-news/2024/dec/08/wisconsin-unions-court-restores-collective-bargaining-rights [https://perma.cc/T72V-Q76A] (noting that Wisconsin unions recently convinced a Dane County judge to overturn Act 10, but that Republicans have repealed the ruling).

A key challenge faced by RTWA opponents is that the former apply economic classifications, which means that judges will be encouraged to review them using deferential rational basis tests.[290] Even if rational basis is the correct test to apply to such laws, however, not all such standards are created equal, entailing that courts must still determine which version of the test to use.[291] In the RTWA context, this question became central in *Zuckerman v. Bevin*, a 2018 opinion of the Supreme Court of Kentucky.[292] *Zuckerman* concerned the constitutionality of a Kentucky RTWA holding that no employee hired after January 9, 2017, would be required to become or remain a due-paying union member.[293] In 2017, Kentucky union members brought suit, arguing, inter alia, that the statute violated Section 59 of the Constitution of Kentucky, which forbids the General Assembly from passing "special acts" across a variety of areas including "labor, trade, mining or manufacturing."[294]

In *Zuckerman*, a narrow four-three majority of the Kentucky Supreme Court upheld the RTWA's constitutionality by applying rational basis review.[295] It was true, the majority acknowledged, that Kentucky's special legislation prohibition had been originally created to prevent "arbitrary and irrational legislation that favors the economic self-

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290 *See, e.g.*, Zuckerman v. Bevin, 565 S.W.3d 580, 595 (Ky. 2018) ("Rational basis review is appropriate for evaluating . . . [a Kentucky RTWA] since . . . [t]he Supreme Court long ago held that, under federal law, union membership is not a suspect classification triggering strict scrutiny."); Hershkoff, *Positive Rights*, *supra* note 174, at 1153 ("Most, but not all, of economic life falls under the rubric of rationality review.").

291 *See, e.g.*, Bulman-Pozen & Seifter, *supra* note 26, at 1891–92 (noting that many state courts have rejected "toothless rational basis review" in favor of alternatives including reasonableness and nonarbitrariness tests, sliding or more "fluid" scales of scrutiny, and balancing tests); *see id.* at 1892 nn.209–10 (collecting exemplary state case law).

292 *Zuckerman*, 565 S.W.3d 580.

293 The text of Kentucky's RTWA reads as follows:

> (a) Notwithstanding subsection (1) of this section or any provision of the Kentucky Revised Statutes to the contrary, no employee shall be required, as a condition of employment or continuation of employment, to:
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> 1. Become or remain a member of a labor organization;
>
> 2. Pay any dues, fees, assessments, or other similar charges of any kind or amount to a labor organization; or
>
> 3. Pay to any charity or other third party, in lieu of these payments, any amount equivalent to or pro rata portion of dues, fees, assessments, or other charges required of a labor organization.
>
> (b) As used in this subsection, the term "employee" means any person employed by or suffered or permitted to work for a public or private employer.

KY. REV. STAT. § 336.130(3) (West 2024).

294 *Zuckerman*, 565 S.W.3d at 587 n.9, 599; KY. CONST. § 59.

295 *Zuckerman*, 565 S.W.3d at 600.

interest of the one or the few over that of the many."[296] However, it then explained, in a 1998 case called *Yeoman v. Commonwealth*,[297] it had determined that legislation was generally not special in nature as long as (1) it applied equally to every member of its target class, and (2) its classifications were "distinctive and natural reasons supporting the classification."[298] Applying *Yeoman*, the court then found that the RTWA was a species of general, not special, legislation for two reasons.[299] First, it explained, "it applies to all employers and all employees, both public and private," "does not single out any particular union, industry or employer," and "applies statewide."[300] Second, it elaborated that the RTWA also pursues the legitimate aim of "promot[ing] economic development."[301]

Joined by two of her colleagues on the bench, Justice Michelle M. Keller wrote an impassioned dissent arguing that, because Kentucky's RTWA qualified as a form of constitutionally disfavored special legislation, the majority should have applied a more searching rational basis test.[302] Beginning with history, she first pointed out that Kentucky's special legislation ban had originally been created in order to stop the state's legislature from establishing "special privileges for those with wealth and power sufficient to sway the Assembly and to ensure equality under the law."[303] The aim of limiting "[u]nbridled legislative power,"[304] which "had become the captive of special interest groups" in the nineteenth century, forms the basis of Kentucky's special legislation test under *Yeoman*'s two-part standard.[305] This doctrine, she reminded the court, requires "the party claiming the validity of the classification to show that there is a valid nexus between the classification and the purpose for which the statute in question was drafted."[306]

In *Zuckerman*, Justice Keller then reasoned that such a nexus had not been shown.[307] While, to her mind, the RTWA's declared "economic

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296 *Id.* at 599.

297 983 S.W.2d 459 (Ky. 1998).

298 *Zuckerman*, 565 S.W.3d at 600 (citing *Yeoman*, 983 S.W.2d at 466); *see also id.* at 613 (Keller, J., dissenting) ("The law must apply equally to all in a class, and there must also be distinctive and natural reasons supporting the classification. Otherwise, the legislation is constitutionally invalid and must be struck as impermissible special legislation." (citing *Yeoman*, 983 S.W.2d at 466)).

299 *Id.* at 600.

300 *Id.*

301 *Id.* at 598.

302 *Id.* at 615 (Keller, J., dissenting).

303 *Id.* at 611 (quoting White v. Manchester Enter., Inc., 910 F. Supp. 311, 314 (E.D. Ky. 1996)).

304 *Id.*

305 *Id.* (quoting Tabler v. Wallace, 704 S.W.2d 179, 184 (Ky. 1985)).

306 *Id.* at 614 (quoting Yeoman v. Commonwealth, 983 S.W.2d 459, 468 (Ky. 1998).

307 *Id.* at 615.

development" purpose was plausibly constitutional,[308] it was not sufficiently related to its underlying classificatory scheme, which arbitrarily distinguished between members of its object classes.[309] Rather than applying to employers and employees generally, she noted, the RTWA only affected the contract rights of those "associated with labor organizations," and, what is more, exempted all who had been union members prior to January 9, 2017.[310] But, "[a]ssuming the General Assembly intend[ed] economic development in the general sense, and not just non-union economic development," she queried,

> [W]hy would it choose to enact a law that, by the Commonwealth's own admission, will not affect non-union employers and employees because those private organizations have never received or compelled payment of money from members or nonmembers? The Commonwealth's own arguments for classifications and for justifications of the RTWA fail to pass constitutional muster.[311]

For the purposes of this Article, Justice Keller's dissenting riposte is important not only because it won significant support on the bench (falling but one vote shy of a winning majority) but also because it demonstrates how courts and litigants may apply their constitution's special legislation prohibitions to challenge state capture. Insofar as the anticapture purposes of Kentucky's special legislation trace to the historical context typical of most such bans,[312] courts and litigants should feel comfortable applying Justice Keller's analysis and the tradition of Kentuckian constitutional jurisprudence it represents. When it comes to state capture, courts ultimately have a choice. They may proceed deferentially, or they may decide to demand more from their legislatures. This is by no means to say that courts should simply defer to labor organizations' demands. In other contexts, perhaps, courts might have reason to worry that labor organizations, not businesses, have achieved undue influence in the policymaking process.[313] As the proliferation of RTWAs perhaps suggests, however, that day has yet to arrive.

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308 *Id.*

309 *Id.* at 614.

310 *Id.* at 613.

311 *Id.* at 615.

312 *See supra* Section I.A.1.a.

313 Today, for example, such concerns are sometimes raised with respect to public sector unions. *See, e.g.*, PHILIP K. HOWARD, NOT ACCOUNTABLE: RETHINKING THE CONSTITUTIONALITY OF PUBLIC EMPLOYEE UNIONS 83–114 (2023) (contending that public sector unions apply unduly influence to extract rents from the policymaking process); Gilmore v. Gallego, 552 P.3d 1084, 1089–94 (Ariz. 2024) (finding that a memorandum of understanding between a police union and the City of Phoenix providing paid release time violated the public purpose doctrine associated with the Gift Clause of the Arizona State constitution).

III. CONSTITUTIONAL CHALLENGES IN CAPTURED COURTS

Public law scholars concerned with state capture have emphasized the importance of regulating political spending, strengthening political rights, cultivating forms countervailing power, and implementing anticapture review.[314] Aside from a few noteworthy exceptions, however, they have generally overlooked the role of state courts as venues to contest and potentially invalidate special interest legislation. For critics of this Article's proposal, this oversight may well seem justified. Perhaps state courts and state constitutional litigation simply should not be part of the solution to present-day state capture.

Though various responses to such criticism may be inferred from the preceding discussion, this Part considers what it takes to be three of the strongest points of opposition to state anticapture review. It addresses, in turn, the worry that state courts cannot effectively check state capture because they themselves have been captured by special interests,[315] that it would be best to avoid anticapture strategies that could reenforce American juristocracy,[316] and that judicial review, in and of itself, is not an effective anticapture mechanism.[317]

A. *Judicial Capture*

A key suggestion arising from the substantial literature on state and local government law is that state courts are arguably just as captured as their legislative counterparts.[318] In their 2023 book, *Free to Judge: The Power of Campaign Money in Judicial Elections*, Professors Michael Kang and Joanna Shepherd offer a comprehensive empirical study of state judicial elections demonstrating that private expenditures on judicial campaigns shape judicial decision-making in statistically significant ways.[319] "[A]veraged over all judges," they report, "each $10,000

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314 *See, e.g.*, Andrias & Sachs, *supra* note 18, at 550–54; Levinson, *supra* note 18, at 38, 112.

315 *See infra* Section III.A.

316 *See infra* Section III.B.

317 *See infra* Section III.C.

318 *See, e.g.*, KANG & SHEPHERD, *supra* note 23, at 95 (contending that private interests substantially influence state judicial behavior); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 626 (1994) (discussing the prevalence of state capture in state and local appropriation); GRUMBACH, *supra* note 21, at 75–84 (summarizing this literature to explain how the powerful are advantaged by lower levels of government).

319 *See* KANG & SHEPHERD, *supra* note 23, at 10 (explaining that their study includes "comprehensive data over three decades of state supreme court decisions, ranging over the 1990s

contribution from a business increases the odds of a judge casting a pro-business vote by about 1 percent."[320] Partisanship plays an important role as well.[321] As they put it, "campaign contributions to state supreme court justices" from coalitions of interest groups with partisan alignments "are significantly predictive of the justices' voting on the bench."[322] They also find that similar patterns hold in criminal justice contexts.[323] Specifically, the more money private interest groups expend on attack ads focusing on criminal justice, the less sympathetically state judges seeking reelection tend to treat criminal defendants.[324] In other words, they find that "money matters a lot," and, "[w]hether it comes from business groups, the major parties, or other interest groups as part of a party coalition, campaign money predicts how elected justices later vote. Money gets what it wants in judicial elections."[325]

Kang and Shepherd's findings put difficult questions to the nineteenth-century theory that electoral judiciaries would be immune to capture.[326] That theory may have been sensible for its time, but states are no longer "backwaters" and state judicial elections are no longer "sleepy, low-key affairs."[327] As the star of state politics has risen in the American

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to the 2010s, as well as all the campaign contributions given to the elected judges deciding those cases across the fifty states"); *id.* at 95 (concluding that contributions from business groups, major parties, and other organized interests predict state judicial voting); *see also* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (2011) (finding that "campaign contributions from business groups [and partisan judicial elections] are associated with judicial votes in favor of business interests").

320 KANG & SHEPHERD, *supra* note 23, at 11; Kang & Shepherd, *supra* note 319, at 84–87.

321 *See* KANG & SHEPHERD, *supra* note 23, at 87–90.

322 *Id.* at 88; *see also id.* at 92 ("Republican justices are more likely to favor their own party in election cases by a statistically significant margin compared to Democratic justices, controlling for other factors.").

323 *Id.* at 74–82.

324 *Id.* at 77 ("[I]n a state with 2000 total ads to start, sympathy for criminal defendants, as measured by voting for the defendant in a supreme court appeal, goes down by 2 percent on average as the number of television ads doubles."); *see also* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 248 (2004) (examining over 22,000 Pennsylvania criminal cases to find that judges impose longer sentences the closer they are to standing for reelection); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107, 128–30 (2007) (finding that Kansas judges facing partisan elections issue more punitive rulings than those only facing retention elections).

325 KANG & SHEPHERD, *supra* note 23, at 95.

326 *See supra* Section II.B.

327 GRUMBACH, *supra* note 21, at 42 (highlighting increased state-level economic regulation as evidence that states are no longer the "backwaters" of the federal system); Pozen, *supra* note 149, at 300 ("The rapid rise in campaign spending, the aggressive outreach done by interest groups and political parties, and the politicization of campaign speech have transformed many judicial races from sleepy, low-key affairs into high-stakes, high-salience affairs.").

constitutional system, its dynamics have assumed the shape of "organized combat," the rough-and-tumble war of interest group politics once associated primarily with the federal political branches.[328] The question thus raised is whether state courts' susceptibility to outside influence renders them inoperative as sites suitable for the contestation of state capture.[329] Of course, it is at least "theoretically possible" that state judges' increasing dependence on outside interests would increase their visibility and, in so doing, potentially deter their affirmance of certain "seeming quid pro quos."[330] But Kang and Shepherd's findings suggest that state judges may be as prone to "subtle" favoritism toward their benefactors as their legislative counterparts.[331]

However, the substantial influence exerted on state judges today does not in itself imply that anticapture constitutional challenges are impossible. What it does indicate, though, is that litigants will likely need to think carefully about the specific conditions under which they bring their complaints. Key to Kang and Shepherd's findings, for example, is that state judges are particularly susceptible to capture as they approach reelection periods.[332] Further, they find that, at least in recent years, Republican-controlled state courts have been more susceptible to capture than Democratic ones.[333] This suggests that anticapture advocates should try to align their litigation to the rhythms of the election cycle, and, if possible, begin by bringing challenges in fora where judicial partisanship

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328 *See* JACOB HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 116–36, 138, 259–62, 271–73, 275, 291–93, 295, 300–01 (2010) (describing and applying the theory of American politics as organized combat); LEAH CARDAMORE STOKES, SHORT CIRCUITING POLICY: INTEREST GROUPS AND THE BATTLE OVER CLEAN ENERGY AND CLIMATE POLICY IN THE AMERICAN STATES 5 (2020) ("[O]rganized combat between interest groups is at the heart of American politics.").

329 *See, e.g.*, Croley, *supra* note 149, at 725 (contending that judicial elections may compromise judicial impartiality); Pozen, *supra* note 149, at 290–93 (contending that elected judiciaries may tend toward favoritism); Shugerman, *Gerrymandered Courts*, *supra* note 155, at 23 (contending that the partisan districting of state supreme courts means that state judges are not more majoritarian than state legislatures); *cf.* Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1774 (2021) ("[I]t is hard to see elected judges as being systematically countermajoritarian in the same way that many state legislatures are.").

330 Pozen, *supra* note 149, at 302.

331 *See* KANG & SHEPHERD, *supra* note 23; *supra* notes 319–325 and accompanying text; Pozen, *supra* note 149, at 302 (noting that judicial "favoritism can be subtle" and that "judges' sympathies for the legal views of their supporters will often be hard to extricate from their sympathies for the supporters themselves-and even not-so-subtle favoritism will not always disqualify a judge or undermine a judge's reelection chances").

332 *See* KANG & SHEPHERD, *supra* note 23, at 120–24 (finding that campaign finance money influences state judicial behavior more when judges are soon to face reelection).

333 *Id.* at 93 (reporting evidence that Republican judges in recent years are more likely to favor their own party than are Democrats in cases where the outcome distributes short-term, partisan advantages).

can work in their favor. Here, they should also consider that longstanding trends toward political polarization have resulted in politically homogenous state governments.[334] Currently, for example, Montana is the only state with a Democratic supreme court and Republican legislature.[335] Insofar as this pattern holds, anticapture litigation will have to transpire under suboptimal conditions, for instance, in states where Republican control in the legislative branch is at least partially offset by politically heterogeneous supreme courts.[336]

B. *Juristocracy*

A second set of major worry may be that this paper's proposal enforces "juristocracy," or the idea that judges in the United States already wield far too much power vis-à-vis the other branches of government.[337] This concern takes on heightened importance today in light of the Supreme Court's sharp, rightward turn,[338] general repudiation of deference as an established norm of judicial decision-making,[339] shameful dalliances with a class of ultra-wealthy private patrons,[340] the

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334 *See* GRUMBACH, *supra* note 21, at 42–44 (explaining how political polarization concomitantly resulted in gridlock in federal politics and the expansion of state-level policymaking by politically homogenous state governments).

335 *See 2025 State Partisan Composition*, NAT'L CONF. ST. LEGIS. (Jan. 31, 2025) https://www.ncsl.org/about-state-legislatures/state-partisan-composition [https://web.archive.org/web/20250406233338/https://www.ncsl.org/about-state-legislatures/state-partisan-composition] (reporting the partisan composition of state legislatures of 2025); *State Judicial Elections, 2024*, BALLOTOPEDIA, https://ballotpedia.org/State_judicial_elections,_2024 [https://perma.cc/V4BP-ZBXN] (reporting the results of state judicial elections as of 2024).

336 *See* NAT'L CONF. ST. LEGIS., *supra* note 335 (describing the current composition of state legislatures and judiciaries).

337 RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004) (defining "juristocracy" as the potentially suspect tendency of modern constitutional reform to "transfer[] an unprecedented amount of power from representative institutions to judiciaries").

338 *See, e.g.*, Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2024) (contending that, equipped with a new "nearly bulletproof majority," a defining trend of recent Supreme Court decisions has been "to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself").

339 *See, e.g.*, *id.* at 115 (contending that the Roberts Court is particularly "dangerous" because it "rejects stare decisis, . . . does not defer to considered policy decisions simply because it disagrees with them, . . . throws out established judicial procedure to take and decide cases that it wants whether or not there is a live dispute or whether the facts or the courts below present those cases for resolution").

340 *See, e.g.*, *Senate Judiciary Committee Releases Revealing Investigative Report on Ethical Crisis at the Supreme Court*, S. COMM. ON JUD. (Dec. 21, 2024), https://www.judiciary.senate.gov/

expansion of federal judicial power,[341] and the consolidation of the federal bench under the rule of conservative and business-friendly interests.[342] With these facts in mind, the juristocracy complaint might well be rephrased along the following lines: Should we not worry about reproducing federal-judicial pathologies at the state level?

In the nineteenth century, as we saw, the expansion of state judicial power went hand-in-hand with restraining legislatures.[343] We also saw that such reforms may be defended as measures that improve the representative character of state and local democracy—at least in contexts where judges hold office by popular election.[344] If this theory still held water, it might imply that juristocracy concerns might simply not be as pronounced in the states as they are when it comes to the federal government. But there are strong empirical reasons to think that it does not, or at least that, if it is to be saved, it may require substantial revision.[345] Indeed, it seems highly unlikely that any public institution—representative or otherwise—may be said to be wholly liberated from special interest politics, and thus deserving of democratic trust.

Of course, the strategy advanced here could still be defended on the view that counter-majoritarian concerns classically associated with federal courts do not apply straightforwardly—or "with the same force"—in the states.[346] But that argument, too, loses much of its force once one

press/releases/senate-judiciary-committee-releases-revealing-investigative-report-on-ethical-crisis-at-the-supreme-court [https://perma.cc/XHD7-V5AT] (outlining recent evidence of Justices Alito and Thomas's flagrant conflicts of interest, gift acceptances, and failures to disclose).

341 *See, e.g.*, Lemley, *supra* note 338, at 97.

342 *See, e.g.*, John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/short-reads/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges [https://perma.cc/X29B-CH5E] (analyzing the 226 federal judicial appointments that President Trump made during his first term); *Factbox: Donald Trump's Legacy—Six Policy Takeaways*, REUTERS (Oct. 30, 2020), https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK [https://web.archive.org/web/20201030232350/https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK] (noting that President Trump used his judicial appointments power to flip the ideological composition of the Eleventh Circuit, Second Circuit, and Third Circuit).

343 *See supra* Section II.B.

344 *See, e.g.*, Shugerman, *Gerrymandered Courts*, *supra* note 155, at 24–26 (explaining nineteenth-century justifications for judicial elections); Seifter, *supra* note 329, at 1771–73 (identifying theoretical reasons to think that elected judiciaries encourage majoritarianism today).

345 *See supra* notes 318–336 and accompanying text.

346 Seifter, *supra* note 329, at 1771–73, 1780 (identifying theoretical reasons to think that elected judiciaries encourage majoritarianism today); Hershkoff, *Passive Virtues*, *supra* note 174, at 1839–40.

acknowledges that policymaking is generally more prone to capture in state and local contexts than it is at the federal level.[347]

Faced with juristocracy concerns, the argument for state anticapture review must begin with the fact that state capture affects politics everywhere. It might be said, for instance, that if state capture operates through all state institutions, then there is no reason to fear subnational judicial supremacy more than legislative or executive supremacy. From the perspective of capture, the interdepartmental distribution of power is significant only to the extent that it actually prevents monied minorities from overriding majority will. Under certain conditions, this Article has suggested, state courts can play such an anticapture role more than they currently do,[348] but only, it seems, if state courts reclaim a more active role in the policymaking process.[349]

C. *The Limits of Judicial Review*

A third source of potential skepticism regarding this Article's proposed approach is that judicial review is simply not an effective anticapture mechanism. Professor Mary Elizabeth Magill has outlined some of the most important dimensions of this critique, and though her specific area of concern is federal administrative law, the shortcomings she stresses certainly apply here:

> Judicial review is status quo protecting; judicial review is reactive; judicial review is only available ex post and with respect to discrete decisions; judicial review is systematically less available in cases in which capture may be a real risk; and judicial review is not designed to screen for the subtle cases of regulatory capture, whether capture is defined as non-welfare-enhancing regulation or regulation that departs from the median voter.[350]

These limitations are important, and anticapture advocates must take them seriously. Yet, as outlined in what follows, they do not obviate the necessity of a state constitutional response to the problem of widespread capture in state and local politics.

Magill is correct to point out that judicial review tends to be "conservative" in the sense that it is "status quo"-preserving; it may tend to enforce rather than amend the existing distribution of rights and

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347 *See, e.g.*, Gillette, *supra* note 318, at 626; GRUMBACH, *supra* note 21, at 75–84.

348 *See supra* Section III.A.

349 *See supra* Section II.B.2.

350 M. Elizabeth Magill, *Courts and Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 397, 417–18 (David A. Moss & Daniel P. Carpenter eds., 2014).

privileges against redistribution.[351] There is certainly something to this criticism, especially when one considers that the potential to disrupt the status quo is part of what makes other potential anticapture strategies—like campaign finance reform or the cultivation of countervailing power—so compelling. Yet the status quo-preserving character of judicial review also indicates one of the potential strengths of anticapture judicial review, which operates principally, as Magill observes, by "add[ing] costs to . . . change."[352] Insofar as judicial review makes state capture more costly, it may also lead private interests to invest less in influencing the state legislative process, or, at the very least, encourage them to tread more carefully in the political sphere.

It is also true that contesting state capture through constitutional litigation must be an intrinsically "reactive" strategy; it must proceed an existing harm, and thus always, in a sense, be playing catch up.[353] Yet reactivity in a state political landscape that is already, at a basic level, captured terrain, is also not specific to judicial review. Because state capture is now a deeply engrained feature of state and local policymaking, any anticapture interventions applied today necessarily arrive after the fact. Here, however, a court-centric reform could offer the possibility of reaction where it might not otherwise exist. Only in a world where state capture is rare indeed does it become necessary to worry that judicial review usually occurs retrospectively.

Finally, Magill is also correct that contesting state anticapture through judicial review will be limited by the domain of judicial power itself, or the rights and duties that state constitutions attach to judicial officers.[354] What makes anticapture litigation under states' constitutional restraints on legislative power promising, however, is that, unlike most other anticapture strategies it is relatively unconcerned with specific mechanisms of capture that this or that entity may seek to apply. When it comes to capture, what matters is not that some private entity applied a certain mechanism of influence but that they actually managed to direct the passage of laws favoring their interests above those of the public. Where anticapture judicial review will tend to fall short, arguably, is not in cases of affirmative capture but in cases of "drift"—that is, when lawmaking or regulatory bodies advantage private interests above public ones through forbearance.[355]

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351 *Id.* at 404.

352 *Id.* at 405.

353 *Id.* at 410.

354 *Id.* at 417–18.

355 *See, e.g.*, Daniel P. Carpenter, *Detecting and Measuring Capture*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT, *supra* note 350, at

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State anticapture review is far from perfect and should not by any means be treated as the singular approach to contesting state capture. Indeed, in an environment characterized by systemic capture, anticapture litigation may seem a frustratingly piecemeal response, one inherently limited to chipping away at the problem one law at the time. Some of the most important potential remedies to state legislative capture—like increasing scarce legislative resources—are not ones best advanced through the courts.[356] But if there are real horizons to the constitutional strategy this Article proposes, they are by no means devastating. Because the great need not become the enemy of the good, and it will be sufficient for the purposes of this Article, if state constitutions come to be understood as protecting us against the damage that wealthy individuals and private corporations have already inflicted on the organs of democratic governance and lives of ordinary Americans.

CONCLUSION

State capture occurs when private entities exact rents from the public policy process. Though an old phenomenon, to be sure, it poses a greater threat to democratic governance in the United States today than perhaps ever before. It is ubiquitous at all levels of government and, because it often transpires through mundane, presumptively legal means, extremely difficult to stop.

For those invested in stymieing its influence, the fact that state capture is no stranger to American politics may be of considerable importance. In the nineteenth century, state-level reform movements responded to the threat it posed by dramatically changing their constitutions. Perceiving their state legislatures as hopelessly dominated by special interest politics, they placed stringent, judicially enforceable limits on legislative power. The thought was that state-level democracy could be viable only if judges did more to prevent capture. These new constraints increased the role of state courts in the legislative process,

57, 62 (distinguishing, in regulatory contexts, the phenomena of capture and "drift," or the "happenstance[s] of . . . otherwise neutral public policy process[es]"); HACKER & PIERSON, *supra* note 328, at 83–90 (describing the "drift" as "the failure of government to respond to new economic realities"); *see also* Magill, *supra* note 350, at 416 (noting that anticapture judicial review may also be insufficient in cases in which the aggrieved party may not be said to exist because industry insiders have so effectively barred entry to potential competitors).

356 *See, e.g.*, HERTEL-FERNANDEZ, *supra* note 6, at 259 (suggesting that one of the most effective ways to combat state capture today would be to increase state legislators' salaries, increase the time of legislative sessions, and provide legislators with more staff members).

thus permitting them to monitor and invalidate special interest legislation.

State courts today are more or less aware of this history, and a few have even established tests to give it doctrinal effect. On the whole, however, state judges' adherence to the doctrines and attitudes of their federal counterparts has made it extremely difficult for them to contest state capture within their respective jurisdictions. To prevent privileged minorities from imposing their preferences over and against democratic majorities, state judges will likely need to act less deferentially toward their colleagues in state assembly. One way to do so is to build on approaches developed in states like Arizona and Maryland, where judges confronted with potentially captured legislation abandoned rational basis scrutiny for more searching models of anticapture review. The nineteenth-century state constitutional history explored in this Article suggests that they can; the deepening crisis of constitutional democracy in the United States suggests that they should.

Especially as changing political conditions place ever-increasing pressure on state courts, however, judges cannot stand alone as a kind of final hope for minimal democracy in the United States. State capture today affects all United States residents and must, of necessity, involve a multipronged approach. Anticapture state constitutional challenges will be most effective when combined with other legal and political strategies, especially those directed at mobilizing popular countervailing power and enhancing political rights. Indeed, by combining broad-based political engagement with targeted litigation, we might still stand a chance of liberating our captured states—and perhaps, one day, ourselves.