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THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT DOCTRINE IN THE AMERICAN STATES: STATE COURT REVIEW OF STATE CONSTITUTIONAL AMENDMENTS

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ABSTRACT

Judges and scholars in various countries have recently embraced the doctrine of unconstitutional constitutional amendments, whereby courts invalidate amendments not on account of procedural irregularities but rather because they violate implicit substantive limits on the sorts of amendments that can be adopted. In this Article, I investigate the extent to which this doctrine has migrated to the United States and particularly to U.S. state courts, which review state constitutional amendments on a regular basis. In contrast with several scholars who have detected some support for this doctrine in U.S. state court rulings, I conclude that U.S. state courts have not invalidated amendments for violating implicit substantive limits. State constitutional amendments have been overturned for violating federal guarantees, running afoul of requirements regarding the accuracy of ballot language, failing to comply with procedural rules, or violating certain rules regarding the processes for passing various amendments. However, state courts have not disqualified or overturned amendments for violating implicit bans on addressing certain topics. An additional purpose of this Article is to explain why this doctrine has not been embraced by U.S. state courts and, in the process, contribute to comparative constitutional inquiries into the circumstances that are favorable and unfavorable to judicial invocation of the doctrine. Judicial reluctance to invoke this doctrine is fueled in part by a polity's level of commitment to popular sovereignty and the degree to which the public is directly involved in the amendment process, both of which are at a premium in the

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American states. Judicial reluctance is also a product of the types of amendments that courts are asked to review and whether these amendments directly challenge and seek to overturn judicial interpretations of constitutional principles. Many of the amendments that generate requests to invoke this doctrine in U.S. state courts are of this kind, thereby presenting a particularly stark conflict between popular sovereignty and judicial supremacy and making it difficult for courts to prioritize the latter over the former.

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Scholars and jurists have, in recent years, considered the possibility that constitutional amendments can be deemed unconstitutional, not on account of procedural irregularities in their enactment but because their substantive content renders them illegitimate. Some scholars have endorsed the proposition that courts can invalidate constitutional amendments for altering a constitution's "basic structure" or

"unamendable core," even when the constitution does not explicitly insulate certain provisions from amendment. Courts in several polities have embraced this doctrine and occasionally invalidated amendments on this ground.[1]

In this Article, I analyze the extent to which the unconstitutional constitutional amendment doctrine ("UCA doctrine") has migrated to the United States and particularly U.S. state courts. In part because of the scarcity of amendments to the U.S. Constitution, the U.S. Supreme Court has had few opportunities to consider legal challenges to federal constitutional amendments and has not issued any decisions invalidating federal amendments, whether on procedural or substantive grounds.[2] However, state constitutions are amended on a frequent basis, generally through legislature-generated amendments (an option available in all states) or citizen-initiated amendments (available in eighteen states), and occasionally via convention-crafted amendments (an option in all states) or commission-crafted amendments (an option in Florida).[3] As of 2019, 7,683 amendments have been approved to the fifty current state constitutions, an average of nearly 154 amendments per state.[4] Moreover, legal challenges to these amendments are filed on a regular basis. Occasionally, amendments are challenged in federal court and overturned for violating federal guarantees, as is typical of federal systems that provide various means of policing subnational

1. The most comprehensive treatment of the doctrine and its embrace by courts is YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017).

2. The U.S. Supreme Court heard substantive challenges to the Eighteenth Amendment (alcohol prohibition) in *Rhode Island v. Palmer*, 253 U.S. 350, 385–86 (1920), and the Nineteenth Amendment (women's suffrage) in *Leser v. Gamett*, 258 U.S. 130, 135–37 (1922). The U.S. Supreme Court has also ruled on procedural questions concerning amendments, as in the case of the Eighteenth Amendment, in *Hawke v. Smith*, 253 U.S. 221, 224–25 (1920) and *Dillon v. Gloss*, 256 U.S. 368, 370–71, 376–77 (1921), and the unratified Child Labor Amendment in *Coleman v. Miller*, 307 U.S. 433, 435–36, 456 (1939).

3. *See* JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 11–34 (2018) (discussing state constitutional amendment procedures). *See generally* G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1076–79 (2005); Robert F. Williams, *Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 ARK. L. REV. 553, 556 (2016).

4. John Dinan, *State Constitutions*, *in* BOOK OF THE STATES 2019 3, 5 tbl.1.3 (2019) (ebook), http://knowledgecenter.csg.org/kc/system/files/1.3.2019.pdf (based on the sum of all adopted amendments to the current fifty state constitutions as reported in this table).

encroachments on national powers and guarantees.[5] However—and this is my concern in this Article—amendments are also challenged in state courts and generate an increasing number of state court rulings disallowing amendments from appearing on the ballot and sometimes overturning them after they are approved by voters.[6]

State court decisions reviewing state constitutional amendments have been examined in several prior studies, generally as part of analyses either broader or narrower than the present study. A decade ago, Kenneth P. Miller produced a comprehensive study of state and federal court decisions reviewing citizen-initiated measures, whether statutes or amendments.[7] Other scholars have focused specifically on *pre-election* judicial review of citizen-initiated measures. These studies have at times examined pre-election review of citizen-initiated measures of all kinds (statutes or constitutional amendments).[8] An important article by Scott L. Kafker and David A. Russcol focused specifically on *pre-election* review of *citizen-initiated* amendments.[9] My study is more focused than several other studies, in that I look only at *state* court decisions reviewing *constitutional amendments*. I thereby leave aside decisions issued by *federal* courts as well as decisions reviewing *statutes*. At the same time, my concern is broader than some other studies, in that I examine state court decisions issued at both the pre-election and post-enactment stage and I consider court decisions reviewing amendments of any kind, whether generated by citizens, legislators, conventions, or commissions.

This study can be distinguished from prior studies not only in its focus on state court decisions reviewing amendments at the pre- and post-enactment stages but also in its concern with investigating whether and in what ways judges in issuing these decisions have embraced the UCA doctrine. The recent surge of interest in the UCA doctrine in other countries has led several scholars to begin to consider the migration of

5. The leading article, albeit dated, is Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1548–58 (1990).

6. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 401–02 (2009) (discussing the trend of increasing state court review of constitutional amendments).

7. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS (2009); *see also* Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1250–53 (1998); Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y. 295, 320–26 (analyzing several instances of judicial review of citizen-initiated amendments).

8. *See* James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 299, 301 (1989).

9. Scott L. Kafker & David A. Russcol, *The Eye of a Constitutional Storm: Pre-election Review by the State Judiciary of Initiative Amendments to State Constitutions*, 2012 MICH. ST. L. REV. 1279, 1281, 1286.

this doctrine to the U.S. states. Richard Albert identified several state constitutional provisions whose language might be understood to indicate that they are explicitly unamendable.[10] David Landau took stock of various rationales invoked by U.S. state courts in overturning state amendments, with an eye to connecting these rulings with the comparative constitutional literature and focusing in particular on instances of "selective entrenchment," whereby some state constitutions specify that certain types of changes can only be undertaken through designated processes.[11] Other scholars including Manoj Mate and Lawrence Friedman have highlighted specific state supreme court opinions where judges could be understood as expressing some support for a version of the UCA doctrine.[12] Jonathan Marshfield recently undertook an historical analysis of state constitutional convention debates surrounding creation of amendment and revision mechanisms and compiled a database of relevant state court rulings. In the process, he identified several state court rulings holding that some constitutional changes cannot be undertaken through certain mechanisms.[13]

In contrast with scholars who have detected some support for the UCA doctrine in U.S. state court rulings, I conclude that the doctrine has not been embraced by U.S. state courts in the sense of issuing rulings invalidating amendments for violating implicit substantive limits. Certainly, state courts, along with federal courts, have occasionally disallowed amendments that violate federal guarantees.[14] State courts have also invalidated amendments for failing to present voters with accurate ballot language or violating procedural requirements such as improperly mixing multiple subjects in a single amendment or running afoul of process requirements that prevent certain changes from being achieved through particular processes.[15] However, state courts have not

10. Richard Albert, *American Exceptionalism in Constitutional Amendment*, 69 ARK. L. REV. 217, 240–42 (2016).

11. David Landau, *Selective Entrenchment in State Constitutional Law: Lessons from Comparative Experience*, 69 ARK. L. REV. 425, 440–44 (2016).

12. Lawrence Friedman, *The Potentially Unamendable State Constitutional Core*, 69 ARK. L. REV. 317, 324 (2016); Manoj Mate, *State Constitutions and the Basic Structure Doctrine*, 45 COLUM. HUM. RTS. L. REV. 441, 491–93 (2014).

13. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. L. REV. 65, 71 (2019) (discussing his examination of debates from the 233 state constitutional conventions and analysis of several hundred state cases).

14. *See infra* notes 25–29 and accompanying text.

15. *See infra* Sections I.A to I.D.

disqualified or overturned amendments for violating state constitutional bans on amendments addressing certain topics.

The Article proceeds in two parts. First, I identify the doctrines that U.S. state courts have relied on to invalidate state constitutional amendments, and I take note of rulings invoking these doctrines, with the goal of distinguishing these doctrines and rulings from the UCA doctrine embraced by courts in certain countries. As part of this discussion, I show how some scholarly efforts to interpret judicial decisions as embracing a UCA doctrine have not always distinguished judicial enforcement of process constraints (that limit the types of constitutional changes that can be made through *certain* amendment processes) from substantive constraints (that would bar these changes from being made through *any* process). State courts in the United States have indicated little openness to the latter sort of ruling.

Second, I explain why the UCA doctrine has not been embraced by U.S. state courts, and, in the process, I advance some conclusions about the circumstances that are least and most favorable to judicial invocation of the doctrine. Judicial willingness to invoke the UCA doctrine is affected in part by a polity's level of commitment to popular sovereignty and in particular by the degree to which the public is directly involved in the amendment process. The commitment to popular sovereignty, while generally strong in the United States, is particularly strong in the U.S. states. Every state but one requires popular ratification of amendments, which makes it particularly difficult for courts to invalidate amendments that have been approved by voters.[16] Judicial willingness to invoke the UCA doctrine will also vary depending on the subjects and purposes of the amendments that courts are asked to review. In the U.S. states, the amendments that are most likely to generate challenges based on the UCA doctrine are often intended to overturn rights-expansive state court rulings. These cases present a particularly stark conflict between popular sovereignty and judicial supremacy, thereby making it especially difficult to prioritize the latter over the former.

I. STATE COURT RULINGS INVALIDATING AMENDMENTS

State court decisions disqualifying or overturning state constitutional amendments have been issued on four grounds. First, amendments are invalidated for violating federal constitutional guarantees. Second, amendments are disallowed because the title or

16. Dinan, *supra* note 4, at 8 tbl.1.4, http://knowledgecenter.csg.org/kc/system/files/1.4.2019.pdf.

ballot summary is inaccurate or misleading. Third, amendments are struck down for failing to follow various procedural requirements, whether because supporters failed to secure enough signatures to qualify citizen-initiated amendments for the ballot, or legislators did not follow proper steps in approving a legislature-generated amendment, or an amendment addressed multiple unrelated subjects. Fourth, courts have invalidated amendments because they run afoul of various limits on the processes through which certain changes can be adopted. In surveying state court rulings invoking each of these doctrines, my intent is not to provide a comprehensive list of all the rulings in each area. Rather, my purpose is to identify leading cases as well as recent rulings with the goal of making clear the difference between these rulings and invocation of the UCA doctrine.

A. Federal Guarantees

State constitutional amendments can run afoul of the U.S. Constitution, federal court decisions, or congressional statutes in various ways, generally by failing to guarantee a minimum level of rights and at times by encroaching on federal powers. Federal systems differ in their means of policing subnational violations of national rules with some federations requiring subnational constitutional amendments to be approved by a national legislature, a court, or another national institution before these amendments can take effect.[17] The U.S. federal system does not require federal officials to approve state constitutional amendments before they take effect. However, amendments can be challenged as a violation of federal guarantees, with these lawsuits brought in federal or state courts and filed either before or after the amendments are approved.[18]

Occasionally, *federal* courts invoke federal constitutional guarantees to block enforcement of state constitutional amendments.[19] A half-decade

17. *See* John Dinan, *The Consequences of Drafting Constitutions for Constituent States in Federal Countries*, *in* MULTINATIONAL FEDERALISM: PROBLEMS AND PROSPECTS 238 (Michel Seymour & Alain-G Gagnon eds., 2012); G. Alan Tarr, *Subnational Constitutions and Minority Rights: A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L.J. 767, 783–87 (2009).

18. *See infra* notes 19–32 and accompanying text.

19. One could also take note of federal court decisions invalidating provisions adopted as part of a state constitutional revision or replacement, even though these were not state constitutional amendments as such. The leading example is *Hunter v. Underwood*, 471 U.S.

after passage of a 1910 Oklahoma amendment that restricted the suffrage but included a grandfather clause that ensured the restrictions would fall unequally on black and white voters, the U.S. Supreme Court invalidated the amendment as a violation of the Fifteenth Amendment.[20] More than three decades after passage of a 1956 Arkansas amendment that sought to nullify a U.S. Supreme Court ruling barring racially segregated public schools, a federal district court held the amendment unenforceable as a clear violation of the Federal Supremacy Clause.[21] Additionally, a federal circuit court relied on the Religious Establishment Clause to invalidate a 2010 Oklahoma amendment preventing courts from considering Sharia law when deciding cases.[22] To provide a recent example, a federal district judge in 2018 relied on the First Amendment's Free Speech Clause in determining that a provision in a 2002 Colorado campaign finance amendment was inconsistent with U.S. Supreme Court jurisprudence and therefore unenforceable.[23]

State courts are also free to issue rulings declaring state constitutional amendments inconsistent with federal guarantees. In fact, several well-known U.S. Supreme Court decisions that invalidated state constitutional amendments actually affirmed *state* supreme court rulings that had already declared these amendments violative of federal guarantees.[24] Such was the case with the 1967 *Reitman v. Mulkey* ruling, in which the U.S. Supreme Court affirmed a California Supreme Court determination that a 1964 California amendment violated the federal equal protection clause by permitting discrimination in selling and renting private residential property.[25] The 1996 U.S. Supreme Court case, *Romer v. Evans*, had a similar origin.[26] In holding invalid on federal equal protection grounds a 1992 Colorado amendment that barred state or local governments from enacting anti-discrimination ordinances

222 (1985), in which the U.S. Supreme Court ruled unenforceable on federal equal protection grounds a felon disenfranchisement provision included as part of Alabama's 1901 Constitution.

20. Guinn v. United States, 238 U.S. 347, 367 (1915).

21. Dietz v. Arkansas, 709 F. Supp. 902, 905 (E.D. Ark. 1989).

22. Awad v. Ziriax, 966 F. Supp. 2d 1198, 1204 (W.D. Okla. 2013).

23. Holland v. Williams, No. 16-CV-00138-RM-MLC, 2018 WL 2938320, at *5, *9 (D. Colo. June 12, 2018).

24. It should be noted that in some cases decided on appeal from state supreme courts, the state supreme court initially *upheld* the amendment as consistent with federal guarantees, only to have the U.S. Supreme Court on appeal reach a different conclusion and hold the amendment invalid. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 432, 434 (1994) (invalidating a 1910 Oregon amendment that limited judicial review of punitive damages awards despite it being initially upheld by the state supreme court).

25. *See* Mulkey v. Reitman, 413 P.2d 825, 834–35 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967).

26. 517 U.S. 620 (1996).

protecting gay and lesbian persons, the U.S. Supreme Court was affirming a Colorado Supreme Court ruling issued three years earlier.[27] Also of note is *U.S. Term Limits, Inc. v. Thornton*, a 1995 U.S. Supreme Court decision that invalidated a 1992 Arkansas amendment imposing term limits on members of the state's congressional delegation.[28] In holding that this amendment—and similar congressional term limits amendments in other states—violated the Qualifications Clause of the U.S. Constitution by adding to the qualifications for congressmembers, this U.S. Supreme Court decision affirmed an Arkansas Supreme Court ruling issued the year before.[29]

In another set of cases, state court decisions have relied on federal constitutional provisions or federal court doctrines to disqualify amendments before they are put to a vote. These sorts of rulings are infrequent but are occasionally issued.[30] For instance, the Oklahoma Supreme Court struck a "personhood" amendment from the 2012 state ballot on the ground that the measure would limit abortion rights in a way clearly contrary to U.S. Supreme Court jurisprudence.[31] Also of note are decisions of the Montana and Arkansas Supreme Courts in the 1990s disallowing amendments that sought to take the first step in amending the U.S. Constitution in ways inconsistent with procedures set out in the Article V amendment process.[32]

B. Publicity Requirements

Just as it is a basic feature of federal systems that subnational constitutional provisions must be consistent with national constitutional guarantees, it is an equally well-established principle, applicable to all polities, that measures submitted for public approval should be presented in a way that voters can make an informed decision. State courts are frequently asked to review ballot titles and summaries of amendments. When this language is deemed inaccurate or misleading,

27. The Colorado Supreme Court ruling is *Evans v. Romer*, 854 P.2d 1270, 1273, 1285–86 (Colo. 1993) (en banc).

28. 514 U.S. 779, 783 (1995).

29. *Id.* The Arkansas Supreme Court ruling is *U.S. Term Limits, Inc. v. Hill*, 872 S.W.2d 349, 353, 356–57 (Ark. 1994).

30. Kafker & Russcol, *supra* note 9, at 1320, 1320 n.347.

31. *In re* Initiative Petition No. 395, State Question No. 761, 286 P.3d 637, 638 (Okla. 2012).

32. *See, e.g.*, Donovan v. Priest, 931 S.W.2d 119, 128 (Ark. 1996); State *ex rel.* Harper v. Waltermire, 691 P.2d 826, 826, 829–31 (Mont. 1984).

state courts have issued decisions preventing amendments from appearing on the ballot and, in some cases, overturning them after they are approved.[33]

In part because Florida's Constitution requires pre-election judicial review of all citizen-initiated amendments,[34] the Florida Supreme Court has had frequent occasion to consider the accuracy of ballot language. The standards the Florida Supreme Court has developed in reviewing citizen-initiated amendments have then been applied not only in reviewing citizen-initiated amendments but also in reviewing legislature-generated and commission-crafted amendments. On no fewer than five occasions since the 1980s, the Florida Supreme Court determined that information about an amendment did not afford voters an opportunity to make an informed decision.[35] Most of these rulings were issued before the public could vote on the amendment, as with a 1982 ruling disqualifying a legislature-crafted amendment regarding limits on post-legislator lobbying,[36] a 1984 ruling keeping off the ballot a citizen-initiated amendment dealing with civil suits,[37] and rulings disallowing commission-referred amendments dealing with property taxes (in 1992)[38] and operation of charter schools (in 2018).[39] However, in one notable case, the Florida Supreme Court invalidated an amendment well after its approval by voters.[40] In a 2000 decision, the Florida Supreme Court invalidated a legislature-crafted amendment, approved in the 1998 election by 72.8% of voters, which altered the language of the state's cruel-and-unusual punishment clause with an eye to insulating the death penalty from potential state court reversal.[41] Over the objections of multiple dissenters, a majority of judges determined that the ballot summary failed to convey the amendment's central purpose and disclose all its components.[42]

Courts in other states have relied on similar reasoning to disqualify amendments placed on the ballot by constitutional conventions, legislatures, or citizens. In a few cases, these rulings were issued after

33. *See infra* notes 36–47 and accompanying text.

34. *See* FLA. CONST. art. IV, § 10.

35. These rulings have occasionally found additional faults with amendments beyond inaccurate ballot language, thereby invalidating the amendments on multiple grounds.

36. Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982).

37. *See* Evans v. Firestone, 457 So. 2d 1351, 1352 (Fla. 1984) (per curiam).

38. Smith v. Am. Airlines, Inc., 606 So. 2d 618, 622 (Fla. 1992).

39. Detzner v. League of Women Voters, 256 So. 3d 803, 806, 811 (Fla. 2018) (per curiam).

40. Armstrong v. Harris, 773 So. 2d 7, 22 (Fla. 2000).

41. *Id.* at 26 (Wells, C.J., dissenting).

42. *Id.* at 21.

voters had approved amendments. For instance, the Hawai'i Supreme Court in 1979 ruled that voters were given insufficient information, both on the ballot itself and in associated materials, to determine the "nature and effect" of some of the thirty-four amendments that a constitutional convention had submitted to voters the prior year.[43] Hawai'i voters approved all of these convention-referred amendments, but the court decision blocked about a quarter of them from taking effect.[44] Meanwhile, in 1987, the Montana Supreme Court overturned a citizen-initiated amendment approved by voters the prior year authorizing limits on monetary damages for injuries. Over multiple dissents, a majority of justices noted that several words of the amendment had been misprinted in the voter information pamphlet and, moreover, the full text of the amendment had not appeared in newspapers prior to the election.[45]

Far more common are state court rulings enforcing adequacy-of-information requirements to keep amendments off the ballot rather than invalidate them after their passage. To provide several recent examples, in 2018 the Hawai'i Supreme Court relied on this reasoning to keep off the ballot an amendment that would have permitted additional revenue to be raised to fund public schools.[46] Also in 2018, a Kentucky judge ordered, several weeks before the election and after ballots had been printed, that votes cast on a crime victims' rights amendment should not be counted, in a ruling later upheld by the state supreme court.[47]

C. Procedural Rules

State courts have issued numerous decisions disqualifying or overturning amendments on procedural grounds and for a wide range of procedural deficiencies.[48] Often the focus is on citizen-initiated

43. Kahalekai v. Doi, 590 P.2d 543, 554 (Haw. 1979).

44. *Id.* at 554–57.

45. State *ex rel.* Mont. Citizens for Pres. of Citizens' Rights v. Waltermire, 738 P.2d 1255, 1257–59 (Mont. 1987).

46. City & Cty. of Honolulu v. Nago, No. 18-1-1326-08, 2018 WL 5117002, at *1 (Haw. Oct. 19, 2018).

47. The Kentucky Supreme Court ruling, issued in June 2019, is *Westerfield v. Ward*, No. 2018-SC-00583-TG, 2019 WL 2463046 (Ky. June 13, 2019). The original decision in the case was issued by a Franklin County Circuit Court Judge in October 2018, several weeks before the November 2018 election, at which 63% of voters supported the amendment. *Id.* at *3.

48. This Section analyzes a sample of the procedural limits enforced by courts. Some additional limits and court rulings are noted in WALTER F. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 209–34 (1910).

amendments and whether various procedural steps have been followed in qualifying them for the ballot.[49] In some cases, state courts have disqualified a citizen-initiated amendment because signature-gatherers did not include on their petitions adequate information about the amendment's purpose and scope.[50] The concern in these cases is that individuals may have been unable to make a meaningful decision about whether to sign the petition. Rulings of this kind were issued, for instance, by the California Supreme Court in a 1934 decision concerning a tax-related amendment[51] and recently by the Arizona Supreme Court in a 2018 decision regarding an amendment to increase state income taxes and use the revenue for school spending.[52] In other cases, state courts have determined that petitioners failed to secure the requisite number of signatures to qualify an amendment for the ballot. In 2018 the Arkansas Supreme Court became the latest court to issue such a decision, holding that supporters of an amendment reinstating strict term limits for state legislators relied on a large number of invalid signatures in trying to qualify the amendment for the ballot.[53]

Legislature-crafted amendments have also been deemed by state courts to run afoul of procedural requirements. In one of the more well-known rulings of this kind, a year after Iowa legislators approved and voters in 1882 ratified a liquor prohibition amendment, the Iowa Supreme Court invalidated the amendment because its full text had not been entered in the house journal and, moreover, the version entered on the senate journal included four extra words that were not included in the version enrolled and approved by voters.[54] In other states, courts have invalidated amendments because legislators or other officials failed to comply with rules designating when an amendment vote should be held, as with early twentieth-century rulings issued by courts in Louisiana,[55] Alabama,[56] and Oklahoma.[57]

49. *See, e.g.*, Kafker & Russcol, *supra* note 9, at 1294–1300.

50. *See, e.g.*, *infra* notes 51–52 and accompanying text.

51. Boyd v. Jordan, 35 P.2d 533, 533–34 (Cal. 1934).

52. Molera v. Reagan, 428 P.3d 490, 496 (Ariz. 2018) (per curiam).

53. Zook v. Martin, 558 S.W.3d 385, 389–90 (Ark. 2018).

54. Koehler & Lange v. Hill, 14 N.W. 738, 746–47 (Iowa 1883). The first requirement—entering the full text of the amendment in the house journal—was invoked nearly two decades later to invalidate another Iowa amendment after it was approved in the 1900 election. State *ex rel.* Bailey v. Brookhart, 84 N.W. 1064, 1067 (Iowa 1901).

55. Graham v. Jones, 3 So. 2d 761, 770 (La. 1941).

56. *See* Hooper v. State *ex rel.* Fox, 89 So. 593, 595–96 (Ala. 1921).

57. Associated Indus. v. Okla. Tax Comm'n, 55 P.2d 79, 87–88 (Okla. 1936); State *ex rel.* Short v. State Bd. of Equalization, 230 P. 743, 745 (Okla. 1924).

Although various procedural rules have triggered state court invalidation of amendments, none of these procedural rules have proved to be more important than rules in place in many states prohibiting amendments from addressing multiple subjects and requiring separate votes on unrelated measures.[58] The overriding goal of these single-subject and separate-vote requirements is to increase the likelihood that voters can consider each distinct constitutional change on its merits without being forced to vote for a package of changes assembled through log-rolling or with an eye to securing passage of an unpopular change on the coattails of a popular change.

State courts have in a number of cases disqualified amendments on single-subject grounds before an election could be held. Subjects addressed in these disqualified amendments include liquor regulations (a 1980 Oklahoma amendment),[59] tax-and-expenditure limitations (a 1984 Florida amendment),[60] the structure of the legislative branch and lobbying rules (a 1990 Missouri amendment),[61] limits on affirmative action (a series of Florida amendments in 2000),[62] and imposition of a gross-receipts tax and associated changes in collection and distribution of tax revenue (a 2000 Oregon amendment).[63] In 2018 alone, state courts kept off the ballot a citizen-initiated amendment in Massachusetts that would have made the income tax progressive and dedicated the added revenue to education and transportation[64] and a legislature-generated amendment in Arkansas that sought to cap non-economic damages in tort suits.[65]

Single-subject and separate-vote requirements have also been invoked by state courts to invalidate amendments after voters have approved them. In 1922, eight years after Mississippi voters approved an amendment establishing the initiative and referendum, the Mississippi Supreme Court invalidated the amendment on the grounds that the various components should have been submitted as separate measures.[66]

58. *Single Subject Rules*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/single-subject-rules.aspx (last updated May 8, 2009).

59. *In re* Initiative Petition No. 314, 625 P.2d 595, 599, 607–08 (Okla. 1980).

60. Fine v. Firestone, 448 So. 2d 984, 985–86 (Fla. 1984).

61. Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 826, 831–32 (Mo. 1990) (en banc) (per curiam).

62. *See* KENNETH P. MILLER, DIRECT DEMOCRACY AND THE COURTS 121–22 (2009).

63. Dale v. Keisling, 999 P.2d 1229, 1231, 1235 (Or. Ct. App. 2000).

64. Anderson v. Attorney Gen., 99 N.E.3d 309, 311, 326 (Mass. 2018).

65. Martin v. Humphrey, 558 S.W.3d 370, 372–73 (Ark. 2018).

66. Power v. Robertson, 93 So. 769, 780 (Miss. 1922) (en banc).

It took another seven decades before Mississippi voters regained the power to initiate amendments through passage of a 1992 amendment. The Montana Supreme Court has also invoked the separate-vote requirement to overturn notable amendments after their enactment, including a 1998 tax-and-expenditure limitation amendment[67] and a 2016 victims' rights amendment,[68] with both decisions coming the year after the amendment was ratified. High-profile amendments were also overturned post-enactment by the Oregon Supreme Court, which invalidated a 1996 victims' rights amendment two years after it was approved[69] and a 1992 legislative term limits amendment a decade after it was enacted.[70] Additionally, the Pennsylvania Supreme Court invalidated, four years after its passage, a 1995 amendment that would have authorized child victims in sexual abuse cases to give video depositions or closed-caption testimony instead of appearing in court.[71]

D. Rules Regarding the Processes for Adopting Constitutional Changes

Some state constitutions stipulate that certain changes can only be adopted through designated processes. These process-based limits take several forms. First, some of the eighteen states that allow citizens to initiate constitutional amendments limit the subjects that can be addressed through the constitutional initiative process, thereby requiring changes of certain kinds to be adopted through other amendment processes aside from the constitutional initiative process. A second limitation, present in about half of the states and enforced in several of them, distinguishes between amendment on one hand and revision on the other hand and holds that changes amounting to a revision can only be adopted through certain processes, generally through convention-generated changes. A final limitation, which is currently present in only three states and does not appear to have been the subject of litigation, provides that amendments undertaking certain kinds of changes must meet higher legislative-approval or voter-ratification thresholds than are usually required for enacting amendments to other provisions.[72]

67. Marshall v. Cooney, 975 P.2d 325, 331–32 (Mont. 1999).
68. Mont. Ass'n of Ctys. v. Fox, 404 P.3d 733, 735 (Mont. 2017).
69. Armatta v. Kitzhaber, 959 P.2d 49, 50–51 (Or. 1998).
70. Lehman v Bradbury, 37 P.3d 989, 991–92 (Or. 2002) (en banc).
71. Bergdoll v. Kane, 731 A.2d 1261, 1264 (Pa. 1999).
72. A New Mexico provision stipulates that: "No amendment shall restrict the rights created by Sections One and Three of Article VII hereof, on elective franchise, and Sections Eight and Ten of Article XII hereof, on education, unless it be proposed by vote of three-

Six of the eighteen states that allow for citizen-initiated amendments adopt the first type of process-based limitation by restricting the subjects that can be addressed through this process, even while allowing these subjects to be addressed through other amendment processes.[73] Illinois is the most stringent. Citizen-initiated amendments in Illinois are limited to addressing "structural and procedural subjects" concerning the legislature.[74] Other states explicitly mark certain provisions or subjects

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fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting on the amendment vote in favor of that amendment." N.M. CONST. art. XIX, § 1. Other New Mexico amendments need only secure the approval of a majority of legislators and a majority of voters. *See* 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING, STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 64 (2006).

A provision added to Florida's Constitution via a 1996 amendment requires that amendments imposing a new state tax or fee not in effect in November 1994 must be ratified by two-thirds of the voters participating in the election; all other amendments need only be ratified by three-fifths of voters casting votes on the amendment. FLA. CONST. art. XI, § 7.

A provision added to Oregon's Constitution via a 1998 amendment sets a special voter-ratification requirement for any amendments, or for any other measure subject to voter ratification, that would themselves erect a super-majority voter-ratification requirement for taking certain actions. By virtue of this Oregon constitutional provision: "Any measure that includes any proposed requirement for more than a majority of votes cast by the electorate to approve any change in law or government action shall become effective only if approved by at least the same percentage of voters specified in the proposed voting requirement." The provision explains that "[t]he purpose of this section is to prevent greater-than-majority voting requirements from being imposed by only a majority of the voters." OR. CONST. art. II, § 23.

These appear to be the only current state constitutional provisions of this kind. However, similar provisions requiring certain constitutional changes to be approved through a special process were found in earlier state constitutions but have since been eliminated or rendered unenforceable. For instance, a provision in Hawai'i's 1950 constitution sought to make it more difficult to rely on the amendment process to change a reapportionment formula that took account of counties rather than population in drawing state senate districts and thereby protected rural areas of the state. This Hawai'i provision stipulated that "no constitutional amendment altering this proviso or the representation from any senatorial district in the senate shall become effective unless it shall also be approved by a majority of the votes tallied upon the question in each of a majority of the counties." HAW. CONST. of 1950, art. XV, § 2, para. 6 (1950). This provision was later deemed unenforceable as a violation of the U.S. Constitution by a federal district court in *Holt v. Richardson*, 238 F. Supp. 468, 472 (D. Haw. 1965).

73. This paragraph draws on, and relevant citations to state constitutional provisions can be found in, John Dinan, *State Constitutional Initiative Processes and Governance in the Twenty-First Century*, 19 CHAPMAN L. REV. 61, 97, 102–04 (2016); John Dinan, *Twenty-First Century Debates and Developments Regarding the Design of State Constitutional Amendment Processes*, 69 ARK. L. REV. 283, 289, 302–05 (2016).

74. Dinan*, State Constitutional Initiative Processes*, *supra* note 73, at 103.

as off limits to citizen-initiated amendments. Massachusetts, Missouri, and Arizona limit the ability of citizen-initiated amendments to make appropriations.[75] Massachusetts and Mississippi disallow citizen-initiated amendments on a range of other subjects, including various rights provisions.[76] Ohio, by virtue of a recent amendment, does not allow citizen-initiated amendments to be a vehicle for establishing monopolies.[77] In none of these instances, it should be stressed, do these states mark off certain provisions or subjects as unamendable. Rather, they stipulate that certain subjects cannot be addressed through constitutional initiative processes and should be addressed through other amendment processes.

Courts in the half-dozen states that impose substantive limits on citizen-initiated amendments vary in how often they issue rulings enforcing these limits. The Illinois Supreme Court has had frequent opportunity to enforce an Illinois constitutional provision confining the subject matter of citizen-initiated amendments. In fact, in the half century since adoption of the current Illinois Constitution of 1971 (which for the first time allowed citizen-initiated amendments in that state), the Illinois Supreme Court has only allowed one citizen-initiated amendment to proceed to the ballot: a 1980 amendment reducing the size of the state house of representatives and instituting single-member house districts.[78] Illinois courts have disallowed five other citizen-initiated amendments on the ground that they are not confined to addressing "structural and procedural subjects" concerning the legislative branch. In various rulings from the 1970s through the 2010s, Illinois courts have disallowed amendments dealing with legislative compensation and conflicts of interest (a 1976 state supreme court ruling),[79] creating a statutory initiative process (a 1982 state appellate court ruling),[80] requiring a super-majority legislative vote to increase taxes (a 1990 state supreme court ruling),[81] limiting legislative terms (a 1994 state supreme court ruling and then again in a 2014 state appellate court ruling),[82] and

75. *Id.*

76. *Id.* at 103–04.

77. Dinan, *Twenty-First Century Debates*, *supra* note 73, at 302.

78. Thomas Q. Ford, *The Question for Another Day:* Hooker v. Illinois State Board of Elections *and Its Effect on the Vitality of Citizen Ballot Initiatives and Redistricting Reform in Illinois*, 93 CHI. KENT L. REV. 897, 903 (2018).

79. Coal. for Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 140, 147 (Ill. 1976).

80. Lousin v. State Bd. of Elections, 438 N.E.2d 1241, 1242–44, 1246 (Ill. App. Ct. 1982).

81. Chi. Bar Ass'n v. State Bd. of Elections, 561 N.E.2d 50, 52, 56 (Ill. 1990).

82. Chi. Bar Ass'n v. Ill. State Bd. of Elections, 641 N.E.2d 525, 526, 529 (Ill. 1994); Clark v. Ill. State Bd. of Elections, 17 N.E.3d 771, 774, 778 (Ill. App. Ct. 2014).

creating an independent redistricting commission (a 2014 trial court ruling).[83]

Courts in other states with subject-matter limits on citizen-initiated amendments have not been as active as Illinois courts in policing these limits but have occasionally kept amendments off the ballot on these grounds. For instance, the Massachusetts Supreme Court ruled in 1981 that a wide-ranging citizen-initiated amendment dealing with state and local revenue ran afoul of a requirement that the initiative process could not be used to make specific appropriations of funds.[84] In 2000 the Mississippi Supreme Court sided with lower state courts in rejecting an effort to propose an initiated amendment banning nearly all gambling in the state, on the ground that the proposed amendment ran afoul of subject-matter restrictions on the initiated-amendment process.[85]

A second type of process-based limit enforced by some state courts is grounded in a distinction between changes that can be considered amendments and changes that amount to a constitutional revision. The amendment/revision distinction has been most fully developed by courts in California. The California Constitution originally stipulated that revisions could only be undertaken by a convention. This was then changed in 1962 to allow revisions by a convention or a legislature-generated amendment but not by a citizen-initiated amendment. This amendment/revision distinction has also been applied in several other states whose constitutions distinguish between processes that can be used to generate amendments and processes that must be used to adopt revisions. Generally, state constitutions that embrace such a distinction stipulate that revisions should be undertaken via conventions.[86]

The California Supreme Court has had various occasions since the late nineteenth century to apply the amendment/revision distinction,[87]

83. Clark v. Ill. State Bd. of Elections, No. 14 CH 07356 (Ill. Cir. Ct. 2014).

84. Slama v. Attorney Gen., 428 N.E.2d 134, 139 (Mass. 1981).

85. *In re* Proposed Initiative Measure No. 20, 774 So. 2d 397, 402–03 (Miss. 2000).

86. This amendment/revision distinction and cases invoking this distinction are discussed in WILLIAMS, *supra* note 6, at 403–05 and Marshfield, *supra* note 13, at 78.

87. In an 1894 ruling that prevented an amendment from appearing on the ballot, even while making clear that the ruling did not stand in the way of the substantive outcome that the amendment sought to achieve, the California Supreme Court discussed the amendment/revision distinction but resolved the case on another ground. *See* Livermore v. Waite, 36 P. 424, 425–26 (Cal. 1894). The disqualified amendment would have declared the seat of state government to be San Jose rather than Sacramento but would have made the move conditional on the state receiving "a donation of a site of not less than ten acres and one

ruling in two cases that amendments or portions of amendments actually amount to revisions and cannot be adopted through the citizen-initiated amendment process.[88] In a 1948 ruling issued at the pre-election stage, the court disqualified a citizen-initiated amendment that contained twelve sections and 208 sub-sections and would have affected so many parts of the current constitution that it was better designated as a revision than as a mere amendment.[89] Then, in 1990, the court overturned a portion of a wide-ranging citizen-initiated amendment titled the Crime Victims Justice Reform Act several months after voters approved the amendment. While allowing most of the amendment's provisions to take effect, the court found fault with one provision requiring state courts to construe a number of provisions of the state bill of rights in a manner consistent with and providing no greater protection than the U.S. Constitution. The court determined that this provision constituted "such a far-reaching change in our governmental framework

million dollars" and state officials then certifying that the change could take place. *Id.* at 425. The court determined that the amendment could not be submitted to voters because of this conditional aspect of the amendment taking effect. *Id.* at 427. The court reasoned:

> As the proposed amendment is therefore only a proposition for the people to submit to some other individuals or body to determine whether there shall be a change of the seat of government, we hold that it is not such an amendment as the legislature has been authorized to submit to their votes.

Id. at 428. The court went on to make clear that the legislature was not prevented by this ruling from moving the capitol. *Id.* The legislature could achieve this outcome via a statute submitted for popular approval, an avenue clearly provided in the existing constitutional provision for moving the state capitol without need of a constitutional amendment, or by crafting a constitutional amendment that would take "immediate effect" and not be conditional on other steps being taken by other officials. *Id.*

88. In *Strauss v. Horton*, the California Supreme Court rejected the argument that a citizen-initiated amendment barring recognition of same-sex marriage constituted a revision of the state constitution. 207 P.3d 48, 110 (Cal. 2009). The timeline is as follows: In May 2008, the California Supreme Court interpreted the state constitution as requiring legal recognition of same-sex marriage. *Id.* at 66. In November 2008, California voters approved a citizen-initiated amendment barring recognition of same-sex marriage and thereby reversing the court's interpretation of the constitution. *Id.* at 66–67. When amendment opponents filed suit in state court—they would later prevail in a separate federal lawsuit on federal constitutional grounds—they argued that the November 2008 amendment was such a significant change that it amounted to a revision and therefore could not be enacted through a citizen-initiated amendment. *Id.* at 68. Although a majority of the judges rejected this argument, Justice Moreno dissented from this conclusion, as noted in Mate, *supra* note 12, at 449–50. It should be stressed that Moreno's dissent was *not* making the claim that certain portions of a constitution are insulated from change or part of an unamendable core of a constitution, along the lines of the UCA doctrine, but rather was arguing that certain constitutional changes can only be enacted through certain processes and not through others. *Id.*

89. McFadden v. Jordan, 196 P.2d 787, 788–89 (Cal. 1948).

as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process."[90]

On a handful of other occasions, as Jonathan Marshfield has shown, courts in other states have also relied on the amendment/revision distinction to disallow amendments from appearing on the ballot.[91] At times, state courts have held that *citizen-initiated* amendments cannot appear on the ballot because they would bring about a constitutional revision that should be undertaken through other processes.[92] For instance, in 1970, before the Florida Constitution was changed to allow the constitutional initiative process to be used to adopt constitutional amendments as well as revisions, the Florida Supreme Court disqualified a citizen-initiated amendment that would have changed the legislature from a bicameral to a unicameral body. In the view of the court, this would so "radically change the whole pattern of government in this state" as to amount to a revision that could be achieved through other processes but not through the citizen-initiated amendment process.[93] Meanwhile, in 2008, a Michigan appeals court invoked the amendment/revision distinction to disqualify a citizen-initiated amendment that would have brought about a wide range of structural reforms.[94]

At other times, state courts have applied the amendment/revision distinction to keep off the ballot *legislature-crafted* amendments that sought to undertake a wholesale replacement of the state constitution or make changes of such significance that they were considered to be a revision. In a 1983 ruling, the Alabama Supreme Court prevented an amendment from appearing on the ballot that would have taken the first of these two routes, in terms of replacing the existing Alabama Constitution via a single amendment.[95] The Alaska Supreme Court, in a

90. Raven v. Deukmejian, 801 P.2d 1077, 1080 (Cal. 1990).

91. Marshfield, *supra* note 13, at 83–84.

92. *See* Holmes v. Appling, 392 P.2d 636, 639–40 (Or. 1964). In some other cases involving the amendment/revision distinction, state courts have not been responsible for preventing citizen-initiated amendments from appearing on the ballot but rather declined to compel state officials to place a citizen-initiated amendment on the ballot, thereby in effect preventing the amendment from going forward. Marshfield, *supra* note 13, at 84–86.

93. Adams v. Gunter, 238 So. 2d 824, 830–32 (Fla. 1970). Two years later, in response to this ruling, the Florida Constitution was amended to broaden the reach of the citizen-initiated amendment process by allowing this process to be used to undertake revisions of the constitution. *See* Weber v. Smathers, 338 So. 2d 819, 822–23 (Fla. 1976) (England, J., concurring).

94. *See* Citizens Protecting Michigan's Constitution v. Sec'y of State, 761 N.W.2d 210, 229 (Mich. Ct. App. 2008).

95. State v. Manley, 441 So. 2d 864, 865 (Ala. 1983).

1999 ruling, kept off the ballot an amendment that would have fallen in the second of these two categories, in requiring the rights of prisoners to be interpreted in a manner consistent with and providing no greater protection than is afforded by the U.S. Constitution. The court ruled that both "qualitatively and quantitatively," this change amounted to "an impermissible constitutional revision" that could only be adopted by a convention and not through a legislature-generated amendment.[96]

E. Lack of Support for the UCA Doctrine in State Courts: Several Caveats

Several caveats should be noted about the conclusion advanced in this Article about a lack of support for the UCA doctrine in state court rulings. To restate the main conclusion: state courts in invalidating amendments have grounded their rulings in federal guarantees, publicity rules, procedural requirements, or process-based limits rather than an understanding that certain amendments are substantively illegitimate. With the exception of instances where amendments run afoul of federal guarantees, state court decisions have not prevented supporters of amendments from re-enacting them by framing more accurate ballot language, adhering to procedural requirements, or proceeding through different constitutional change processes. With this main conclusion having been advanced, it is important to consider the evidence brought forth by scholars who have detected some support in state court rulings for substantive limits on the amending power and, as necessary, offer qualifications to the general conclusion advanced in this Article.

1. Explicit Unamendability Provisions in Prior State Constitutions

Although no current state constitutional provisions are understood as barring certain substantive changes, in prior years a few provisions were crafted to make them explicitly unamendable.[97] These explicit unamendability provisions were adopted in three sets of cases. First, during the founding era, Delaware's 1776 Constitution declared, in a provision soon eliminated, that no part of certain constitutional provisions "ought ever to be violated" and then set out procedures for

96. Bess v. Ulmer, 985 P.2d 979, 981, 987–88 (Alaska 1999).

97. *See* Albert, *supra* note 10, at 341 n.132.

amending other provisions in a way that suggested the first set of provisions was unamendable.[98]

Second, during the Antebellum Era, when the question of extending slavery beyond southern states was a matter of much dispute, two Midwestern states made clear in their inaugural constitutions, in provisions that were eliminated several decades later, that these constitutions could never be changed to authorize slavery. Ohio's 1802 Constitution stipulated that "no alternation of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this State."[99] Indiana's 1816 Constitution included identical language.[100]

In a third set of cases, several Reconstruction Era constitutions explicitly barred amendments to certain provisions regarding voting rights. These state constitutions and provisions were adopted as part of a congressional reconstruction process in the late 1860s whereby states were required as a condition for rejoining the Union to enfranchise African-Americans and ensure that their right to vote would be guaranteed in the future. Georgia's 1868 Constitution stipulated in the final line of its amendment article: "Nor shall the right of suffrage ever be taken from any person qualified by this constitution to vote."[101] Mississippi's 1868 Constitution barred passage of any amendments prior to 1885 that would "in any manner effect [sic] the eighteenth section of the Bill of Rights," a section that prohibited property or education

98. DEL. CONST. of 1776, art. XXX. This provision, which was removed in Delaware's 1792 Constitution, stated in full:

> No article of the declaration of rights and fundamental rules of this state, agreed to by this convention, nor the first, second, fifth, (except that part thereof that relates to the right of suffrage,) twenty-sixth, and twenty-ninth articles of this constitution, ought ever to be violated on any pretence whatever. No other part of this constitution shall be altered, changed, or diminished without the consent of five parts in seven of the Assembly, and Seven Members of the Legislative Council.

99. OHIO CONST. of 1802, art. VII, § 5. This provision was removed in Ohio's 1851 Constitution.

100. IND. CONST. of 1816, art. VIII. The entire provision stated:

> But as the holding any part of the human creation in slavery or involuntary servitude can only originate in usurpation and tyranny, no alternation of this constitution shall ever take place, so as to introduce slavery or involuntary servitude into this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted.

This provision was removed in Indiana's 1851 Constitution.

101. GA. CONST. of 1869, art. XII. This language was removed in Georgia's 1877 Constitution.

qualifications for voting.[102] Virginia's 1870 Constitution barred any amendment or revision restricting "the right of suffrage, or any civil or political right as conferred by this Constitution, except for causes which apply to all persons and classes without distinction."[103]

It should be stressed that these references to the "inviolate" nature or unamendable character of certain provisions were intended to serve particular purposes in extraordinary times and were later removed or have not been interpreted by courts as insulating certain provisions from amendment.[104] In all but one instance, an anomalous mid-nineteenth century Arkansas case, state courts interpreted constitutional language directing that certain provisions should remain "inviolate" to mean that these provisions cannot be violated by *legislation* but can be changed via constitutional amendment. This prevailing interpretation is best captured by the Alabama Supreme Court in a 1940 ruling where the justices considered whether "inviolate" language in the Alabama bill of rights meant to signal that no *laws* could be passed violating these rights or rather to advance the much more significant claim that no *amendments* could be passed to these provisions. After surveying the

102. MISS. CONST. of 1868, art. XIII. This language was removed in Mississippi's 1890 Constitution.

103. VA. CONST. of 1870, art. XII. This language was removed in Virginia's 1902 Constitution.

104. The current state constitutional provisions that contain references to the "inviolate" nature of certain rights all differ from Delaware's 1776 provision in a key way. Delaware's provision mentioned the "inviolate" character of certain provisions while making clear that other provisions could be amended through certain channels, in the course of setting out the process for amending the constitution. However, none of the current "inviolate" language appears in discussions of the process for amending the constitution. Rather the current references to the "inviolate" nature of certain rights appear in the course of explaining the importance of these rights. About half of the current state constitutions refer to the right to trial by jury as "inviolate," even as a number of these state constitutional provisions have in fact been amended through the years to define the minimum number of jurors or change various other aspects of the jury. *See, e.g.*, N.Y. CONST. of 1894, art. I, § 2; CONN. CONST. amend. art. IV; WIS. CONST art. I, § 5 (amended 1922). Consider the language of the Wisconsin provision, as amended:

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

References to the "inviolate" nature of certain rights also appear on occasion in guarantees of free assembly, as in the W. VA. CONST. of 1872, art. III, § 16, and GA. CONST. of 1983, art. I, § I, para. XI; freedom of the press, as in KAN. CONST. of 1859, § 11; bill of rights, as in ARK. CONST. of 1874, art. II, § 6; equality, as in ARK. CONST. of 1874, art. II, § 3; and search and seizure, as in KAN. CONST., Bill of Rights, § 15.

rulings of other courts and the opinions of legal commentators, the court sided with the former interpretation of "inviolate," explaining: "We are clear that it does not put a limitation on the power of amendment of the Constitution, but on the power of legislation."[105]

The one state court ruling that comes the closest of any court ruling in U.S. history to embracing the UCA doctrine is an 1851 Arkansas Supreme Court decision that interpreted "inviolate" language in a different fashion, as preventing any amendments to certain provisions. In this case, the Arkansas Supreme Court had occasion to interpret a provision in the final section of the state declaration of rights declaring that "everything in this article is excepted out of the general powers of the government, and shall forever remain inviolate; and that all laws contrary thereto, or to the other provisions herein contained, shall be void."[106] The Arkansas Supreme Court interpreted this language as prohibiting any provision in the declaration of rights from being changed via a legislature-crafted amendment; the court determined that changes to these provisions could only be achieved via a constitutional convention.[107]

This unusual mid-nineteenth-century Arkansas Supreme Court interpretation of "inviolate" language, as well as subsequent efforts to draw on this Arkansas ruling to argue that certain provisions are unamendable (or even to limit the process through which these provisions can be amended), have all been soundly rejected.[108] In an 1867

105. Downs v. City of Birmingham, 198 So. 231, 236 (Ala. 1940).

106. *See* ARK. CONST. of 1836, art. II, § 24; Eason v. State, 11 Ark. 481 (1851).

107. *Eason*, 11 Ark. at 492–94. Notably, at the time this ruling was issued, the Arkansas Constitution could only be changed in two ways: either by legislative approval of an amendment and without any opportunity for voter ratification of that amendment (it was only later that Arkansas would join other states in requiring voter ratification of legislature-crafted amendments) or by calling a convention. In this context, the Arkansas Supreme Court can be seen as expressing support for popular sovereignty in noting that the main problem with allowing a legislature-crafted amendment to the state bill of rights was that the people would not have a direct role in making this change, in a way that would be possible via a convention. As the court argued, such a "convention, when assembled and invested with the entire sovereign power of the whole people . . . may rightfully strike out or modify any principle declared in the Bill of Rights if not forbidden to do so by the Federal constitution." *Id.*

108. *See* JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 507–09 (1867). It is worth noting in this regard that the Arkansas Supreme Court's reasoning in this 1851 case differed from the same court's reasoning in a ruling issued three years earlier in *State v. Cox*, 8 Ark. 436, 442–44 (1848). *Eason*, 11 Ark. at 500–03.

state constitutional treatise, John Alexander Jameson deemed "utterly fallacious" the reasoning of the Arkansas Supreme Court and any notion that references to provisions remaining "inviolate" impose a limitation on the "making of amendments."[109] Walter F. Dodd reached a similar conclusion in his 1910 analysis of judicial decisions reviewing state constitutional amendments. Acknowledging that several early state constitutions contained explicit unamendability provisions,[110] Dodd concluded that "the state constitutions now in force contain practically no such restrictions, and amendments are therefore subject to judicial control, as tested by the state constitutions, with respect to their method of enactment only and not with respect to their content and substance."[111]

This remains the dominant understanding of U.S. state courts. Only one other explicit unamendability provision was in effect when Dodd was writing and still in effect today. A provision in Alabama's 1901 Constitution declares that "Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment."[112] However, the Alabama Supreme Court determined in a 1955 ruling that this provision could itself be amended.[113]

The few other explicit unamendability provisions currently found in state constitutions were added after Dodd's analysis and seek to discourage amendments that saddle constitutions with extraneous matters. The intent of these provisions is not to bar certain changes but,

109. JAMESON, *supra* note 108, at 510–11.

110. Dodd noted the already mentioned provisions in Delaware's 1776 Constitution, Arkansas's 1836 Constitution, and Mississippi's 1868 Constitution, each of which was later eliminated. DODD, *supra* note 48, at 236.

111. *Id.*

112. ALA. CONST. art. XVIII, § 284.

113. In *Opinion of the Justices*, 81 So. 2d 881, 883 (Ala. 1955), the Alabama Supreme Court considered whether a legislature-crafted amendment regarding the basis of legislative apportionment violated this constitutional provision. No justice on the Alabama Supreme Court concluded that this language meant that the provision was insulated from change. *Id.* at 887, 893. The dispute centered on whether this language meant either: (1) changes to the basis of apportionment could not come through a legislature-generated amendment but rather must come through a convention whose recommendations would be approved by voters or (2) this language itself could be amended, so that changes to the basis of apportionment could be achieved either through legislature-generated amendments or convention-generated amendments. *Id.* at 883, 887–88. Three Alabama justices sided with the first interpretation and could point to comments from the drafters of the relevant language indicating that the intent of this language was to require any changes in the basis of the apportionment to be approved by a convention rather than by a legislature-generated amendment. *Id.* at 893. But the other four Alabama justices sided with the second interpretation, which expresses the view that is currently dominant in the states: that no state constitutional provisions are unamendable. *Id.* at 887.

rather, to encourage supporters of these changes to proceed through statutory processes rather than constitutional processes. Thus, after many years when "local" amendments applicable only to particular counties were added to the Georgia Constitution on a regular basis, a provision was inserted in the course of drafting Georgia's 1983 Constitution stipulating that amendments must be "of general and uniform applicability throughout the State," thereby barring any further local amendments.[114] Provisions in several other state constitutions also prevent or limit passage of amendments that only affect certain localities or have disparate effects on certain localities.[115] Additionally, a provision added to the California Constitution via a 1962 amendment sought, in response to repeated amendments authorizing issuance of bonds, to require future bond measures to be submitted as statutes rather than as constitutional changes. This California provision holds that: "No amendment to this Constitution which provides for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors, nor shall any such amendment to the Constitution hereafter submitted to or approved by the electors become effective for any purpose."[116] The purpose of this California provision, therefore, is not to prevent issuance of bonds but, rather, to discontinue the need for bond authorizations to take the form of constitutional changes and to permit bonds to be issued via legislative measures.

2. Procedural Rules as a Possible Pretext for Substantive

114. GA. CONST. art. X, § 1, para. 1. For a further discussion, see Gerald Benjamin, *Constitutional Amendment and Revision*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 177, 184–85 (G. Alan Tarr & Robert F. Williams eds., 2006).

115. Maryland, Louisiana, and Alabama are rare states that continue to permit passage of local amendments but require that they be approved in a way that deviates from the approval requirements for amendments of statewide applicability by providing that local amendments be approved by a majority of voters in the state as a whole as well as by a majority of voters in the affected localities. *See* Benjamin, *supra* note 114. Meanwhile, by virtue of a 1998 amendment, California does not allow amendments, or other matters submitted for popular approval, that "[i]nclude or exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the measure, or based upon the casting of a specified percentage of votes in favor of the measure, by the electors of that political subdivision." CAL. CONST. art. IV, § 8.5(a); *see also* Benjamin, *supra* note 114.

116. CAL. CONST. art. XVI, § 2. This California provision goes on to provide: "Each measure providing for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors in the form of a bond act or statute." *Id.*

Opposition to Amendments

A second qualification is in order regarding the lack of support in state court rulings for the UCA doctrine. One cannot rule out the possibility that judges in issuing rulings on procedural grounds may have been motivated by an un-stated opposition to the substance of these amendments.[117] Dissenting judges have at times taken issue with the reasoning judges have employed in determining that procedural requirements have not been met. Moreover, these dissents have occasionally been offered in a quite spirited fashion, in a way that suggests that some justices are of the view that procedural requirements doctrines are capable of being invoked in a pretextual manner.

Consider a sample of dissenting opinions in 2018 state court rulings that prevented amendments from appearing on the ballot. An Arizona Supreme Court decision that kept off the ballot a tax-related citizen-initiated amendment on the ground that the ballot language was defective commanded the support of five of the justices but generated dissents from two others; one of the dissenters included Chief Justice Scott Bales, who argued "we have never required perfection in drafting as a condition for the valid exercise of legislative authority, and doing so with initiatives would infringe upon the people's constitutional right to enact laws independently of the legislature," and concluded that he did "not believe that the 100 word description presents a substantial danger of fraud, confusion, or unfairness sufficient to invalidate the initiative petitions."[118] A Massachusetts Supreme Court ruling that removed a tax-related citizen-initiated amendment from the ballot for combining unrelated subjects also produced a five-two split, with Justice Kimberly Budd writing in dissent that the majority's interpretation of this procedural requirement "fundamentally interferes with the ability of the people to exercise the constitutionally granted legislative power" by turning procedural "requirements into absolute disqualifiers."[119] To take

117. For instance, in discussing the California Supreme Court ruling in *Livermore v. Waite*, 36 P. 424 (1894), which disallowed a vote from being held on an amendment that would have moved the state capitol from Sacramento to San Jose on the ground that this would violate an understanding that amendments must take immediate effect and cannot be conditioned on other measures being taken by other officials, Dodd wrote, "The California decision is indefensible; it cannot be justified and can be explained only upon the view that the court had determined to prevent the submission of the amendment for removing the capitol, and could find no better reason to present for its action." DODD, *supra* note 48, at 235.

118. Molera v. Reagan, 428 P.3d 490, 498 (Ariz. 2018) (per curiam) (Bales, C.J., dissenting).

119. Anderson v. Attorney Gen., 99 N.E.3d 309, 340 (Mass. 2018) (Budd, J., dissenting).

a final example from another 2018 case where a court invoked the single-subject rule to disallow an amendment, in this case an Arkansas Supreme Court decision removing an amendment capping damages and attorney's fees in tort suits, Justice Shawn Womack argued in a lone dissent that although judicial review of amendments "to ensure compliance with constitutional requirements is appropriate and necessary," "[h]ere, the majority steps beyond that limited role by disregarding the plain language of the constitution and applying a test that is not required to evaluate the legality of the proposed amendment."[120]

3. Judicial Evasion of the Effects of Amendments

In a few cases, courts have stopped short of invalidating amendments but have evaded the effects of these amendments in ways that might have been motivated by substantive opposition. The main example, widely discussed in the literature, is a 1984 Massachusetts Supreme Court ruling where the justices split four-three in a case regarding the death penalty.[121] After the court in a 1980 decision ruled that the death penalty is inconsistent with the "cruel or unusual punishments" clause of the state constitution, the legislature approved and voters in 1982 ratified an amendment that sought to re-instate the death penalty over the court's objections.[122] The key portion of the amendment declared that "No provision of the Constitution . . . shall be construed as prohibiting the imposition of death."[123] Once the amendment passed and the legislature enacted a statute re-instating the death penalty, this statute was challenged and invalidated by the state supreme court in a 1984 decision.[124] The majority acknowledged passage of the 1982 amendment but nevertheless held that statutes implementing the death penalty could still be held unconstitutional as a violation of other provisions aside from the "cruel or unusual punishment" provision [125]

120. Martin v. Humphrey, 558 S.W.3d 370, 373–74, 377–88, 380 (Ark. 2018).

121. Commonwealth v. Colon-Cruz, 470 N.E.2d 116, 117 (Mass. 1984). This case has been discussed in JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS 149 (1998); Friedman, *supra* note 12, at 322–25; Kafker & Russcol, *supra* note 9, at 1317 n.321.

122. Friedman, *supra* note 12, at 322–24.

123. *Colon-Cruz*, 470 N.E.2d at 117 (quoting MASS. CONST. art. CXVI.)

124. Friedman, *supra* note 12, at 323–24.

125. *Id.* at 322–24.

Although this 1984 Massachusetts ruling did not actually overturn an amendment but rather overturned a statute enacted pursuant to the amendment, the behavior of the majority in this case led Lawrence Friedman in a recent article to consider whether the ruling expresses support for the view that "the Massachusetts constitution contains an implicitly unamendable core[.]"[126] Certainly, a case can be made that the ruling's effect is difficult to square with the amendment's purpose. As Justice Joseph Nolan complained, in one of several dissenting opinions in this case, "the people made it clear that the capital punishment statute must escape invalidation by any article of the Massachusetts Constitution," and he could not see how the amendment's language "'[n]o provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death,' could be interpreted to mean other than that the court cannot invalidate the statute under the State Constitution."[127] Nevertheless, as Friedman notes, the language of the amendment did not explicitly insulate all possible death penalty statutes from invalidation, thereby providing a plausible case for the majority's decision to invalidate the statute even in the face of the amendment.[128] Moreover, as Friedman notes, the majority in this case did not go so far as to declare that certain subjects or provisions are insulated from amendment in a way envisioned by the UCA doctrine.[129] As Friedman concluded, "a state constitutional amendment that expressly sought to abridge a value contained within a state's constitutional core will almost inevitably be immune from challenge."[130]

4. Embrace of the UCA Doctrine in Dicta or in Concurring or Dissenting Opinions

An analysis of state court rulings reviewing state constitutional amendments has to acknowledge, finally, that although the contemporary record is bereft of majority opinions invoking the UCA doctrine to invalidate amendments, judges have occasionally raised the possibility that certain amendments could be unconstitutional. However, these claims are invariably found in dicta, in majority opinions that did

126. *Id.* at 324–25.
127. *Colon-Cruz*, 470 N.E.2d at 135 (Nolan, J., dissenting).
128. Friedman, *supra* note 12, at 324.
129. *Id.*
130. *Id.* at 330.

not result in the invalidation of an amendment, or in concurring or dissenting opinions.

Of particular interest, as Jonathan Marshfield has shown in a recent analysis, is a 1936 Alabama Supreme Court decision in which the majority made a case for implicit substantive limits on the amendment process but in a part of the opinion that was not integral to the ruling.[131] In this case, the court was asked to interpret and apply an amendment that temporarily capped at $6,000 the annual salary and fees for public officials.[132] As Marshfield notes, the court ultimately held that "the amendment did not apply to the facts in the case."[133] However, while deciding the case, the majority made clear that it recognized substantive limits on the amendment power, even if the court did not invalidate an amendment in this instance.[134] The majority wrote that "we do not wish to be understood as holding that the right to amend the Constitution . . . includes the right of a majority to temporarily suspend the Constitution."[135] After all, the majority reasoned, if the amendment process could be used to:

> temporarily suspend the provisions of the Constitution protecting public salaries from reduction—provisions intended to secure to the people of the state a virile, independent, and just government of law—then by like procedure the provisions of the Constitution protecting freedom of speech and freedom of the press may also be *temporarily* suspended . . . [along with] every right and immunity protected by the Declaration of Rights.[136]

The court concluded: "No such thought was ever entertained by the framers of the Constitution or the people in its adoption."[137] In this case, therefore, the majority opinion signaled support for the UCA doctrine and to an extent not seen in any other instance in the

131. Houston Cty. v. Martin, 169 So. 13, 15 (Ala. 1936).
132. *Id.*
133. Marshfield, *supra* note 13, at 121.
134. *Martin*, 169 So. at 16–17.
135. *Id.* at 15.
136. *Id.* (emphasis added).
137. *Martin*, 169 So. at 15.

twentieth century; however, it is important to stress that the court did not actually invalidate the amendment in question in this case.[138]

The Massachusetts Supreme Court offers the leading twenty-first-century example of a judge making a case for implicit substantive limits on the amending power, as Kafker and Russcol have noted,[139] albeit in a concurring opinion. This concurrence was penned by Justice John Greaney (and joined by Justice Roderick Ireland) in a 2006 case concerning a proposed amendment barring recognition of same-sex marriage.[140] Three years earlier, the Massachusetts Supreme Judicial Court interpreted the state constitution as requiring recognition of same-sex marriage.[141] However, same-sex marriage opponents crafted and secured support for a citizen-initiated amendment that would have essentially overturned this ruling. In 2006, the court was asked by same-sex marriage supporters to rule that such an amendment was illegitimate because it ran afoul of a process-based limit on the subjects that could be addressed through a citizen-initiated amendment. The court rejected this challenge and allowed the amendment to continue to the next stage of the process.[142]

In a concurrence, Justice Greaney noted that if the amendment were approved (it ultimately failed to secure sufficient legislative support to be submitted to voters) he would be open to considering "the question whether our Constitution can be home to provisions that are apparently mutually inconsistent and irreconcilable," in the sense that a provision barring recognition of same-sex marriage "would look so starkly out of place in the Adams Constitution, when compared with the document's elegantly stated, and constitutionally defined, protections of liberty, equality, tolerance, and the access of all citizens to equal rights and benefits."[143] This statement, expressed in a concurrence at a time when the question was not yet before the court, could be seen as the closest that a state judge in the United States has come to endorsing the UCA doctrine in a reported case. In a sign of the extent to which this comment, offered in a concurring opinion, is an outlier in the U.S. state judicial tradition, Kafker and Russcol noted Justice Greaney's remarks and then concluded, in an understated fashion: "to challenge a properly passed

138. *See id.* at 15–17 (holding that this particular case did not require the court to consider the validity of the amendment because the amendment did not apply to the controversy before the court).

139. Kafker & Russcol, *supra* note 9, at 1316–17.

140. Schulman v. Attorney Gen., 850 N.E.2d 505 (Mass. 2006).

141. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

142. *Schulman*, 850 N.E.2d at 508–09.

143. *Schulman*, 850 N.E.2d at 512–13 (Greaney, J., concurring).

state constitutional amendment on grounds that it generally violated the state constitution as it existed prior to amendment would be novel, to say the least."[144]

II. EXPLAINING LACK OF SUPPORT FOR THE UCA DOCTRINE IN U.S. STATE COURTS

At various times in U.S. history, scholars have expressed support for the UCA doctrine and urged judges to enforce substantive limitations on amendments, generally with a focus on federal amendments but occasionally applying this doctrine to state amendments.[145] However, the UCA doctrine has not been applied by the U.S. Supreme Court or any of the fifty state supreme courts to invalidate an amendment on substantive grounds. I turn in this Section to offer some explanations for the lack of support for the UCA doctrine in state courts.

A. The Level of Commitment to Popular Sovereignty

The United States as a whole offers infertile ground for the UCA doctrine, in part because of a strong commitment to popular sovereignty in the American constitutional tradition.[146] It is no surprise, therefore, that the UCA doctrine has failed to draw support from U.S. federal or state courts. This commitment to popular sovereignty is even stronger at the state level than at the federal level, as reflected especially in the direct involvement of voters in approving nearly all state constitutional amendments and in a way that presents particularly high hurdles in the way of state judges who might seek to declare amendments unconstitutional on substantive grounds.

144. Kafker & Russcol, *supra* note 9, at 1317.

145. See the discussion and various scholars cited in ROZNAI, *supra* note 1, at 41–42. Perhaps the most distinguished scholar (who is also a jurist) to endorse this doctrine was Thomas Cooley in Thomas Cooley, *The Power to Amend the Federal Constitution*, 2 MICH. L.J. 109, 118–20 (1893), discussed in Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE INT'L L.J. 1, 9–10 (2018). Passage of the Eighteenth Amendment enacting prohibition spurred the most sustained debate about the UCA doctrine among U.S. scholars and led several to embrace the UCA doctrine in the context of federal constitutional amendments. *See* ROZNAI, *supra* note 1, at 42 n.12. In recent years, support for the UCA doctrine was expressed most notably by Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754–57 (1980).

146. See the particularly helpful discussion by Richard Albert, *Nonconstitutional Amendments*, 22 CAN. J.L. & JURIS. 5, 35–38 (2009).

Consider the different processes for amending the U.S. Constitution and the fifty state constitutions. Amendments to the U.S. Constitution require the consent of the people but only in an indirect fashion. The usual route for adopting federal amendments, followed in passing all but one of the twenty-seven ratified amendments, is to secure two-thirds support in both houses of Congress and then secure ratification by the legislatures in three-fourths of the states. At each of these stages—the proposal and ratification stage—public opinion is registered in an indirect fashion, via election of U.S. congressmembers and state legislators.

The one opportunity for voters to play a more direct role in the federal amendment process occurred with ratification of the Twenty-First Amendment repealing prohibition. In that case, Congress took advantage of the option, provided in Article V of the U.S. Constitution, to submit the amendment to ratification by conventions in three-fourths of the states. Whenever Congress submits amendments for ratification, it has the option of requiring ratification by state legislatures or by state conventions.[147] Congress directed that ratification should be undertaken by state legislatures in the case of each of the other amendments that have been submitted for ratification, including twenty-six of the ratified amendments and all six un-ratified amendments.[148] However, out of a concern that state legislatures might not register public opinion on prohibition repeal in an accurate fashion, in the sense that legislators might be more resistant to voters to supporting repeal, Congress in 1933 directed that the Twenty-First Amendment be ratified by state conventions, similar to how the U.S. Constitution was ratified in 1787 and 1788.[149]

In the case of the Twenty-First Amendment to the U.S. Constitution, voters had an opportunity to select delegates to these ratifying conventions. In most states, delegates ran on platforms supporting or opposing ratification, with voters generally able to vote for slates of delegates designated by their support or opposition. In fact, in some of these states, voters were able to instruct, or at least advise, delegates on

147. U.S. CONST. art. V.

148. *See* DAVID C. HUCKABEE, RESEARCH SERV., 97-922 GOV, RATIFICATIONS OF AMENDMENTS TO THE U.S. CONSTITUTION 4–5 tbls. 1, 2 & 3 (1997), https://www.senate.gov/reference/resources/pdf/97-922.pdf (listing the ratified and un-ratified amendments); THOMAS H. NEALE, RESEARCH SERV., R42592, THE ARTICLE V CONVENTION FOR PROPOSING CONSTITUTIONAL AMENDMENTS: HISTORICAL PERSPECTIVES FOR CONGRESS 4 n.9 (2012), https://fas.org/sgp/crs/misc/R42592.pdf (noting that all but one amendment was submitted for ratification by state legislatures).

149. SEAN BEIENBURG, PROHIBITION, THE CONSTITUTION, AND STATES' RIGHTS 225–26 (2019).

whether to vote for ratification because the question of whether to support ratification appeared on the ballot alongside the slate of delegates.[150]

When it comes to enacting state constitutional amendments, voter participation is even more direct. Delaware is the lone exception. Amendments in Delaware take effect when they are approved by the legislature and without any requirement that they be ratified by voters.[151] In every other state, constitutional amendments must be approved in a popular referendum.[152] There are, to be sure, a range of mechanisms in place for amending state constitutions, depending on the state, including legislature-generated amendments and convention-crafted amendments that are available in all states, as well as citizen-initiated amendments in eighteen states and commission-submitted amendments (in Florida). States also vary in the rules and thresholds for using each of these amendment processes, with some states requiring a majority vote of the legislature and/or people and other states setting supermajority requirements at the legislature or voter-approval stage. Despite this variation, states are consistent, with the exception of Delaware, in requiring that amendments adopted through any of these processes only take effect upon the approval of voters in a referendum.[153]

This near-universal requirement of direct popular participation in the state constitutional amendment process makes it particularly difficult for judges to disqualify or invalidate amendments as long as voters can make an informed choice, procedural requirements are satisfied, and designated processes are followed. State courts have made clear the importance of popular sovereignty in the United States generally and in state governments especially. The Florida Supreme Court expressed this view in a 1956 case in reasoning echoed by numerous other state court rulings. As the court concluded, in rejecting a challenge to a proposed amendment,

150. This process is discussed in John Dinan & Jac C. Heckelman, *Support for Repealing Prohibition: An Analysis of State-Wide Referenda on Ratifying the 21st Amendment*, 95 SOC. SCI. Q. 636, 638 (2014).

151. *See* Dinan, *supra* note 4, at 8 tbl.1.4, http://knowledgecenter.csg.org/kc/system/files/1.4.2019.pdf.

152. *Id.*

153. *See id.* at 5–10 tbls.1.3, 1.4 & 1.5, http://knowledgecenter.csg.org/kc/content/book-states-2019-chapter-1-state-constitutions.

> Another thing we should keep in mind is that we are dealing with a constitutional democracy in which sovereignty resides in the people. It is their Constitution that we are construing. They have a right to change, abrogate or modify it in any manner they see fit so long as they keep within the confines of the Federal Constitution.

The court went on to note that there was a strong case to be made for judicial deference to legislative action "if there is any reasonable theory under which it can be done" but that the case for judicial deference "is even more impelling when considering a proposed constitutional amendment which goes to the people for their approval or disapproval."[154]

Three decades later, in 1986, the Nebraska Supreme Court offered similar insight into the reasoning underlying state court reluctance to impose substantive limits on amendments, focusing more generally on the strength of the commitment to popular sovereignty in state constitutionalism.[155] Quoting from and endorsing the logic of a trial court ruling that dealt with the legitimacy of a citizen-initiated amendment limiting corporate farming and ranching, the court noted: "The ultimate source of power in any democratic form of government is the people. Our Nebraska Constitution is a document belonging to the people. Subject only to the supremacy clause of the United States Constitution, the people may put in their document what they will."[156] In this particular case, the court was invited to overturn the amendment on the ground that the material was better suited for a statute and ill-suited for inclusion in a constitution. However, the court's reasons for rejecting this argument also apply more broadly to the question of whether and how state courts should approach claims that certain amendments are substantively improper. As the court argued:

> It would completely subvert our role as one of the three branches of government established by the people in the Constitution to expand our jurisdiction to tell the voters of this state that although the Constitution states that the people have reserved

154. Gray v. Golden, 89 So. 2d 785, 790 (Fla. 1956).

155. *See* Lawrence Friedman, *The Potentially Unamendable State Constitutional Core*, 69 ARK. L. REV. 317, 317–18 (2016).

156. Omaha Nat. Bank v. Spires, 389 N.W.2d 269, 275 (Neb. 1986) (quoting the trial court).

> the power to amend that Constitution, they may only amend it in ways that we determine [to be appropriate] . . . .[157]

B. Clashes Between Popular Sovereignty and Judicial Supremacy

Another reason for the failure of the UCA doctrine to take hold in U.S. state courts is that state constitutional amendments are in a number of cases intended to overturn state court rulings, thereby presenting an especially stark conflict between popular sovereignty and judicial sovereignty and making it particularly difficult to prioritize the latter over the former. Four federal amendments—the Eleventh, Fourteenth, Sixteenth, and Twenty-Sixth Amendments—have overturned U.S. Supreme Court rulings.[158] Therefore, court-overturning amendments are an occasional feature at the federal level. However, court-overturning amendments are even more prominent at the state level. These court-responsive amendments were adopted in the early twentieth century to combat state court decisions restricting workers' rights and authorize a number of labor reforms such as maximum-hours, minimum-wage, and workers' compensation acts.[159] The late twentieth and early twenty-first centuries saw another surge of court-responsive amendments for the purpose of overturning and, in some cases, preempting state court decisions enhancing protection of the rights of criminal defendants, guaranteeing abortion rights, legalizing same-sex marriage, limiting the death penalty, and overturning caps on damages in tort suits.[160]

In fact, the cases that feature the fiercest battles over state court review of constitutional amendments and prompt discussion of the UCA doctrine generally involve amendments seeking to reverse prior state court interpretations of constitutional provisions. State courts have considered the legitimacy of amendments seeking to overturn state court decisions expanding the rights of criminal defendants, especially in California.[161] State courts have also reviewed same-sex marriage ban amendments enacted in response to state court rulings legalizing same-

157. *Id.* at 278.

158. JOHN DINAN, THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 882 (Mark Tushnet et al. eds., 2015).

159. John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 989–1000 (2007).

160. *See* DINAN, *supra* note 3, at 109–49.

161. Raven v. Deukmejian, 801 P.2d 1077, 1080 (Cal. 1990); Brosnahan v. Brown, 651 P.2d 274, 276 (Cal. 1982).

sex marriage in Massachusetts and California.[162] Additionally, state courts have reviewed amendments seeking to reinstate or authorize various uses of the death penalty in response to state court rulings limiting the death penalty, as in California, Massachusetts, and Florida.[163]

It is not surprising that these cases have been especially apt to prompt judges to consider the possibility that a prior judicial interpretation of a constitutional provision should become insulated from amendment by becoming designated a part of the basic structure or unamendable core of a constitution.[164] As much as one can appreciate why judges are tempted to embrace the UCA doctrine when amendments challenge judicial supremacy, it is equally understandable why judges have to date resisted the temptation. It is precisely because in the United States, and especially in U.S. states, ultimate responsibility for constitutional interpretation is vested in the people whose voice is expressed directly through the constitutional amendment process, rather than in the judiciary, that the UCA doctrine is especially difficult to maintain in such cases. To the extent that state courts have been willing to invalidate court-overturning amendments, as they have done in various cases, courts have based these rulings solely on publicity requirements, procedural rules, or process limitations and have not embraced the UCA doctrine by declaring certain amendments substantively impermissible.

The reasons for judicial reluctance to embrace the UCA doctrine in cases involving a direct conflict between the people and the judiciary—one might say *especially* in these sorts of cases—are perhaps best explained by a passage in the 2009 California Supreme Court decision declining to invalidate a same-sex marriage-ban amendment enacted in response to a contrary state supreme court ruling the previous year. After noting that "in past years a majority of voters have adopted several state constitutional amendments . . . that have diminished state constitutional rights of criminal defendants, as those rights had been interpreted in prior decisions of this court" the court made clear that it was an

162. Strauss v. Horton, 207 P.3d 48, 67 (Cal. 2009); Schulman v. Attorney Gen., 850 N.E.2d 505, 506 (Mass. 2006).

163. People v. Frierson, 599 P.2d 587, 591 (Cal. 1979); Armstrong v. Harris, 773 So. 2d 7, 16 (Fla. 2000); Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984).

164. Such is the case with the Massachusetts Supreme Court's ruling in *Commonwealth v. Colon-Cruz* regarding an amendment overturning a prior ruling disallowing the death penalty and rulings of the Massachusetts Supreme Court and California Supreme Court regarding amendments overturning prior rulings requiring recognition of same-sex marriage in *Schulman v. Attorney General* and *Strauss v. Horton*, respectively. *See* 207 P.3d 48 (Cal. 2009); 850 N.E.2d 505 (Mass. 2006); 470 N.E.2d 116 (Mass. 1984).

established principle "that the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be modified and diminished by a change in the state Constitution itself, effectuated through a constitutional amendment approved by a majority of the electors."[165]

In response to claims that would have some persuasiveness in other constitutional systems—to the effect that court-overturning amendments might be deemed improper insofar as they encroach on judicial authority to interpret constitutional provisions—the court responded: "Once the people have adopted a constitutional amendment, of course, it is the duty of the courts to apply the state Constitution as amended by the new provision."[166] Far from viewing the amendment as "improperly imping[ing] upon the judiciary's authority or responsibility," the court explained, it is "the court's obligation to follow the mandate of the amended Constitution," a mandate that "flows from the judiciary's foundational responsibility to act in accordance with the commands of the current governing law."[167]

III. CONCLUSION

Although this analysis of state court decisions reviewing state constitutional amendments does not seek to advance the normative debate about whether judges should embrace the UCA doctrine, it advances scholarship regarding the UCA doctrine in two respects. First, this analysis joins other empirical inquiries into the degree to which the UCA doctrine has been embraced in various legal systems. Several scholars have undertaken extensive studies of U.S. state court rulings regarding state constitutional amendments but without linking their findings to debates about the UCA doctrine. Meanwhile, other scholars who have been primarily concerned with studying the UCA doctrine have begun to examine state court decisions and detected some support for the UCA doctrine in these state court rulings. One purpose of this Article is to bring these literatures together and show that, although U.S. state courts frequently invalidate state constitutional amendments, there are no cases in which they have embraced the UCA doctrine.

165. *Strauss*, 207 P.3d at 105.
166. *Id.* at 465.
167. *Id.*

One lesson to emerge from this analysis is the need to distinguish cases where judges enforce process-based limits on constitutional amendments (whereby judges require certain changes to be pursued through *certain* amendment or revision processes and not through other processes) from cases where judges rule that certain constitutional changes cannot be achieved through *any* processes. U.S. state courts have issued a number of the former rulings but none of the latter. This distinction is worth keeping in mind when undertaking and scrutinizing empirical analyses of the UCA doctrine in other polities. It may well be that some rulings in other polities that have been understood as embracing the UCA doctrine have actually done something different and simply required that certain changes be made through certain processes.

This Article also makes a second contribution, by explaining why the UCA doctrine has not been embraced by U.S. state courts and focusing on two features of the U.S. state constitutional tradition that are critical in accounting for this lack of support. First, state constitutions embody a commitment to popular sovereignty to an extent that is nearly unrivaled by other polities, as shown in the near universal requirement for direct popular participation in amending state constitutions. Additionally, many of the cases in which U.S. state courts are particularly pressed to invalidate amendments involve direct conflicts between popular sovereignty and judicial supremacy. In a number of these cases, judges have issued a prior interpretation of the constitution, but the people seek to amend the constitution to overturn the judges' interpretation. That is, the cases where the UCA doctrine is most likely to surface in litigation in U.S. state courts have not focused on separation of powers disputes testing the extent of executive power or pitting the legislature against the executive or altering electoral rules or seeking to limit the institutional power of the judiciary. These are the sorts of cases that often arise in other countries where the UCA doctrine has been considered. The cases where the UCA doctrine is advanced most vigorously by litigants in U.S. state courts are of a different character, involving judicial efforts to expand rights by constitutional interpretation and subsequent efforts by the people to counteract these judicial interpretations.

A leading benefit of this analysis—and this has broader implications for our understanding of comparative constitutionalism—is to advance our understanding of the circumstances that are most and least fertile for the embrace of the UCA doctrine. The suggestion from this study of U.S. state courts and constitutional amendments is that the degree of openness to the UCA doctrine will be affected in part by the polity's level of commitment to popular sovereignty and also by the degree to which judicial review of constitutional amendments involve cases pitting popular sovereignty directly against judicial supremacy.