OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 41 SPRING 2016 NUMBER 1

SPEECH

STATE CONSTITUTIONAL AMENDMENTS AND AMERICAN CONSTITUTIONALISM

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I am honored to be delivering the William J. Brennan Lecture.[1] Justice Brennan's 1977 article, *State Constitutions and the Protection of Individual Rights*,[2] is one of the most influential law-journal articles ever published.[3] It highlighted the role of state constitutions at a time when some state courts were invoking state bills of rights to provide more protection for rights than was guaranteed by the United States Supreme Court, and scholars were just starting to take note of these rulings.[4] The

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1. This Article is adapted from the William J. Brennan Lecture delivered at Oklahoma City University School of Law on October 15, 2015. The Brennan Lecture is named in honor of the late United States Supreme Court Justice William J. Brennan, Jr. I am grateful for the invitation to deliver this lecture and appreciate the hospitality extended by the law school faculty and students during my visit.

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

3. *See* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012).

4. For several scholarly analyses from the mid-1970s, see A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973); Donald E. Wilkes, Jr., *The New Federalism in Criminal*

article also brought state constitutions to the attention of a broad scholarly and popular audience—in a way that could only be accomplished by someone of Justice Brennan's stature.[5]

It is notable that Justice Brennan focused on state courts in his famous 1977 article;[6] that was certainly his main purpose, urging "state courts to step into the breach" where federal courts left off in expanding rights.[7] But he made brief mention of the role of state constitutional amendments in a 1986 article, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, in the course of explaining why the U.S. Supreme Court should not place barriers in the way of rights-expansive state court rulings.[8] One reason why state court discretion to issue rights-expansive rulings should not be constrained, Justice Brennan argued, was that any concerns about judicial activism had less force at the state level—due in part to the greater availability of state constitutional amendments for responding to state court rulings.[9]

In my remarks, I will build on Justice Brennan's brief attention to the role of state constitutional amendments by addressing the topic in a sustained fashion. We are so accustomed, when we talk about constitutionalism, to focus first and foremost on courts that we often fail to attend to the importance of constitutional amendments. It is, in one sense, understandable that courts receive so much attention from constitutional scholars, in view of the prominent role of the federal judiciary in superintending the U.S. Constitution. This nearly exclusive focus on the U.S. Supreme Court can be overdone, to be sure.[10] The U.S.

Procedure: State Court Evasion of the Burger Court, 62 KY. L.J. 421 (1974).

5. As a sign of the field's vitality in the decades after Justice Brennan's article, there are now two state constitutional law casebooks: RANDY J. HOLLAND ET AL., STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE (2010); ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (5th ed. 2015).

6. *See generally* Brennan, *supra* note 2.

7. *Id.* at 503.

8. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986) ("The Supreme Court has no conceivable justification for interfering in a case plainly decided on independent and adequate state grounds.").

9. *Id.* ("[S]tate constitutions are often relatively easy to amend; in many states the process is open to citizen initiative.").

10. For a discussion regarding the range of officials and institutions responsible for constitutional change at the federal level, see MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 140–73 (2013). While noting that "[d]ecisions

Supreme Court is by no means solely responsible for constitutional change at the federal level.[11] On some occasions, federal constitutional amendments have been vehicles for important changes. The President and members of Congress also play a role.[12] Nevertheless, at the federal level, discussions of the U.S. Constitution revolve, to a great extent, around the Supreme Court Justices and their decisions, which, for practical purposes, generally serve as the final word on constitutional questions.[13]

When we turn to consider governance in the fifty states, it is difficult to ignore the importance of state constitutional amendments. In fact—and let me get right to my bottom line—at the state level, constitutional change often takes place through passage of state constitutional amendments rather than through issuance of state court decisions.[14] Moreover, when state supreme courts do issue rulings announcing new understandings of constitutional principles, these rulings are generally not the last word, as they are often at risk of being overturned by constitutional amendments. In short, constitutionalism takes a very different form in state capitols, such as Oklahoma City, Austin, and Topeka, than in Washington, D.C.[15]

Given the importance of state constitutional amendments, I will focus on their role in American constitutionalism and address three questions. First, why do state constitutional amendments play such a prominent role in the states, contrasted with the relatively modest role of federal constitutional amendments? Second, in what ways have state constitutional amendments been responsible for changes in understandings of rights and principles? Third, should we view the prominent reliance on state constitutional amendments as something to

reinterpreting constitutional provisions are a form of constitutional change," meaning that the U.S. Supreme Court plays an important role in superintending the U.S. Constitution, Graber also notes that "presidents" and "congressional leaders," among other actors, play key roles in modifying constitutional understandings at the federal level. *Id*. at 142, 161.

11. *See id*. at 142.

12. *Id.*

13. Xenophon Contiades & Alkmene Fotiadou, *Models of Constitutional Change*, *in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 417, 438 (Xenophon Contiades ed., 2013) (referring to "[j]udge-made informal change through constitutional review" as "the primary mechanism for constitutional evolution in the USA").

14. *See* John Dinan, *State Constitutionalism*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 863, 883–84 (Mark Tushnet et al. eds., 2015).

15. *See id.*

be applauded and encouraged or critiqued and regretted?

I. CONSTITUTIONAL AMENDMENTS IN THE STATES

It is appropriate to start by documenting and explaining the prominence of state constitutional amendments in comparison with the modest number of federal amendments. There is no denying the dramatic differences between amendments at the state and federal levels, even as we allow for some variation among the fifty states.[16]

A. Documenting the Prominence of State Constitutional Amendments

The U.S. Constitution has been amended only twenty-seven times.[17] This actually overstates the frequency of federal amendments given that ten of those amendments were ratified within several years of the document taking effect.[18]

The fifty current state constitutions, meanwhile, have been amended 7,481 times for an average of nearly 150 amendments per state.[19] To be sure, this masks significant variation among the states. The Alabama Constitution of 1901 has been amended 892 times,[20] far outpacing the number of amendments to any other state constitution, due in part to the unusual way that Alabama amendments often deal with the governance of particular counties.[21] California's 529 amendments to its 1879 constitution, South Carolina's 500 amendments to its 1895 constitution, and Texas's 484 amendments to its 1876 constitution also rank in the top tier, along with Oregon's 255 amendments to its 1857 constitution.[22] The Oklahoma Constitution of 1907, with 196 amendments, is also among the more oft-amended state constitutions.[23]

On the other hand, some state constitutions are changed less often. Every one of the fifty state constitutions is amended more frequently

16. *See generally* U.S. CONST. amends. I–XXVII; John Dinan, *State Constitutional Developments in 2014*, *in* 47 THE BOOK OF THE STATES 3, 11 tbl.1.1 (2015 ed. 2015).

17. *See generally* U.S. CONST. amends. I–XXVII.

18. *See id.* amends. I–X.

19. Calculated from the number of enacted amendments for each state through 2014, as reported in Dinan, *supra* note 16.

20. *Id.*

21. *See id.* at 12 tbl.1.1 n.(a).

22. *Id.* at 11 tbl.1.1.

23. *Id.*

than the U.S. Constitution,[24] but compared with other states, some are amended infrequently.[25] For instance, the Vermont Constitution of 1793 has been amended only fifty-four times; the Indiana Constitution of 1851 only forty-seven times; and the Tennessee Constitution of 1870 only forty-three times.[26]

B. Explaining the Prominence of State Constitutional Amendments

The frequent adoption of state constitutional amendments—albeit in some states more than others—is, in part, a product of more accessible amendment rules. Article V of the U.S. Constitution imposes high barriers to proposing and ratifying amendments.[27] Amendments can be proposed in one of two ways: (1) by a two-thirds vote in both houses of Congress; or (2) by application from two-thirds of state legislatures for Congress to call a convention.[28] All thirty-three formally proposed federal constitutional amendments have taken the congressional-proposal route,[29] even as some state legislatures continue to pursue the convention-proposal route,[30] with a particular focus on securing a balanced-budget amendment.[31] As for ratification of federal amendments, this can also be done in two ways. All but one of the twenty-seven successful amendments were ratified by legislatures in three-fourths of the states.[32] The Twenty-First Amendment, repealing

24. The amendment rate for constitutions is generally determined by calculating the average number of amendments adopted per year. Thus, the U.S. Constitution, which has been amended twenty-seven times in 226 years, has an amendment rate of 0.12 amendments per year. The Vermont Constitution, in effect since 1793, has been amended fifty-four times in the ensuing 222 years; therefore, it has an amendment rate of 0.24 amendments per year. All other state constitutions have a higher amendment rate. These amendment rates are calculated from the data on dates of current state constitutions and the number of enacted amendments. *See id.*

25. *See id.*

26. *Id.*

27. *See* U.S. CONST. art. V.

28. *Id.*

29. *See* THOMAS H. NEALE, CONG. RESEARCH SERV., R42589, CRS REPORT FOR CONGRESS: THE ARTICLE V CONVENTION TO PROPOSE CONSTITUTIONAL AMENDMENTS: CONTEMPORARY ISSUES FOR CONGRESS 3 (2014).

30. *See id.* at 6–7.

31. *See* Stephen Dinan, *Balanced Budget Convention Gains Steam as Congressman Calls for Official Evaluation*, WASH. TIMES (Apr. 1, 2014), http://www.washingtontimes.com/news/2014/apr/1/balanced-budget-convention-gains-steam-congressman/?page=all [https://perma.cc/4XH2-CJK2].

32. *See* John Dinan & Jac C. Heckelman, *Support for Repealing Prohibition: An*

prohibition, was the only amendment ratified in the alternative fashion set out in Article V—by conventions in three-fourths of the states.[33]

The rules for amending the fifty state constitutions are, in nearly all respects, less burdensome. No state requires more than a two-thirds legislative vote for proposing amendments, and most states set a lower barrier.[34] In nearly half of the states, amendments can be proposed by a simple legislative majority—even if this approval must be made in two consecutive sessions in a number of these states.[35] As for state ratification rules—and every state but Delaware requires voters to approve amendments—all but seven states permit ratification by a bare majority vote.[36] Two states, Florida and New Hampshire, require a supermajority popular vote.[37] A handful of states maintain a requirement (as was in effect in Oklahoma until 1974[38]) whereby amendments have to be approved by a majority of voters participating in the entire *election*, which essentially counts blank ballots as "no" votes.[39]

The flexibility of state amendment rules is further evident in the range of ways that amendments can be adopted without the legislature playing a role. Every state provides, either explicitly or by tradition, for the legislature to call a convention with the power to consider constitutional amendments or wholesale constitutional revisions.[40]

Analysis of State-Wide Referenda on Ratifying the 21st Amendment, 95 SOC. SCI. Q. 636, 637 (2014).

33. *Id.*

34. The rules for legislative proposal of amendments are provided in Dinan, *supra* note 16, at 13 tbl.1.2. The only occasions where states require more than a two-thirds legislative vote involve situations in which an alternative procedure is available where either amendments can also be proposed by a majority vote in two consecutive sessions or the greater-than-two-thirds rule applies to only a limited category of amendments. *See id.* at 14 tbl.1.2 nn.(c)–(d).

35. *Id.* at 13 tbl.1.2.

36. *Id.*

37. *Id.*

38. *See* DANNY M. ADKISON & LISA MCNAIR PALMER, THE OKLAHOMA STATE CONSTITUTION 69 (2011).

39. Dinan, *supra* note 16, at 13 tbl.1.2. The states are Hawaii, Illinois (which requires ratification by a majority of votes cast in the election or by three-fifths of voters on the question), Minnesota, Tennessee, and Wyoming. *Id.* at 13 tbl.1.2 & 14 tbl.1.2 nn.(f)–(g).

40. *Id.* at 16 tbl.1.4; *see also* G. Alan Tarr & Robert F. Williams, *Forward: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1078–79 (2005). Forty-one state constitutions have an explicit provision for the legislature to call a convention. In the remaining states, legislatures have often exercised this power—even in the absence of an explicit constitutional provision—in a way that has been upheld by state courts. *See id.*

However, fourteen states (including Oklahoma) go further and mandate that at periodic intervals, the question of whether to call a convention should be submitted to the people—generally every twenty years but as often as every ten years in some states.[41]

In all but one of these fourteen states, mandatory convention referenda are regularly submitted to voters.[42] Oklahoma is unique in failing to comply with this provision;[43] the last occasion for an Oklahoma convention referendum was 1970.[44] Since there is a constitutional requirement that a convention referendum be submitted to voters every twenty years,[45] Oklahoma's failure might be deemed one of the more notable instances in the fifty states of a clear disregard for an explicit state constitutional mandate. Therefore, the Oklahoma legislature has been out of compliance with this rule since 1990.[46] Nevertheless, in the thirteen other states with such constitutional mandates, this device has been a regular vehicle, albeit less frequently in recent decades, for voters to call conventions with the power to consider amendments and to draft new constitutions in some cases.[47]

Additionally, eighteen states allow citizens to initiate and approve amendments—generally with no participation of the legislature.[48] When Oklahoma adopted its 1907 constitution, it became the second state,

41. Dinan, *supra* note 16, at 16 tbl.1.4; *see also* Tarr & Williams, *supra* note 40, at 1079–80.

42. Dinan, *supra* note 16, at 16 tbl.1.4.

43. *See* John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 401–02 (2010).

44. *Id.*

45. *See* OKLA. CONST. art. XXIV, § 2. The Oklahoma Constitution stipulates as follows: "That the question of such proposed convention shall be submitted to the people at least once in every twenty years." *Id.*

46. *See* Dinan, *supra* note 16, at 16 tbl.1.4; *see also* ADKISON & PALMER, *supra* note 38, at 322 (noting that this provision "is routinely ignored").

47. The conventions called as a result of these mandatory convention referenda are listed in Dinan, *supra* note 43, at 404 tbl.1. The last conventions called as a result of voters' approval of a mandatory convention referendum were in New Hampshire in 1984 and Rhode Island in 1986. *See id.*

48. *See* Dinan, *supra* note 16, at 15 tbl.1.3. In sixteen of the eighteen states that provide for citizen-initiated amendments, the legislature does not play a role in the process. However, in Massachusetts and Mississippi, citizen-initiated amendments must first be submitted to the legislature, which retains discretion over whether to submit them for popular ratification (in Massachusetts) and can craft and submit an alternative measure appearing on the ballot alongside the initial measure (in Mississippi). *Id.* at 15 tbl.1.3 & nn.(b)–(c).

preceded by Oregon five years earlier, to permit citizen-initiated amendments.[49]

Finally, Florida is unique in allowing still another means of placing amendments on the ballot.[50] In a process pioneered in Florida's 1968 constitution and further developed in later years, commissions assemble every twenty years and are empowered to submit constitutional amendments directly to voters.[51]

Certainly, the relative accessibility of amendment processes accounts for part of the reason why state constitutions are amended more frequently than the U.S. Constitution and for why some state constitutions are amended more often than others.[52] It is no surprise that several of the most frequently amended state constitutions have very accessible processes because they allow legislatures to place amendments on the ballot by a simple majority vote in a single session and also permit citizen-initiated amendments, as in Oregon and Oklahoma.[53] Meanwhile, several of the least frequently amended state constitutions maintain particularly high barriers to amendments in that they do not allow citizen-initiated amendments, and they require legislative passage of amendments in two sessions and by a two-thirds vote in at least one chamber, as in Tennessee and Vermont.[54]

The general prominence of amendments in the states, as well as their particular prominence in certain states, is not solely a product of easier amendment rules, however. Some of the state constitutions that are amended most often, such as the ones for Alabama, Texas, and South Carolina, do not have particularly accessible amendment processes.[55] Each of these states requires a legislative supermajority to approve

49. On the dates of adoption of the constitutional initiative, see JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 313 n.132 (2006).

50. *See* Tarr & Williams, *supra* note 40, at 1076–77, 1097.

51. *Id.*

52. The leading study providing support for the influence of amendment rules on amendment rates is Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355 (1994). For a recent study that relies on a different method for calculating the amendment rate, see Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 195 (Tom Ginsburg ed., 2012).

53. The rules for legislature-referred amendments in these states are found in Dinan, *supra* note 16, at 13 tbl.1.2. The rules for citizen-initiated amendments for these states are found in *id.* at 15 tbl.1.3.

54. *See id.* at 11 tbl.1.1, 13 tbl.1.2, 14 tbl.1.2 nn.(r) & (t) & 15 tbl.1.3. The rules for legislature-referred amendments in these states are found in *id*. at 14 tbl.1.2 nn.(r) & (t).

55. *See id*. at 11 tbl.1.1, 13 tbl.1.2 & 15 tbl.1.3.

amendments and offers no means of bypassing the legislature through a constitutional-initiative process.[56] On the other hand, some state constitutions, such as Rhode Island's, have rather accessible amendment rules but are amended infrequently.[57] In fact, some states maintain similar amendment rules but boast dramatically different amendment rates.[58] Consider the West Virginia Constitution of 1872 and the Louisiana Constitution of 1974. Their amendment rules are nearly identical,[59] but the Louisiana Constitution is amended over eight times more frequently than the West Virginia Constitution.[60]

We are, therefore, led to take account of different cultures of constitutionalism that prevail in different levels and places.[61] A Madisonian approach to constitutionalism prevails at the federal level and, to a more limited extent, in some states. As James Madison explained in *The Federalist No. 49* and in exchanges with Thomas Jefferson, constitutions should be approached with "veneration" and should not be lightly changed.[62] The unwillingness to resort to adopting

56. None of these states permit citizen-initiated amendments. *See id.* at 15 tbl.1.3. Alabama requires approval of legislature-referred amendments by three-fifths of the legislature followed by ratification by a popular majority. Texas requires approval by two-thirds of the legislature followed by ratification by a popular majority. South Carolina requires approval by two-thirds of the legislature followed by ratification by a popular majority, which is then followed by another legislative vote—this time by a majority vote. *See id.* at 13 tbl.1.2 & 14 tbl.1.2 n.(q).

57. The Rhode Island Constitution of 1986 permits legislature-referred amendments to be approved by a legislative majority and ratified by a popular majority, *id.* at 13 tbl.1.2, but has been amended only thirteen times, *id.* at 11 tbl.1.1.

58. *See id.* at 11 tbl.1.1 & 13 tbl.1.2.

59. Neither state permits citizen-initiated amendments. *Id.* at 15 tbl.1.3. Both states permit legislature-referred amendments upon a two-thirds legislative vote followed by a majority popular vote. *Id*. at 13 tbl.1.2.

60. *See id.* at 11 tbl.1.1. During its forty-one years of operation, the Louisiana Constitution of 1974 has been amended 182 times—an amendment rate of more than four amendments per year. By contrast, in its 143 years of operation, the West Virginia Constitution has been amended seventy-two times—an amendment rate of one amendment every two years. *See id.*

61. The importance of cultural attitudes toward constitutions in influencing amendment rates is noted in John Dinan, *The Past, Present, and Future Role of State Constitutions*, *in* GUIDE TO STATE POLITICS AND POLICY 19, 24 (Richard G. Niemi & Joshua J. Dyck eds., 2014); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 30–34 (1998).

62. THE FEDERALIST NO. 49, at 328–29 (James Madison) (Clinton Rossiter ed., 1961). In *The Federalist No. 49*, James Madison argued that "frequent appeals would, in great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would possess the requisite stability." *Id.*

constitutional amendments at the federal level and in some states is, in part, a product of this Madisonian approach. Along these lines, states in New England, and several other regions, have been more reluctant than other states to propose and adopt amendments.[63]

A Jeffersonian approach clearly prevails in many other states, especially in the South but also in other regions.[64] A willingness to propose and ratify amendments in these states can be seen as in keeping with the spirit of Jefferson's views expressed in letters to Madison, and other correspondents, that each generation should have an opportunity to reconsider the suitability of constitutional arrangements and provisions.[65]

II. THE PURPOSES OF STATE CONSTITUTIONAL AMENDMENTS

In considering how amendments have been used to change state constitutions, it is helpful to consider, for comparative purposes, the quite different way constitutional change takes place at the federal level. Federal constitutional amendments play a modest role in the development of the U.S. Constitution—whether in expanding rights or in responding to judicial decisions interpreting constitutional provisions. By contrast, state constitutional amendments are a regular vehicle for expanding or clarifying rights.

A. Rights Expansion

As various scholars have noted, any effort to understand constitutional change at the federal level would place the focus beyond constitutional amendments.[66] To be sure, one would take account of

63. *See* Dinan, *supra* note 61, at 24.

64. *See id.*

65. In discussing constitutional change, among other topics, Jefferson wrote in a 1789 letter to Madison that "[t]he earth belongs always to the living generation." Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488, 491 (Adrienne Koch & William Peden eds., 1944). Jefferson also wrote in an 1816 letter to Samuel Kercheval as follows: "[L]et us provide in our Constitution for its revision at stated periods," making it "so that it may be handed on, with periodical repairs, from generation to generation." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra*, at 673, 675.

66. *See* 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 32 (2014) ("[E]very American intuitively recognizes that the modern amendments tell a . . . very small part of the big constitutional story of the twentieth century—and that we have to look elsewhere to understand the rest.").

passage of the Bill of Rights and the Civil War Amendments—along with amendments enacting and then repealing prohibition and granting women's suffrage, among several other changes.[67] But—and focusing for present purposes on individual rights—most changes in rights protection have taken place through U.S. Supreme Court rulings. At times, Supreme Court decisions have been vehicles for expanding rights of criminal defendants,[68] religious liberty,[69] free expression,[70] and equal protection.[71] Supreme Court decisions have also recognized various privacy rights, including a right to an abortion[72] and same-sex marriage.[73] Supreme Court rulings have also been responsible for changes in understandings of various rights, such as the prohibition against cruel and unusual punishment[74] and the guarantee of the right to bear arms.[75] When

67. *See* Mark Tushnet, *Social Movements and the Constitution*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION, *supra* note 14, at 241, 243–45 (discussing social movements' focus on the federal constitutional-amendment process for prohibiting liquor and enfranchising women).

68. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 498 (1966) (requiring procedural safeguards during interrogations); Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (requiring counsel for indigent defendants in state court proceedings); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (requiring application of the exclusionary rule in state court proceedings).

69. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (disallowing compulsory-education laws that burden an individual's exercise of religion); Sch. Dist. v. Schempp, 374 U.S. 203, 205 (1963) (disallowing state-sponsored Bible readings in public schools); Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring that government policies that burden an individual's exercise of religion have a compelling interest and be narrowly tailored); Engel v. Vitale, 370 U.S. 421, 424 (1962) (disallowing state-sponsored prayer in public schools).

70. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 372 (2010) (disallowing bans on independent expenditures in political campaigns by corporations and unions); Texas v. Johnson, 491 U.S. 397, 399 (1989) (disallowing flag-desecration bans); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (disallowing limits on campaign spending and individual independent expenditures in political campaigns); Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (disallowing restrictions on speech except in cases where it is intended and likely to "incit[e] . . . imminent lawless action"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (disallowing state-compelled saluting of the flag and recitation of the pledge of allegiance).

71. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (prohibiting state-enforced racial segregation in public schools).

72. *See* Roe v. Wade, 410 U.S. 113, 163–66 (1973) (recognizing a right to an abortion during the first two trimesters of pregnancy).

73. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015) (recognizing a right to same-sex marriage).

74. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (prohibiting application of the death penalty for convictions of child rape); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (prohibiting application of the death penalty against minors);

expansion of rights has not taken place on the initiative of the Court, it has occasionally been achieved through passage of congressional statutes later upheld by the Court,[76] such as the Civil Rights Act of 1964[77] and the Voting Rights Act of 1965.[78]

At the state level, however, rights expansions have frequently taken place through passage of state constitutional amendments.[79] Consider a sample of rights expansions in recent decades, starting with victims' rights, which have invariably been recognized through passage of state constitutional amendments.[80] Oklahoma's passage of a 1996 crime victims' rights amendment[81] was one of thirty-three such state constitutional amendments adopted in the 1980s and 1990s.[82] As the need has arisen to clarify and add to the rights of crime victims, state legislators and citizens have returned to the constitutional amendment process, as when Illinois strengthened its victims' rights provision with passage of an amendment in 2014.[83] In these cases, there was no waiting for state supreme courts to expand or clarify this right. Rather, this was handled, as many rights expansions have been handled in the states, by enacting state constitutional amendments.

Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting application of the death penalty against mentally retarded persons).

75. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding that an individual right to bear arms limits regulations imposed by state and local governments); District of Columbia v. Heller, 554 U.S. 570, 635–36 (2008) (recognizing an individual right to bear arms untethered to militia service).

76. *See* Gerard N. Magliocca, *Constitutional Change*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION, *supra* note 14, at 909, 915 ("Acts of Congress are another powerful tool for constitutional reform. Many of the rights that Americans consider fundamental, such as Social Security and the freedom from private racial or gender discrimination, come from statutes.").

77. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 242–43 (1964) (upholding the validity of the Civil Rights Act of 1964).

78. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 643, 646–47 (1966) (upholding the validity of the Voting Rights Act of 1965); South Carolina v. Katzenbach, 383 U.S. 301, 307–08 (1966) (upholding the validity of the Voting Rights Act of 1965), *abrogated by* Shelby County v. Holder, 133 S. Ct. 2612 (2013).

79. *See generally* John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105 (2012/2013).

80. *See id.* at 2132–33.

81. *See Oklahoma Victims Rights, State Question 674 (1996)*, BALLOTPEDIA, http://ballotpedia.org/Oklahoma_Victims_Rights,_State_Question_674_%281996%29 [https://perma.cc/RE3J-9KC6] (last visited Apr. 2, 2016).

82. *See* SARAH BROWN HAMMOND, VICTIMS' RIGHTS LAWS IN THE STATES 17 & 18 tbl.2 (2006).

83. Dinan, *supra* note 16, at 5.

Consider a development that has attracted widespread attention since the U.S. Supreme Court held in *Kelo v. City of New London* that there is no federal constitutional ban on taking private property for economic development purposes.[84] As we mark the tenth anniversary of this decision and take stock of how states have responded, we find that state courts rarely took the lead in extending protection against the use of eminent domain for economic development purposes—doing so on two main occasions in the ruling's aftermath,[85] in Oklahoma[86] and Ohio.[87] State constitutional amendments have much more frequently been vehicles, along with passage of state statutes,[88] for expanding this right. On a dozen occasions, in the years after the *Kelo* decision, states approved constitutional amendments limiting the eminent-domain power.[89]

Consider the way the right to bear arms has been expanded in the states. At the federal level, advocates of heightened protection for gun rights focused their energy on generating lawsuits in the hope of persuading Supreme Court Justices to issue favorable rulings—and with some important recent success.[90] But at the state level, advocates have pressed for the adoption of state constitutional amendments; several of the many examples that could be offered from recent decades[91] include amendments in Alabama[92] and Missouri[93] in 2014, Louisiana in 2012,[94] and Kansas in 2010.[95]

84. *See* Kelo v. City of New London, 545 U.S. 469, 488–90 (2005).

85. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 182–83 (2015).

86. *See* Bd. of Cty. Comm'rs v. Lowery, 2006 OK 31, ¶ 25, 136 P.3d 639, 653–54.

87. *See* City of Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, at ¶ 9.

88. SOMIN, *supra* note 85, at 135.

89. Eleven of these amendments are noted in Dinan, *supra* note 79, at 2125–26. A twelfth amendment, which is much more limited in its effect, was adopted in California in 2008. John Dinan, *State Constitutional Developments in 2008*, *in* 41 THE BOOK OF THE STATES 3, 7 (2009 ed. 2009).

90. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 750 (2010); District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

91. These state constitutional amendments are discussed in Dinan, *supra* note 79, at 2127–28; Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 216–17 (2006).

92. Dinan, *supra* note 16, at 6.

93. *Id.*

94. John Dinan, *State Constitutional Developments in 2012*, *in* 45 THE BOOK OF THE STATES 3, 7 (2013 ed. 2013).

95. John Dinan, *State Constitutional Developments in 2010*, *in* 43 THE BOOK OF THE

Consider two recent state-level movements, with no federal counterpart, concerning the right to hunt and fish and the right to farm, both of which are motivated by a desire to protect hunters and farmers against restrictive measures supported by animal-welfare and conservation groups.[96] When the right to hunt and fish has been recognized in recent years, it has invariably come through passage of state constitutional amendments. Oklahoma's 2008 amendment related to hunting and fishing rights[97] is one of seventeen such amendments enacted in the last two decades.[98] Mississippi voters adopted the most recent such amendment in 2014.[99] Texas voters considered whether to approve such an amendment in 2015.[100] The right to farm has not enjoyed quite the same attention.[101] But if Oklahoma voters approve such an amendment, which has qualified for the 2016 ballot,[102] they would be following a path taken in recent years by North Dakota[103] and Missouri[104] voters.

Numerous other examples could be cited. For instance, in 2014, Missouri voters approved an amendment to their existing search-and-seizure guarantee, making it explicit that "the people shall be secure in their . . . electronic communications and data, from unreasonable

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STATES 3, 7 (2011 ed. 2011).

96. Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 82–83 (2009).

97. Dinan, *supra* note 89.

98. Vermont included a right to hunt and fish in its original 1777 constitution. In addition to Vermont's long-standing provision, seventeen states have approved constitutional amendments guaranteeing such a right, leading to a total of eighteen states whose constitutions currently include such protection. Dinan, *supra* note 16, at 5.

99. *Id.*

100. *Texas Right to Hunt, Fish and Harvest Amendment, Proposition 6 (2015)*, BALLOTPEDIA, http://ballotpedia.org/Texas_Right_to_Hunt,_Fish_and_Harvest_Amendment,_Proposition_6_%282015%29 [https://perma.cc/8CB7-YZU7] (last visited Apr. 4, 2016).

101. For recent discussion prompted largely by efforts to adopt such an amendment in Indiana, see Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG (Jan. 9, 2014, 7:56 PM), http://www.bloomberg.com/bw/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield [https://perma.cc/6JVK-XEES]; Baylen Linnekin, *Right-to-Farm Debate Heats Up*, REASON.COM (Oct. 24, 2015), https://reason.com/archives/2015/10/24/right-to-farm-debate-heats-up [https://perma.cc/J88Q-SEYK].

102. *Oklahoma Right to Farm, State Question 777 (2016)*, BALLOTPEDIA, http://ballotpedia.org/Oklahoma_Right_to_Farm,_State_Question_777_%282016%29 [https://perma.cc/3AN3-9FXB] (last visited Apr. 4, 2016).

103. Dinan, *supra* note 16, at 5.

104. *Id.*

searches and seizures."[105] Not content to leave it to the Missouri Supreme Court to extend search-and-seizure protection, Missouri legislators and voters took it upon themselves to guarantee this right.

B. Court-Overturning Amendments

To set out some of the leading ways that state constitutional amendments have been responsible for changes in understandings of rights is not to suggest that state courts have been inactive. On various occasions, state courts have issued notable rulings, expanding rights along the lines that Justice Brennan encouraged in his nearly four-decade-old article.[106]

To this end, several state supreme courts have barred the imposition of the death penalty altogether or limited application of the death penalty beyond what is required by the U.S. Supreme Court.[107] A number of state courts have interpreted search-and-seizure guarantees as setting a higher bar for admissibility of evidence than at the federal level,[108] among other criminal-procedure protections. Some state courts have invalidated tort-reform legislation as violating state constitutional provisions.[109] Courts in many states have issued rulings announcing a right to equal per-pupil spending across districts or requiring more spending on K–12 schools, even as the U.S. Supreme Court has declined to recognize any federal right of this kind.[110] And well before the U.S. Supreme Court recognized a right to same-sex marriage in 2015, state courts were announcing a right to same-sex civil unions or marriage, beginning with Vermont in 1999 and Massachusetts in 2003.[111]

105. MO. CONST. art. I, § 15 (amended 2014).

106. *See generally* JEFFREY M. SHAMAN, EQUALITY *AND* LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW (2008).

107. *See* Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2070–71 (2012/2013).

108. *See* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE 31–45, 51–74 (1991).

109. *See* G. ALAN TARR, JUDICIAL PROCESS AND JUDICIAL POLICYMAKING 330 (6th ed. 2014).

110. *See* John Dinan, *School Finance Litigation: The Third Wave Recedes*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96, 96–97 (Joshua M. Dunn & Martin R. West eds., 2009).

111. *See* Miller, *supra* note 107, at 2076–78. An earlier Hawaii decision, issued in 1993, signaled that the Hawaii Supreme Court was prepared to invalidate the state's law reserving marriage to opposite-sex couples, but the court did not actually require legalization of same-sex marriage. *See id.* at 2077.

In view of these developments, there is no denying the role that some state courts have played in introducing new understandings of rights, doing so sometimes well before the U.S. Supreme Court and occasionally going beyond what the U.S. Supreme Court requires. However, when state courts have taken the lead in expanding rights, state constitutional amendments have, in a number of cases, been vehicles for reversing or overturning these rulings[112]—in a way that is impractical at the federal level in response to the U.S. Supreme Court's rights-expansive rulings. The point, therefore, is not that state courts have failed to play a role in the development of state constitutions but rather that state courts undertaking to play such a role find that their rulings are at significant risk of reversal via state constitutional amendments,[113] depending on the amendment rules in the various states.[114]

Court-overturning state constitutional amendments have been especially prevalent in the aftermath of death-penalty rulings, dating back to a 1972 California amendment that reinstated the death penalty just six months after a California Supreme Court decision banned capital punishment.[115] In the 1980s, Massachusetts and Oregon voters approved similar court-overturning amendments for the purpose of reinstating the death penalty after contrary state court rulings.[116] In the 1990s, an amendment was also adopted in New Jersey in response to a state court decision holding that the death penalty was inapplicable in certain situations; the amendment's purpose was to insulate this aspect of the state death-penalty statute from state court invalidation.[117]

State constitutional amendments have also been enacted in response to state court decisions expanding the rights of criminal defendants.[118] To provide a sample, Florida and California adopted amendments in the 1980s, curtailing state court decisions that expanded the reach of the

112. *See generally* John Dinan, *Forward: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007). For a discussion of state constitutional amendments from the early twentieth century that overturned state court decisions regarding workers' rights, see EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 123–29 (2013).

113. Miller, *supra* note 107, at 2079.

114. *Id.* at 2090–92.

115. Dinan, *supra* note 112, at 1006–07.

116. *Id.* at 1007–08.

117. *See id.* at 1009.

118. *See id.* at 1011–16; *see also* Miller, *supra* note 107, at 2082–84.

exclusionary rule.[119] Both amendments barred state courts from issuing rulings exceeding the search-and-seizure rules imposed by the U.S. Supreme Court.[120]

On several occasions, state constitutional amendments have been enacted in response to state court decisions expanding abortion rights.[121] For instance, a 2004 Florida amendment authorized a parental-notification law after a contrary court ruling the previous year.[122] In 2014, Tennessee voters approved an amendment authorizing various abortion restrictions in the face of a state court ruling a decade and a half earlier.[123]

Still other efforts to adopt court-overturning amendments could be noted, including some that were approved by voters and others that were rejected. The list of adopted amendments includes a 2003 Texas amendment authorizing a cap on noneconomic damages in tort suits.[124] That amendment was adopted in response to a contrary state court decision a decade and a half earlier[125]—one of several state court rulings around the country posing obstacles to the enactment of tort-reform measures in recent decades.

The list of voter-rejected amendments includes a 2012 Florida amendment that sought to eliminate language in the state's religious-liberty clause.[126] Florida is one of many states with "Blaine amendments" (dating from the late nineteenth century), which go much further than the U.S. Constitution in explicitly barring public funding or support for religious groups.[127] And several state supreme courts have relied on these state constitutional provisions to place barriers in the way of school vouchers, among other programs,[128] thereby prompting efforts to enact state constitutional amendments to overturn these decisions and to insulate programs from state court reversal.[129] However, voters rejected

119. *See* Dinan, *supra* note 112, at 1010–11.
120. *See id.*
121. *See* Miller, *supra* note 107, at 2085–86.
122. *See id.*
123. Dinan, *supra* note 16, at 7.
124. Dinan, *supra* note 79, at 2117.
125. *See id.*
126. *See* James N.G. Cauthen, *Referenda, Initiatives, and State Constitutional No-Aid Clauses*, 76 ALB. L. REV. 2141, 2141 (2012/2013).
127. *See id.* at 2142–43.
128. For a recent state court ruling, see Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist., 2015 CO 50, 351 P.3d 461.
129. *See* Cauthen, *supra* note 126, at 2143–44.

the 2012 Florida effort to adopt an amendment that would have eliminated this language and permitted more government support of religious programs.[130]

As indicated by the failure of this religious-liberty amendment in Florida, state courts get the last word in practice regarding some rights-expansive rulings.[131] Nevertheless, as demonstrated by the number of successful court-overturning measures, state constitutional amendments are often adopted to constrain and overturn rights-expansive state court decisions in a way rarely achieved at the federal level, where only four federal amendments have overturned court decisions.[132]

One way to illustrate the difference between state and federal constitutionalism is to consider the varying reactions to, and prospects of, a proposed federal constitutional amendment[133] that would overturn the U.S. Supreme Court's campaign finance decision from 2010, *Citizens United v. FEC*,[134] and a proposed state constitutional amendment[135] that would overturn the Oklahoma Supreme Court's 2015 ruling that ordered the removal of a Ten Commandments monument from the state capitol grounds, *Prescott v. Oklahoma Capitol Preservation Commission*.[136] A proposed federal constitutional amendment authorizing limits on campaign spending received relatively little media attention when it was debated in the U.S. Senate in the summer of 2014. There was no sense, given the high barriers to amending the federal constitution, that this was anything other than an election-year effort to appeal to sympathetic

130. *See id.* at 2166.

131. *See id.* at 2142–43, 2169 (noting the failure of many court-overturning state constitutional amendments intended to revise "Blaine amendment" language); *see also* Dinan, *supra* note 110, at 102–03 (noting the failure of efforts to enact state constitutional amendment processes to respond to state court interpretations of state education clauses to require equity or adequacy of school funding).

132. *See* U.S. CONST. amends. XI, XIV, XVI, XXVI; *see also* Miller, *supra* note 107, at 2099 n.288.

133. Ramsey Cox, *Senate GOP Blocks Constitutional Amendment on Campaign Spending*, HILL (Sept. 11, 2014, 2:19 PM), http://thehill.com/blogs/floor-action/senate/217449-senate-republicans-block-constitutional-amendment-on-campaign [https://perma.cc/7ZPY-WYQ5].

134. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

135. Barbara Hoberock, *Fallin Urges Lawmakers to Act Swiftly on Ten Commandments Amendment*, TULSA WORLD (Oct. 7, 2015, 12:00 AM), http://www.tulsaworld.com/news/capitol_report/fallin-urges-lawmakers-to-act-swiftly-on-ten-commandments-amendment/article_9ae978f6-3269-5795-97d9-cb8bbb12430f.html [https://perma.cc/YF7L-2B8T].

136. Prescott v. Okla. Capitol Pres. Comm'n, 2015 OK 54, ¶ 7 (per curiam).

partisans.[137] Contrast this with the reception to proposals, discussed in the summer of 2015, to revise the language in the Oklahoma Constitution that served as the basis for the Oklahoma Supreme Court's decision ordering the removal of the Ten Commandments monument.[138] There is no telling, at this point, whether such an amendment will appear on the 2016 ballot. But proposals to enact such an amendment in Oklahoma have received significant attention,[139] in part because the history of court-overturning amendments suggests that such amendments have a legitimate shot at passing and are rooted in an enduring tradition at the state level.[140]

III. ASSESSING THE ROLE OF STATE CONSTITUTIONAL AMENDMENTS

It is one thing to identify two different approaches within the American constitutional tradition: (1) a federal approach where constitutional change largely takes place outside of the federal amendment process, often through U.S. Supreme Court decisions; and (2) a state approach where constitutional change frequently takes place via state constitutional amendments and where state court decisions often do not offer the final word. This is part of my aim: to set out these competing approaches. But the next question that naturally presents itself is how we should assess these different approaches. In particular, what difference does it make that constitutional change frequently takes place in the states through constitutional amendments? And are there reasons why reliance on constitutional amendments for undertaking constitutional change should be either welcomed and encouraged or regretted and discouraged?

I take the conventional view to be as follows. On one hand, some scholars argue that it does not make much difference whether

137. *See* Cox, *supra* note 133.

138. *See* OKLA. CONST. art. II, § 5 ("No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.").

139. *See, e.g.*, Richard Pérez-Peña, *Oklahoma: State Moves Monument Depicting the Ten Commandments*, N.Y. TIMES, Oct. 7, 2015, at A20; Josh Sanburn, *The Fight Over Oklahoma's Ten Commandments Monument Rages On*, TIME (July 2, 2015), http://time.com/3944749/oklahoma-ten-commandments-monument/ [http://perma.cc/GSU5-8UMA].

140. *See generally* Dinan, *supra* note 112.

constitutional change takes place through amendments or through other means.[141] And to the extent that it does make a difference, scholars are inclined to view the state approach as inferior to the federal approach.[142]

I will argue, to the contrary, that there are meaningful consequences from undertaking constitutional change through amendment processes; moreover, when considering the balance of these consequences, the state approach might actually be seen as superior. The common tendency to prefer the federal approach, and to look with disfavor on the state approach, is due in part to our greater familiarity with the federal approach and might be overcome to the extent that we become more knowledgeable about the state approach and its virtues. A lack of familiarity with the state approach to constitutionalism is, to be sure, not the only reason why scholars might view the state approach as inferior to the federal approach. The state and federal approaches can also be seen as achieving different aims in a way that invites consideration of the consequences of the competing approaches.

In weighing the advantages and disadvantages of the state versus the federal approach to constitutional change, we are led to consider three main questions. What difference does it make whether judges or the general public are the key actors? What difference does it make whether the key acts are court opinions or formal textual changes in a constitution? And what difference does it make whether political activity is focused primarily on influencing the selection and decision-making of judges or on persuading legislators and the citizenry?

A. The Role of Judges and the Public

In considering why it might make a difference whether constitutional change takes place through amendments or in another fashion, we are

141. *See* Magliocca, *supra* note 76, at 919 ("There is no significant advantage to using the Article Five process when other options are available, which is why political activists of all stripes focus on litigation and influencing public opinion rather than hammering out proposed changes to the Constitution itself."); David A. Strauss, Commentary, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1462 (2001) ("[I]f a formal amendment process were unavailable, society would find another way to enforce the change it has determined to make—by legislation and judicial interpretation, or by alterations in social understandings and private sector behavior.").

142. For an argument about the superiority of the Madisonian approach to constitutional change over the Jeffersonian approach, see William A. Galston, *Pluralist Constitutionalism*, *in* WHAT SHOULD CONSTITUTIONS DO? 228, 231–33 (Ellen Frankel Paul et al. eds., 2011).

first led to consider who plays a role in such changes. What are the effects of giving the public, as opposed to judges, a significant role in constitutional change?

This is likely to make a difference in which rights are protected because the public is more likely than judges to be protective of certain rights, and vice versa.[143] When the public plays a prominent role in approving—and in some cases initiating—constitutional changes, this has generally led to expanded protection for victims' rights, property rights, and continuation of the death penalty.[144] When judges play a more prominent role, this is more likely to lead to expanded protection for rights of criminal defendants and to limits on tort reform and the death penalty.[145] As an illustration of the differences between the inclinations of judges and the citizenry, it would be as unlikely to find judges handing down an anti-Sharia ruling (along the lines of an amendment passed in Oklahoma five years ago[146]) as to find voters approving an amendment removing a Ten Commandments monument from the state capitol (along the lines of what the Oklahoma Supreme Court ordered this year[147]).

But beyond a practical difference—in that some rights are more likely to be protected through constitutional amendments as compared with court decisions, and reasonable persons could be led to prefer either of these approaches on this ground—one would also have to consider the advantages of permitting the public to have a direct role and an effectively final word in constitutional changes.[148] This, after all, might be seen as most consistent with a republican form of government insofar as it is rooted in popular sovereignty as the ultimate touchstone of constitutional meaning.[149] Relying on amendments to expand rights and

143. This point, particularly about the difference in the level of protection for rights of minority groups when these rights are determined by the public or by judges, is made in Contiades & Fotiadou, *supra* note 13, at 429.

144. *See supra* notes 114–19, 123.

145. *See supra* notes 106–08.

146. *Oklahoma International and Sharia Law, State Question 755 (2010)*, BALLOTPEDIA, http://ballotpedia.org/Oklahoma_International_and_Sharia_Law,_State_Question_755_%282010%29 [https://perma.cc/66MV-CLF8] (last visited Apr. 5, 2016).

147. Prescott v. Okla. Capitol Pres. Comm'n, 2015 OK 54, ¶ 7 (per curiam).

148. *See* Contiades & Fotiadou, *supra* note 13, at 430.

149. Lutz, *supra* note 52, at 357 ("[F]ormal amendment, legislative revision, and judicial interpretation[ ]reflect declining degrees of commitment to popular sovereignty, and the level of commitment to popular sovereignty may be a key attitude for defining the nature of the political system.").

to counteract state court decisions ensures that the public will have an opportunity to approve constitutional changes and to initiate them in some states. By contrast, relying on judges to announce new understandings of rights and giving them the final word in practice means that the public will have only an indirect role in constitutional change—by influencing the selection of judges and passing judgment, at times, on their continuation in office.

B. The Role of Constitutional Amendments and Court Decisions

A second consideration in weighing the consequences of the state and federal approaches involves analyzing what difference it makes whether constitutional change is achieved by making formal revisions to the constitutional text or by relying on judicial interpretation of constitutional provisions.

On one hand, there are reasons why some might prefer that constitutional changes not be made through the amendment process. On this view of the matter, constitutions should be short and spare documents. To change or add to the constitutional text on a regular basis and in a detailed fashion is to risk turning a constitution into a statute book—in a way that Chief Justice John Marshall warned against[150]—and depriving the document of the veneration that James Madison viewed as particularly valuable.[151] Certainly, this is the way we have come to view the U.S. Constitution.

But this is not the only possible constitutional model.[152] The contrary view (which has much to recommend it based on experience in the states) is that when facing a choice between changing a constitution through an amendment or relying on judicial interpretation of a constitutional provision, an amendment has the advantage of announcing publicly and clearly that a constitutional change is being made rather

150. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) ("A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.").

151. *See* THE FEDERALIST No. 49, *supra* note 62.

152. TARR, *supra* note 61, at 9–10.

than leaving it uncertain whether a court decision has merely applied an existing provision to a new circumstance or has, in fact, promulgated a new principle.[153] Proceeding through the amendment process also has the benefit of lending added legitimacy to a constitutional change and making it less susceptible to future reversal.[154]

C. The Role of the Constitutional Amendment Process and Litigation

A final criterion in assessing the merits of undertaking constitutional change through the amendment process or through litigation is to consider the effects on how citizens and groups devote their political activity and energy.

Consider how groups devote their activity and energy when litigation is the main engine of constitutional change.[155] Consider a group that supports recognition of a federal right—whether regarding abortion, same-sex marriage, or a right to bear arms untethered to militia service. Or consider a group dissatisfied with the way a right has been defined at the federal level, believing that the right to an abortion has been defined too expansively; government support of religious institutions has been unduly constrained; or corporate expenditures in political campaigns have been improperly protected. At the federal level, attention is focused first and foremost on influencing selection of judges.[156] Efforts are made to win the presidency and control of the senate in order to gain the upper hand in appointing sympathetic Justices to anticipated vacancies on the U.S. Supreme Court.[157] Equally fierce battles are waged once vacancies occur, with groups mobilizing for and against nominees.[158] Groups then focus on generating and financing cases intended to present sympathetic Justices with an opportunity to issue favorable rulings in the hope that a swing Justice (or Justices) will be open to supporting a new right—whether a right to make unlimited independent expenditures in political

153. Brannon P. Denning & John R. Vile, Essay, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247, 279 (2002).

154. *See id.* at 256–57.

155. For a discussion of the points in this paragraph, particularly the way that groups and movements seek support for their goals in the U.S. Supreme Court by gaining influence in the judicial-selection process and then generate cases designed to lead to favorable outcomes, see Tushnet, *supra* note 67, at 249–53.

156. *See id.*

157. *See id.*

158. *See id.*

campaigns; a right to bear arms not tethered to militia service; a right to same-sex marriage; or a right to an abortion.[159] This is how constitutional politics is practiced at the federal level.

But now consider the way groups devote their energy when the constitutional amendment process is the primary vehicle for constitutional change, as it is in many states.[160] Consider groups that support stricter limits on affirmative action or increased protection against government searches of electronic databases. Certainly, some attention is devoted to securing the selection of favorable judges and litigating cases to secure such outcomes at the state level. But groups also spend a great deal of effort building political support for amendments by persuading enough legislators to place amendments on the ballot or by persuading enough citizens to sign initiative petitions to qualify amendments for the ballot and then persuading the electorate to approve them.[161] In considering how constitutional change is achieved in the states—where political energy and activity is placed, to a great extent, on persuading legislators and citizens rather than only persuading judges—there is much to be said in favor of the broad opportunities that are afforded in terms of participation by, and persuasion of, a wider range of officials and actors in the way constitutional politics unfolds at the state level.[162]

IV. CONCLUSION

I have sought, in delivering the Brennan Lecture, to continue in the tradition of giving state constitutions the scholarly attention they merit, especially in view of their long-standing importance for the way states are governed. But in considering how constitutional change takes place, I have sought to turn attention away from the usual focus on state courts in interpreting state constitutions; instead, I have highlighted the role of legislators and citizens in amending state constitutions. Moreover, I have challenged the tendency to view the prominent reliance on enacting constitutional amendments at the state level as necessarily inferior to the

159. *See id.*

160. ZACKIN, *supra* note 112, at 198–99 (discussing the way that "movements" and "political organizers" have directed their energy at the state level toward adoption of rights-expansive state constitutional amendments).

161. *See id.*

162. *See id.*

heavy reliance on judicial interpretation of constitutional provisions at the federal level. The dominant approach to constitutional change in the states has much in its favor, and it might even be seen as superior, in key respects, to the approach followed at the federal level.