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State Constitutional Amendment Processes and the Safeguards of American Federalism

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Federalism scholars have studied the range of ways that state interests are advanced in the American federalism system, including through intergovernmental lobbying, federal lawsuits, state statutes, and state non-participation in federal programs. State constitutional law scholars, meanwhile, have noted the ways that state court rulings can provide greater protection for rights than at the federal level. I call attention to another way that state interests are advanced in the federal system and with increasing frequency: through state constitutional amendment processes. I also analyze the conditions under which processes can be effective in comparison with traditional mechanisms of state influence. In a number of cases, constitutional amendment processes are serving a role that can be played just as effectively by traditional mechanisms of state influence, and there is no reason why amendment processes are any more effective than these mechanisms. But in other instances, state constitutional amendment processes are more effective than alternative mechanisms or are effectively supplementing these other mechanisms.

A principal challenge facing federal systems is maintaining a balance of power between federal and state governments. At times this involves protecting the federal government against state encroachments. More often in the contemporary era this involves securing adequate representation for state governments in the federal policy process. Inquiries into the mechanisms by which state governments advance their interests in the American federal system date to *The Federalist*[2] and have continued through the years[3] and have even undergone a recent

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2. THE FEDERALIST NOS. 39, 45, 46 (James Madison) (Clinton Rossiter ed., 2003).

3. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV.

resurgence as scholars have sought to identify the range of available mechanisms and assess the conditions when they are effective.[4]

Intergovernmental lobbying is a leading means by which governors, legislators, and other officials advance state interests.[5] At times, state officials acting individually or collectively lobby for passage of federal legislation to protect state interests, as with enactment of the Unfunded Mandates Reform Act of 1995.[6] At other times, state officials lobby federal officials to repeal congressional statutes that encroach on state prerogatives, as with the repeal of a 2006 Insurrection Act Rider expanding the situations where the president can federalize National Guard troops without gubernatorial consent.[7]

State officials can also turn to the judicial process and file federal lawsuits seeking invalidation of congressional statutes seen as encroaching on state prerogatives. Most of these suits are unsuccessful, such as California's challenge to the National Voter Registration Act of 1993 (Motor Voter Act), South Carolina's challenge to the Driver's Privacy Protection Act (DPPA), and Connecticut's challenge to the No Child Left Behind Act (NCLB).[8] But sometimes state litigants prevail, as with New York's challenge to the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act[9] and various challenges to congressional statutes abrogating state sovereign immunity in intellectual property, age discrimination, and disability rights cases.[10]

543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

4. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 94-100 (2005); John Dinan, *The State of American Federalism, 2007-2008: Resurgent State Influence in the National Policy Process and Continued State Policy Innovation*, 38 PUBLIUS 381, 382 (2008); JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 61-76 (2009). I rely in the following paragraphs on the typology employed by Gardner.

5. DONALD H. HAIDER, WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING (1974); ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM (1995).

6. Timothy J. Conlan, James D. Riggle & Donna E. Schwartz, *Deregulating Federalism? The Politics of Mandate Reform in the 104th Congress*, 25 PUBLIUS, Summer 1995, at 23, 23 (Summer 1995).

7. Dinan, *supra* note 4, at 383-84.

8. The Ninth Circuit rejected California's challenge to the Motor Voter Act in *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert denied*, 516 U.S. 1093 (1996). The United States Supreme Court rejected South Carolina's challenge to the DPPA in *Reno v. Condon*, 528 U.S. 141 (2000). The Second Circuit rejected Connecticut's challenge to the NCLB in *Connecticut v. Duncan*, 612 F.2d 107 (2d Cir. 2010).

9. New York v. United States, 505 U.S. 144 (1992).

10. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (concerning intellectual property); Kimel v. Fla. Bd. of Regents, 528 U.S. 62

State legislators also advance state interests by enacting state statutes in areas where the federal government has not yet acted or by enacting state policies that exceed federal requirements. A recent example is the passage of numerous state greenhouse gas emissions regulations in excess of federal regulations.[11] States also expanded eligibility for Medicaid beyond the minimum federal requirements.[12]

State officials can also decline to participate in federal programs, thereby avoiding the need to comply with associated directives or conditions. Non-participation in federal programs can serve, at one level, as a means of preserving state policy discretion, as when numerous states declined to accept abstinence-only federal education grants, because doing so would have required them to comply with federal directives regarding the content of sex-education lessons.[13] Additionally, when state non-participation is sufficiently widespread, this can induce federal policy-makers and administrative officials to relax directives viewed as burdensome. This occurred when numerous states initially declared their intent not to fulfill requirements of the REAL ID Act and thereby suffer the penalty that their residents' driver's licenses would not be accepted at airports and other federal buildings;[14] in response, the Department of Homeland Security delayed implementation of REAL ID directives.[15]

State judges, meanwhile, can interpret state constitutional provisions to require a greater level of rights protection than is guaranteed by federal court interpretations of the U.S. Constitution. Various state courts have interpreted state criminal procedure provisions, including search-and-seizure guarantees, as requiring more protection than is provided by cognate federal constitutional provisions.[16] State courts have also relied on state constitutional provisions to invalidate death penalty statutes[17] and legalize same-sex marriage,[18] among other rulings.

(2000) (concerning age discrimination); Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (concerning disability rights).

11. Barry Rabe, *Environmental Policy and the Bush Era: The Collision Between the Administrative Presidency and State Experimentation*, 37 PUBLIUS 413, 423-26 (2007).

12. Richard B. Freeman and Joel Rogers, *The Promise of Progressive Federalism, in* REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY 205, 211 (Joe Soss, Jacob S. Hacker & Suzanne Mettler, eds., 2006).

13. Dinan, *supra* note 4, at 388-89.

14. *Id*. at 384-85.

15. *Id*.

16. *See, e.g.*, ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 160 (2009).

17. *See, e.g.*, People v. Anderson, 493 P.2d 880 (Cal. 1972); Dist. Attorney for the Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980).

Although federalism scholars have examined the first four mechanisms (intergovernmental lobbying, federal lawsuits, state statutes, and state non-participation in federal programs) and state constitutional scholars have conducted extensive studies of the final mechanism (state court decisions), James Gardner has recently noted that insufficient attention has been paid by both groups of scholars to the ways that state courts, through their interpretation of state constitutional provisions, can contribute to the safeguards of American federalism, or as he writes, serve as "agents of federalism."[19] In issuing such decisions state courts can be viewed as serving as agents of federalism; moreover, Gardner argues that it is proper and even advisable for state courts to work consciously to advance state interests in the U.S. federal system.[20]

My purpose is to call attention to still another mechanism increasingly relied on in recent years for advancing state interests in the federal system: state constitutional amendment processes. Throughout American history, state constitutional amendment processes have generally been a vehicle for modifying state institutions, policies, and rights in response to developments within states. Only rarely did states propose constitutional amendments in response to federal action or inaction; examples include amendments regarding women's suffrage[21] or labor rights[22] or prohibition of public aid to religious schools (i.e., State Blaine Amendments).[23] However, the early twenty-first century has seen a flurry of state constitutional amendments intended to advance state interests in the federal system, whether by enacting policies blocked at the federal level or aiding in the reversal or modification of congressional statutes or court rulings. As will be shown, such amendments have been formally proposed in recent years and, in many cases, have been enacted on a wide range of issues, including eminent domain,[24] affirmative action,[25] minimum-wage policy,[26] stem cell research,[27] abortion,[28] medicinal marijuana,[29] health care,[30] and union organizing.[31]

18. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

19. GARDNER, *supra* note 4, at 19.

20. *Id.* at 195.

21. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 399, 400 (2000).

22. John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 992-98 (2007).

23. JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 235 (2006).

24. *See infra* notes 35-47 and accompanying text.

25. *See infra* notes 48-58 and accompanying text.

26. *See infra* notes 60-73 and accompanying text.

27. *See infra* notes 74-90 and accompanying text.

In this article I present a typology of ways that state amendment processes can play a role in safeguarding federalism interests. First, amendments are a vehicle for protecting rights that have gone unrecognized by the United States Supreme Court. Second, amendments are a vehicle for adopting policies that proved unattainable in Congress. Third, amendments can be proposed for the purpose of seeking the reversal or relaxation of United States Supreme Court rulings seen as limiting state discretion. Fourth, amendments can be proposed with the intent of helping to bring about the repeal or modification of congressional statutes seen as encroaching on state prerogatives.

Through an examination of post-2000 amendments, it becomes clear that state constitutional amendment processes can, under certain conditions, be effective in advancing state interests in the U.S. federal system. In a number of cases, it is true, state constitutional amendment processes are serving a role that can be played just as effectively by traditional mechanisms of state influence, such as lobbying, lawsuits, state statutes, and state court rulings, and there is no reason why amendment processes are any more effective than these mechanisms. In some situations, however, state constitutional amendment processes can be more effective than alternative mechanisms such as state statutes or state court rulings, on account of the disinclination or resistance of other state officials. In several other instances, state constitutional amendment processes can supplement traditional mechanisms like lobbying and federal lawsuits.

This analysis might be of use both for federalism scholars and state constitutional scholars. Federalism scholars, who have generally focused on traditional mechanisms for advancing state interests in the U.S. federal system, can benefit from taking account of the reliance on state constitutional processes for this purpose. State constitutional scholars, meanwhile, have taken note of the federalism implications of state constitutional developments but have focused primarily on state court interpretations of state constitutions. A principal benefit of this study is to highlight the increasing reliance on state amendment processes, alongside of and in some cases instead of state court decisions, and to encourage further attention to ways that state constitutional change takes place through state amendment processes as well as, and sometimes instead of, state judicial processes.

28. *See infra* notes 91-105 and accompanying text.
29. *See infra* notes 106-115 and accompanying text.
30. *See infra* notes 116-134 and accompanying text.
31. *See infra* notes 135-142 and accompanying text.

I. RESPONSES TO FEDERAL INACTION

Advancement of state interests in the U.S. federal system can take the form of protecting rights or adopting policies that surpass minimum federal requirements. At times, this involves responding to the United States Supreme Court's failure to interpret the U.S. Constitution as guaranteeing a certain level of rights' protection. At other times, this involves responding to Congress's failure to adopt certain policies. State constitutional amendments have been enacted in each of these situations and can be seen as occasionally more effective than other mechanisms of state influence, on account of the disinclination or outright resistance of other state officials to taking the desired action.

A. Supreme Court Inaction

From the 1970s onward, state court rulings have been the usual means for state officials to respond to the United States Supreme Court's failure to expand rights. At times, state courts have relied on their state constitutions to require recognition of rights that the United States Supreme Court has not yet considered. This occurred with legalization of same-sex marriage by four state courts from 2003 to 2009; the United States Supreme Court had not previously heard a case concerning legalization of same-sex marriage when state supreme courts in Massachusetts, California, Connecticut, and Iowa issued rulings requiring legalization of same-sex marriage.[32] In other instances, the United States Supreme Court has explicitly considered and declined to recognize a right, and state courts have responded by interpreting their state constitutions as guaranteeing the right. Such was the case when the United States Supreme Court explicitly rejected an invitation to recognize a federal right to inter-district school funding equity in a 1973 case *San Antonio Independent School District v. Rodriguez*;[33] numerous state courts responded by recognizing such a right on state constitutional grounds.[34] In each of these instances, state court rulings have been the primary means of securing recognition of rights that have gone unrecognized by the United States Supreme Court. However, in two recent cases discussed below, United States Supreme Court decisions

32. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003); *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub.Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

33. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1973).

34. John Dinan, *School Finance Litigation: The Third Wave Recedes*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 96, 97-98 (Joshua M. Dunn & Martin R. West, eds., 2009).

declining to grant relief to litigants seeking recognition of federal constitutional rights have led supporters of these rights to turn not primarily to state courts but rather to state constitutional amendment processes to secure these rights.

1. Eminent Domain

In the 2005 case, *Kelo v. City of New London*,[35] the United States Supreme Court declined to interpret the federal takings clause as barring use of eminent domain proceedings for economic development purposes. Plaintiffs tried unsuccesfully to persuade the United States Supreme Court to determine that economic development is not a public use and therefore cannot satisfy the federal constitutional requirement that private property can be taken only for public use. Although a majority of Justices declined to read the federal constitution as guaranteeing a right for property-owners not to be subject to eminent domain proceedings for economic development purposes, Justice Stevens in his majority opinion noted that states were free to recognize such a right. He explained: "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose 'public use' requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised."[36]

Whether because state courts were seen as generally disinclined to interpret state takings clauses to achieve the goal frustrated by the United States Supreme Court in *Kelo*,[37] or because the deliberate pace of judicial proceedings was seen as preventing even sympathetic state courts from providing relief in a speedy fashion, efforts to secure greater limitations on eminent domain post-*Kelo* were only occasionally pursued through

35. Kelo v. City of New London, Conn., 545 U.S. 469 (2005), *reh'g denied*, 545 U.S. 1158 (2005).

36. *Id.* at 489 (citations omitted).

37. States courts prior to *Kelo* had occasionally demonstrated a willingness to interpret state constitutional eminent domain provisions to prevent condemnation of land for certain economic development purposes, most notably the Michigan Supreme Court in a 2004 ruling, *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004). *See* David Schultz, *Economic Development and Eminent Domain after* Kelo*: Property Rights and "Public Use" under State Constitutions*, 11 ALB. L. ENVTL. OUTLOOK J. 41, 73-84 (2006), cited in WILLIAMS, *supra* note 16, at 6 n.35. However, other state courts had not been willing to interpret their state constitutions for this purpose. *See Schultz*, *supra*, at 65-73.

state court rulings[38] and were pursued to a much greater degree through state statutes and constitutional amendments.[39] Numerous state legislatures enacted significant statutes tightening eminent domain protections, frequently by declaring that economic development does not constitute public use.[40] Citizen-initiated statutes were also adopted in several states.[41] Most important for present purposes, nine states proceeded through state constitutional amendment processes, presumably out of a desire to make it more difficult for future legislators to relax this requirement, as would be possible if the change rested only on statutory grounds.[42]

Benefiting in part from draft amendments prepared by the Castle Coalition, an arm of the Institute of Justice, the libertarian group responsible for generating the *Kelo* litigation,[43] seven of these nine states adopted legislature-referred eminent domain amendments in 2006: Louisiana, Florida, Georgia, Michigan, New Hampshire, North Dakota,

38. Two state supreme courts, in Ohio and Oklahoma, did take the opportunity in the aftermath of *Kelo* to interpret their state constitutional takings clauses as providing greater protection than the federal takings clause against invocation of eminent domain for economic development purposes. On the Ohio Supreme Court ruling in *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006), *see* Marshall T. Kizner, *State Constitutional Law—Economic Benefit Alone Does Not Constitute a Public Use for Eminent Domain Takings*, 38 RUTGERS L.J. 1379 (2007), cited in WILLIAMS, *supra* note 16, at 6 n.35. Meanwhile, the Oklahoma Supreme Court held in a 2006 ruling: "To the extent that our determination may be interpreted as inconsistent with the United States Supreme Court's holding in *Kelo v. City of New London*, today's pronouncement is reached on the basis of Oklahoma's own special constitutional eminent domain provisions, Art. 2, §§ 23 & 24 of the Oklahoma Constitution, which we conclude provide private property protection to Oklahoma citizens beyond that which is afforded them by the Fifth Amendment to the U.S. Constitution. In other words, we determine that our state constitutional eminent domain provisions place more stringent limitation on governmental eminent domain power than the limitations imposed by the Fifth Amendment of the U.S. Constitution." Bd. of County Comm'rs of Muskogee County v. Lowery, 136 P.3d 639, 651 (2006). The Institute for Justice also identifies a third state court decision that diverged from the United States Supreme Court's interpretation of the federal takings clause in *Kelo*: a South Dakota Supreme Court ruling in *Benson v. State*, 710 N.W.2d 131 (S.D. 2006). *See* INSTITUTE FOR JUSTICE, FIVE YEARS AFTER KELO: THE WEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS 5 n.5 (2010), *available at* http://www.ij.org/images/pdf_folder/private_property/kelo/kelo5year_ann-white_paper.pdf.

39. Elaine B. Sharp & Donald Haider-Markel, *At the Invitation of the Court: Eminent Domain Reform in State Legislatures in the Aftermath of the* Kelo *Decision*, 38 PUBLIUS 556, 559 (2008).

40. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2138-43 (2009).

41. *Id.* at 2143-48.

42. John Dinan, *State Constitutional Developments in 2009*, *in* 42 THE BOOK OF THE STATES 3, 5 (2010).

43. INSTITUTE FOR JUSTICE, *supra* note 38, at 2.

and South Carolina.[44] In Nevada, an eminent domain amendment was proposed via the initiative process and had to obtain voter approval in two successive elections (in 2006 and 2008), which is a unique requirement for approval of citizen-initiated amendments in that state.[45] Texas voters then approved a legislature-initiated amendment in 2009.[46] In several other states, substantive eminent domain amendments were proposed but rejected at the polls, mainly because they were combined with more aggressive restrictions on *regulatory* takings.[47]

In this instance, state constitutional amendment processes can be seen as more effective than alternative mechanisms for securing state interests in the face of federal inaction. In a number of states, judges displayed no inclination to interpret existing state constitutional provisions to achieve the broad protection for property-owners that the United States Supreme Court had failed to locate in the Federal Constitution. Moreover, to the extent that state judges might have been inclined to interpret their state bills of rights in such a fashion, the passivity of judicial institutions and particularly the requirement that judges await a live case or controversy before they can issue rulings, make it unlikely that such an outcome could be secured in a speedy fashion. As for state legislatures, they were capable of acting quickly to provide statutory relief, and many were willing to do so; but legislators were unable to provide the same level of enduring protection against future legislative interference as was possible through constitutional amendment processes.

2. Affirmative Action

Within several years of the first wide-scale adoption of affirmative action programs in the 1960s, opponents began working to eliminate them, primarily by filing state and federal lawsuits. In 1978 in *Regents of the University of California v. Bakke*,[48] the United States Supreme Court granted partial relief to affirmative-action opponents by barring public universities from reserving admission slots for minority applicants; however, the Court declined to bar all considerations of race in the admissions process and even set out examples of racial preferences that would pass constitutional muster.[49] The Court was no more

44. John Dinan, *State Constitutional Developments in 2006*, *in* 39 THE BOOK OF THE STATES 3, 6 (2007).

45. John Dinan, *State Constitutional Developments in 2007*, *in* 40 THE BOOK OF THE STATES 3, 7 (2008).

46. Dinan, *supra* note 42, at 5.

47. Dinan, *supra* note 44, at 6.

48. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

49. *Id.* at 316-18 (discussing the Harvard College admissions program).

prepared a quarter century later in the companion cases, *Grutter v. Bollinger*[50] and *Gratz v. Bollinger*,[51] to interpret the federal constitution as prohibiting all racial preferences in public college admissions, although a majority was prepared to prevent states from offering excessive preferences or relying on non-individualized processes for awarding preferences.[52] Aside from a U.S. Fifth Circuit Court of Appeals ruling invalidating racial preferences in public college admissions in Texas,[53] federal courts have been unwilling to bar affirmative action; rather, they have imposed a barrier to certain types of affirmative action programs and left states to decide whether to impose stricter limits.[54]

Even before the 2003 *Bollinger* decisions, affirmative-action opponents led by University of California Board of Regents member Ward Connerly and the American Civil Rights Institute (ACRI) were working at the state level to go further than the United States Supreme Court in limiting affirmative action, and these efforts accelerated in the rulings' aftermath.[55] It is significant that the ACRI and other affirmative-action opponents did not press their case in state courts, which might have been invited to interpret state bills of rights in a more expansive fashion than the United States Supreme Court was willing to interpret the federal equal protection clause. Presumably, opponents did not view state courts as inclined to sympathize with such arguments. Affirmative-action opponents' relative lack of success in pressing their case in state legislatures is also noteworthy. Opponents might have been expected to seek redress through passage of statutory limits on affirmative action beyond what the United States Supreme Court was willing to require. But this has not been the case. Florida is the only state where opponents enjoyed any significant success through the actions of elected officials, when, in 1999, Governor Jeb Bush issued executive orders limiting racial preferences in government hiring and college admissions, in part out of a desire to head off an ACRI effort to

50. Grutter v. Bollinger, 539 U.S. 306 (2003).
51. Gratz v. Bollinger, 539 U.S. 244 (2003).
52. *Id.* at 275.
53. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. at 306.
54. *See* Thomas M. Keck, Using Courts to Buttress Electoral/Legislative Campaigns: Cases from the Culture Wars 7-9 (Sept. 2-5, 2010) (unpublished manuscript, *available at* http://www.papers.ssrn.com/sol3/papers.cfm?abstractid=1643069).
55. John Dinan, *State Constitutional Developments in 2008*, *in* 41 THE BOOK OF THE STATES 3, 6 (2009).

place on the ballot an even more restrictive citizen-initiated amendment.[56]

Rather than seeking favorable state court rulings or legislative statutes, affirmative-action opponents have generally pressed their case and enjoyed their greatest success through state constitutional amendments, four of which were approved from 1996 to 2010.[57] In most cases affirmative-action opponents have relied on citizen-initiated amendments, as with amendments approved by voters in California in 1996, Michigan in 2006, and Nebraska in 2008, the same year that Colorado voters provided the lone rejection of such an amendment at the polls.[58] Additionally, Arizona voters in 2010 approved a legislature-referred amendment, the only legislature-referred amendment to ban affirmative action.[59]

As was the case with amendments passed in response to the Supreme Court's failure to ban eminent domain for economic development, state constitutional amendment processes can be viewed as more effective than other mechanisms by which opponents might have responded to the United States Supreme Court's failure to ban racial preferences. State courts have not generally shown an inclination to interpret state constitutional provisions as completely barring affirmative action programs. Additionally—and in this respect the affirmative action case differs from the eminent domain case—state legislatures were no more inclined to adopt statutory restrictions. Consequently, direct democratic institutions were the preferred means of securing affirmative-action restrictions, and given the resistance on the part of many legislators to these efforts, citizen-initiated amendments were the most effective means of not only securing adoption of these restrictions but also preserving them in the face of potential legislative opposition in future years.[60]

56. Terry M. Neal & David S. Broder, *Affirmative Action Tears at Florida G.O.P.*, WASH. POST, May 15, 1999, at A1 (discussing the effort by Connerly to qualify an amendment for the 2000 ballot); Editorial, *Affirmative Action in Florida*, N.Y. TIMES, Nov. 14, 1999 (discussing Gov. Bush's issuance of two executive orders as a means of heading off this amendment).

57. John Dinan, *State Constitutional Developments in 2010*, *in* 43 THE BOOK OF THE STATES 6 (forthcoming).

58. Dinan, *supra* note 42, at 5. In one instance, in Washington in 1998, affirmative-action opponents secured popular approval for a citizen-initiated *statute*. *Id.*

59. Initiative and Referendum Institute, *Arizona Steps Back from Affirmative Action*, 2 BALLOTWATCH 2 (2010), *available at* http://iandrinstitute.org/BW%202010-2%20Election%20Results%20(11-6).pdf.

60. For reasons why affirmative-action opponents have generally viewed direct democratic processes as more favorable to their cause than legislatures, *see* Jennifer L. Hochschild, *The Strange Career of Affirmative Action*, 59 OHIO ST. L.J. 997, 1014 (1998).

B. Congressional Inaction

State constitutional amendment processes can extend rights beyond minimum requirements set by the United States Supreme Court; they can also enact policies blocked by Congress or the President. Although state legislation is the dominant means of securing enactment of such policies,[61] two recent instances discussed below illustrate how policy proponents relied on state constitutional amendment processes to achieve their goals.

1. Minimum Wage

With passage of the Fair Labor Standards Act of 1938,[62] Congress established a federal minimum hourly wage, and subsequent Congresses have enacted increases periodically through the years, including a raise to $5.15 in 1997.[63] For nearly a decade after this 1997 increase, however, until 2007, when Congress approved a gradual increase to $7.25,[64] efforts to secure an increase stalled.[65] Supporters of an increase pursued various strategies to pressure Congress to act during this 1997-2007 period, but without success, leading them to try to enact state minimum-wage policies above the federal minimum.[66]

These state-level efforts led, in some cases, to enactment of legislative statutes boosting the minimum wage; but, where legislators opposed them, supporters turned to the citizen initiative process.[67] Some minimum-wage increases were secured through citizen-initiated statutes.[68] But in four states supporters relied on citizen-initiated constitutional amendments. Florida voters approved a minimum-wage amendment in 2004.[69] Nevada voters gave the requisite two approvals

61. Rabe, *supra* note 11, at 423-26.

62. Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219 (West 1994 & Supp. 2010).

63. Stephen Labaton, *Congress Passes Increase in the Minimum Wage*, N.Y. TIMES, May 25, 2007, at A12.

64. *Id.*

65. John Atlas & Peter Dreier, *Waging Victory: One Undernoted Factor in Tuesday's Results: Minimum Wage Initiatives That Swept to Overwhelming Victory in Six States*, THE AMERICAN PROSPECT, Nov. 10, 2006, http://www.prospect.org/cs/articles?article=waging_victory (last visited Oct. 23, 2011).

66. Dale Krane, *The Middle Tier in American Federalism: State Government Policy Activism During the Bush Presidency*, 37 PUBLIUS 453, 464 (2007).

67. Kathleen Ferraiolo, *State Policy Innovation and the Federalism Implications of Direct Democracy*, 38 PUBLIUS 488, 496-98 (2008).

68. Minimum-wage increases were secured through the statutory initiative process in Arizona, Missouri, and Montana in 2006. *State Constitutional Developments in 2006*, *supra* note 44, at 6.

69. Atlas & Dreier, *supra* note 65.

for a minimum-wage amendment in 2004 and 2006.[70] And 2006 brought the enactment of minimum-wage amendments in Colorado and Ohio.[71] The Florida and Nevada amendments mandated a minimum wage increase to $6.15, whereas the Colorado and Ohio amendments raised the minimum wage to $6.85; each of these amendments also required annual inflation-related adjustments to the minimum wage.[72]

In one sense, state amendments were, in this instance, an effective alternative and useful supplement to reliance on intergovernmental lobbying. Upon encountering congressional resistance to a federal minimum-wage increase in the early 2000s, supporters turned to the state level, with the hope that passage of state measures would demonstrate their widespread popularity and bring added pressure to bear on Congress.[73] In fact, by placing minimum-wage increases on the ballot and timing them to appear alongside of elections for the U.S. House and Senate, supporters were seeking not only to bring indirect influence on Congress but also to secure election of Democratic congressmembers who would be more supportive of a federal minimum-wage increase.[74] The intent was to raise the profile of the minimum-wage issue in a way that worked to the advantage of Democratic congressional candidates and also boost the turnout of individuals who would not otherwise have voted in these elections and were more likely to support Democratic congressional candidates.[75]

In another sense, state constitutional amendments were an effective alternative to reliance on state statutes. Some state legislatures were willing to expand the minimum wage beyond the federal level, and so there was no reason for supporters to prefer constitutional amendments to legislative statutes for securing a minimum-wage increase in these states. Moreover, where legislatures were not supportive, citizen-initiated statutes could be relied on to secure these policies, as occurred in several states. In some states, however, supporters sought to insulate minimum-wage increases from the possibility of future legislative reversal, and they viewed constitutional amendments as more effective than statutes in this regard.

70. Dinan, *supra* note 44, at 6.
71. *Id.*
72. Atlas & Dreier, *supra* note 65.
73. Ferraiolo, *supra* note 67, at 496-98.
74. *Id.*
75. *Id.*

2. Stem Cell Research

Scientific advances in the late-20th century leading to the possibility of embryonic stem cell research prompted vigorous debate about whether to support this research with public funds. Beginning in 1997, with the passage and annual renewal of the Dickey Amendment,[76] Congress barred the use of federal funds for creation of embryonic stem cells for research purposes as well as the use of federal funds for any research involving the destruction of embryos.[77] President George W. Bush then issued a directive in 2001[78] that for the first time permitted federal funding for embryonic stem cell research but limited such research to stem cell lines in existence at that time,[79] and in 2006 and 2007 he vetoed congressional efforts to overturn these limits.[80] This policy stood until March 2009, when President Barack Obama issued an executive order rescinding President Bush's directive.[81]

In the face of these limits on federal funding for embryonic stem cell research, supporters turned to the state level. At times, supporters worked through state legislative processes, as when the New Jersey legislature in 2004 passed statutes explicitly authorizing embryonic stem cell research, creating an embryonic stem cell research center, and appropriating $10 million in state funding for such research.[82] But in other states, legislators were unsupportive. Some of these state legislatures rejected proposals to explicitly authorize embryonic stem cell research.[83] Other state legislatures enacted or considered enacting measures banning such research.[84] Still other state legislatures rejected

76. The original amendment was included in the Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, 110 Stat. 26 (1996).

77. Judith A. Johnson & Erin D. Williams, *Stem Cell Research: State Initiatives*, CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS, May 19, 2006, at 1, *available at* http://www.stemcells.nih.gov/staticresources/research/GW-State-Funding.pdf.

78. Address to Nation on Stem Cell Research from Crawford, Texas, 37 WEEKLY COMP. PRES. DOC. 1149, 1151 (Aug. 9, 2001).

79. *Id.*

80. *See* Sheryl Gay Stolberg, *Bush Again Vetoes Bill on Stem Cell Research*, N.Y. TIMES, June 20, 2007, *available at* http://www.nytimes.com/2007/06/20/washington/20cnd-stem.html. During this time, President Bush also issued an executive order in June 2007 codifying his 2001 directive. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 22, 2007).

81. Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (March 9, 2009).

82. *See* Christine Vestal, *Embryonic Stem Cell Research Divides States*, STATELINE, June 21, 2007, http://www.stateline.org/live/details/story?contentId=218416 (discussing the appropriation of state funds) (last visited Oct. 23, 2011); Johnson & Williams, *supra* note 77, at 6 (discussing authorization of stem cell research and creating a stem cell research center).

83. *See, e.g.*, Johnson & Williams, *supra* note 77, at 4 (discussing Illinois).

84. *See, e.g.*, *id.* at 5 (discussing Missouri).

proposals to appropriate funds for such research.[85] In response to this lack of support from some state legislators, proponents of embryonic stem cell research turned occasionally to the citizen initiative process and specifically citizen-initiated amendments.[86]

As in so many other areas, California was the first state to act, when voters in 2004 approved a citizen-initiated amendment.[87] California legislators had enacted a 2002 statute explicitly authorizing embryonic stem cell research but were unwilling to appropriate state funds for this research. In response to the inability to secure funding through Congress or the state legislature, supporters in California initiated and obtained voter approval for a state constitutional amendment in 2004 establishing an embryonic stem cell research institute, the California Institute for Regenerative Medicine, and recognizing a right to conduct stem cell research.[88]

Voters in Missouri in 2006[89] and Michigan in 2008[90] also approved citizen-initiated amendments regarding embryonic stem cell research. These amendments differed from the California amendment in that they did not appropriate state funding for such research. Rather, they authorized such research in the face of legislative resistance, given that the Michigan legislature enacted a statutory ban in 1998 and efforts were under way in the Missouri legislature to impose a ban.[91]

Although the Missouri and Michigan amendments were directed at state legislators and not apparently motivated by congressional inaction, the California amendment was a clear response to the lack of federal funding.[92] Dissatisfied with Congress's failure to authorize federal funding and unable to secure funding through some state legislatures, supporters were able to secure funding through the citizen-initiated state constitutional amendment process and thereby ensure the continuation of funding in the event of an unsupportive state legislature in the future.

II. RESPONSES TO FEDERAL ACTION

Reliance on state constitutional amendment processes to secure rights or policies in excess of federal requirements has attracted only occasional scholarly notice. Even less attention has been given to

85. *See, e.g.*, *id.* at 4 (discussing a funding proposal that died in the Maryland legislature in 2005, only to be approved the next year).

86. Ferraiolo, *supra* note 67, at 504-06.

87. *Id*. at 504.

88. CAL. CONST., art. XXXV; *see also*, Johnson & Williams, *supra* note 77, at 2-3; Vestal, *supra* note 82.

89. *State Constitutional Developments in 2006*, *supra* note 44, at 7.

90. *State Constitutional Developments in 2008*, *supra* note 55, at 10.

91. Vestal, *supra* note 82.

92. Ferraiolo, *supra* note 67, at 504-05.

amendments that have been proposed and occasionally enacted to secure the repeal or modification of federal mandates. Yet, on several recent occasions state constitutional amendment processes have become a vehicle for seeking the reversal of United States Supreme Court rulings and trying to repeal or limit the reach of congressional statutes.

A. Supreme Court Rulings: Abortion

Several strategies have been employed for responding to United States Supreme Court rulings that limit state policy discretion. Sometimes state officials have lobbied Congress to propose federal constitutional amendments to overturn the decisions and return control over the affected policy to the states. This approach was pursued, albeit without success, in response to Supreme Court decisions limiting state discretion regarding redistricting[93] and school prayer[94] in the 1960s.

Short of trying to overturn Supreme Court decisions through the federal amendment process, states have resorted to persuading the Supreme Court to reverse its decisions, whether by filing amicus briefs in cases that might present an opportunity for a reversal of precedent or generating lawsuits designed to present the Court with an opportunity to reverse a precedent. Outright reversals, though infrequent, have occurred in recent years, as in 1991 in *Payne v. Tennessee*[95] when the Court reversed recent precedents from 1987 and 1989 and permitted state prosecutors to introduce victim-impact statements in death-penalty cases.[96] Even when the Court does not actually reverse its precedents, it can signal a change in approach and in such a way as to provide more

93. The United States Supreme Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), prompted the Council on State Governments to urge state legislatures to petition Congress to call a constitutional convention to consider three federal constitutional amendments, including one to remove reapportionment cases from the Court's jurisdiction. Although support for the reapportionment amendment petition fell far short of the two-thirds of states necessary to force a convention and appeared to have stalled by 1963, the Court's subsequent decisions in Wesberry v. Sanders, 376 U.S. 1 (1964), and Reynolds v. Sims, 377 U.S. 533 (1964), led Senator Everett Dirksen (R-IL) to introduce an amendment to permit states to deviate from a one-person/one-vote standards in apportioning one house of their legislature. But this amendment failed to secure the requisite two-thirds vote in the Senate in 1965 and 1966. *See* DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 371-379 (1996).

94. Numerous federal constitutional amendments were introduced in Congress to permit prayer in public schools in response to United States Supreme Court decisions in Engel v. Vitale, 370 U.S. 421 (1962), and School District of Abington Township v. Schempp, 374 U.S. 203 (1963). However none of these amendments came close to securing the requisite two-thirds vote in the House or Senate during the next decade. KYVIG, *supra* note 93, at 381-85.

95. Payne v. Tenn., 501 U.S. 808 (1991).

96. The Court overturned rulings to the contrary in Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989).

policy discretion to states than they were previously thought to enjoy, as when various religious establishment rulings in the last several decades upheld state discretion to adopt policies such as school vouchers.[97]

Abortion is the most prominent policy area where states have generated cases presenting the Court with an opportunity to relax earlier precedents in order to return some discretion to state elected officials. *Roe v. Wade*[98] and *Doe v. Bolton* [99] in 1973 prevented states from outlawing abortions prior to fetal viability and contained some guidance as to what sorts of restrictions states could impose pre-viability but left for further determination specific questions as to which particular restrictions states could adopt.[100] Acting primarily through state legislative processes, states have enacted numerous statutes designed to test the boundaries of and present the Justices with opportunities to reconsider the *Roe* limitations, and with some success in prodding the Court to restore some discretion to state officials.[101] After various periods of uncertainty about whether Court doctrine would permit states to enact informed-consent provisions and waiting-period requirements, among other restrictions, the Court has over time, and generally as a result of personnel changes, made clear that states can enact each of these restrictions, as long as they do not unduly burden the ability to obtain an abortion prior to fetal viability or post-viability where the woman's health or life is at risk.[102]

97. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

98. Roe v. Wade, 410 U.S. 113 (1973).

99. Doe v. Bolton, 410 U.S. 179 (1973).

100. *Roe*, 410 U.S. at 164-165 (setting out general areas in which states retained the ability to regulate abortion).

101. For an example of a 1986 Missouri statute that "took aim at *Roe v. Wade*" and was "designed to give the Court an opportunity to revisit *Roe*" and was upheld by the United States Supreme Court in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), *see* NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE 65 (1996).

102. Regarding informed-consent provisions, the Supreme Court in Akron v. Akron Ctr. for Reproductive Health, Inc. (Akron I), 462 U.S. 416 (1983) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), invalidated state informed consent provisions; but in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), the Court upheld such provisions, arguing that "[t]o the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled." *Casey*, 505 U.S. at 882. Regarding waiting-period requirements, the Court in *Akron I* had invalidated such a provision; but in *Casey*, the Court upheld such a provision, arguing: "Our analysis of Pennsylvania's 24-hour waiting period between the provision of the information deemed necessary to informed consent and the performance of an abortion under the undue burden standard requires us to reconsider the premise behind the decision in *Akron I* invalidating a parallel requirement." *Id.* at 885.

In recent years, some states have gone even further in enacting measures intended to press the Court to reconsider its earlier decisions, sometimes through passage of state statutes but also through proposed state constitutional amendments. States have pressed the Court to reconsider two fundamental aspects of its abortion doctrine. First, some states have enacted statutes prohibiting abortions prior to the point of fetal viability, as a way of generating a case that would present the Court with an opportunity to alter this aspect of its current doctrine. This is the intent of a 2010 Nebraska law that prohibits abortions after twenty weeks, a date chosen not on the basis of fetal viability but pegged to the apparent onset of fetal pain.[103]

Second, abortion opponents have relied on citizen-initiated constitutional amendments to try to enact measures challenging the fundamental holding in *Roe* that pre-viability fetuses are not persons entitled to protection under the Fourteenth Amendment.[104] Abortion opponents in Colorado qualified "personhood" amendments for the ballot in 2008 and then again in 2010, but Colorado voters rejected both measures by large margins.[105] Abortion opponents have also qualified a personhood amendment for the 2011 Mississippi ballot.[106]

Leaving aside the question of whether these recent challenges to Supreme Court limitations on state abortion policy have any prospects for success in persuading the Court to reverse its precedents—and this would likely require additional retirements and subsequent appointments to produce a majority that might be open to such a reconsideration—the point for present purposes is that framing these measures as state constitutional amendments does not hold any advantages in comparison with enacting them as state statutes. Although supporters of personhood amendments are presumably motivated by a belief that constitutional amendments lend more legitimacy to such measures than if they were enacted as statutes, the Supreme Court in considering conflicts between federal and state law gives no more weight to state constitutional

103. *See* John Leland, *Aborton Foes Advance Cause at State Level*, N.Y. TIMES, June 2, 2010, at A18, *available at* http://www.nytimes.com/2010/06/03/health/policy/03abortion.html; Robert Barnes, *Tests of "Roe" More Frequent Since Justices Upheld Late-term Abortion Ban in 2007*, WASH. POST, Dec. 28, 2010, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122703379.html.

104. Nicholas Riccardi, *Foes of Abortion Shift to States*, L.A. TIMES, Nov. 23, 2007, at A1, *available at* http://articles.latimes.com/2007/nov/23/nation/na-egg23.

105. On the 2008 measure, *see* Dinan, *supra* note 55, at 6. On the 2010 measure, *see* Electa Draper, *"Personhood" Amendment Fails by 3-1 Margin*, DENVER POST, Nov. 3, 2010, *available at* http://www.denverpost.com/headlines/ci_16506253.

106. Laura Bauer McClatchy, *New Anti-abortion Tactic: Redefine "Personhood"*, ST. PAUL PIONEER PRESS, April 10, 2010, at A3.

amendments than to state statutes.[107] In this case, therefore, state constitutional amendment processes are an alternative to relying on state legislatures; but state amendments are no more effective than state statutes in generating Supreme Court cases that might revisit judicially imposed limits on state discretion.

B. Congressional Statutes

State policy discretion can be constrained by Supreme Court decisions; it can also be limited by congressional statutes perceived as extending beyond the federal government's legitimate powers or encroaching on state authority. In seeking the repeal or modification of these sorts of congressional statutes, states have at their disposal an array of mechanisms. They can lobby Congress to repeal the offending act. They can file federal lawsuits challenging its legitimacy. They can also enact state statutes intended to present the Supreme Court with a suitable opportunity to invalidate or narrowly construe the congressional act. State constitutional amendment processes have recently provided an additional means of responding to congressional acts regarding medical marijuana, health care, and union organizing, although it is not evident in most cases that these amendments are any more effective than reliance on state statutes for this purpose.

1. Medical Marijuana

The Controlled Substances Act of 1970 ("CSA")[108] classifies marijuana as a Schedule I drug, making its cultivation, distribution, or possession a federal crime unless an exception is specifically authorized; no statutory exception is authorized for medicinal use of marijuana. However, states retain discretion as to whether or not to impose state criminal penalties regarding marijuana, and between 1996 and 2010, fifteen states expressed their opposition to the federal law by removing state criminal penalties associated with medicinal marijuana.[109]

Thirteen states adopted these measures on a statutory basis, including California, the first state to adopt such a measure in 1996.[110] In

107. Williams, *supra* note 16, at 99 ("When the United States Supreme Court evaluates the constitutionality of a state constitutional provision, it does not seem to differentiate between state constitutions and statutes.").

108. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236.

109. These state laws and their dates of enactment can be found at Medical Marijuana Procon.org, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last visited Dec. 28, 2010). On the motivation for the passage of these measures, *see* Ferraiolo, *supra* note 67, at 502-04.

110. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 2010).

language similar to measures passed in other states, the California Compassionate Use Act[111] declares that part of its purpose is "to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes"[112] and "encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana."[113]

Of interest for present purposes is that two of these fifteen states relied on constitutional amendment processes to adopt medical marijuana legalization measures. In both cases these amendments were adopted through the citizen-initiative process. Nevada voters gave the requisite two approvals to a citizen-initiated amendment in 1998 and 2000.[114] Colorado voters approved an initiated amendment in 2000.[115]

In the early 2000s, once a number of states had passed measures removing state criminal penalties for medical marijuana, supporters began working to insulate residents of these states from federal prosecution. Federal lawsuits to achieve this goal proved unsuccessful, when the United States Supreme Court in 2005 in *Gonzales v. Raich*[116] upheld federal power to enforce the CSA regarding individual cultivation of medical marijuana. However, Barack Obama's election as president in 2008 led to a change in the Justice Department's approach to enforcing the CSA such that citizens acting pursuant to state medicinal marijuana legalization measures are no longer subject to federal prosecution. Attorney General Eric Holder announced in October 2009 that "it will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana."[117]

Although fifteen states have therefore been effective in insulating their residents from prosecution for use of medical marijuana in the face of a contrary congressional statute, the constitutional amendments adopted in Nevada and Colorado were no more effective than the statutes adopted in the other thirteen states for achieving this goal. State constitutional amendments were an alternative mechanism used in these two states; but the constitutional status of these two measures rendered them no more or less effective than statutes in securing effective immunity for state residents, whether for purpose of the unsuccessful

111. *Id*.
112. CAL HEALTH & SAFETY CODE ANN. § 11362.5(b)(1)(A) (West 2010).
113. CAL HEALTH & SAFETY CODE ANN. § 11362.5(b)(1)(C) (West 2010).
114. Medical Marijuana Procon.org, *supra* note 109.
115. *Id.*
116. Gonzales v. Raich, 545 U.S. 1 (2005).
117. Carrie Johnson, *U.S. Eases Stance on Medical Marijuana*, WASH. POST, Oct. 20, 2009, at A1, *available at* http://www.washingtonpost.com/wp/dyn/content/article/2009/10/19/AR2009101903638.html.

federal lawsuit or from the vantage point of the Attorney General directive that effectively acceded to these state policies.

2. Health Care

Congress, on March 21, 2010, approved and President Obama, on March 23, 2010, signed into law the Patient Protection and Affordable Care Act of 2010 ("PPACA"),[118] which includes a provision scheduled to take effect in 2014 mandating that individuals purchase health insurance or incur a financial penalty. The health-insurance mandate generated substantial debate in the months preceding passage of the law, with critics arguing that it exceeded the legitimate reach of federal power. In the view of the critics, because states possess plenary power, they are free to adopt an individual mandate, as Massachusetts did as part of a 2006 state health-care overhaul; but the federal government possesses enumerated powers and Congress is thought to lack the power to impose such a mandate.[119] A July 2009 Congressional Research Service Report concluded that "[w]hether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or a service."[120]

In response to the debate about and passage of the PPACA, five state legislatures (Idaho, Virginia, Utah, Georgia, and Louisiana) adopted "health freedom" statutes declaring that state residents are not required to purchase health insurance; another state legislature (Missouri) approved a health freedom statute that was referred to and approved by voters in August 2010; and two state legislatures (Arizona and Oklahoma) proposed constitutional amendments that were approved by voters in November 2010.[121] Arizona voters first considered passing a health

118. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

119. *See, e.g.*, RANDY BARNETT, NATHANIEL STEWART & TODD GAZIANO, *Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional*, (Heritage Found., Wash., D.C.) (2009), *available at* http://www.heritage.org/ research/ reports/2009/12/why-the-personal-mandate-to-buy-health-insurance-is-unprece-dented-and-unconstitutional.

120. JENNIFER STAMAN & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40725, REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS, 3 (July 24, 2009), *available at* http://assets.opencrs.com/rpts/R407245_20090724.pdf.

121. Richard Cauchi, *State Legislation Challenging Certain Health Reforms, 2010-11*, NAT'L CONF. OF STATE LEG., http://www.ncsl.org/default.aspx?tabid=18906 (last visited Dec. 28, 2010). The Florida Legislature also approved a constitutional amendment for placement on the November 2010 ballot, but the Florida Supreme Court in July 2010 ordered the Florida measure to be removed from the ballot on account of what was deemed a misleading ballot summary. *Id.* Additionally, supporters of a health

freedom amendment back in November 2008, when they narrowly rejected a citizen-initiated amendment that would have prohibited any individual from being required to purchase health instance.[122] At the time, supporters of the Arizona amendment were seeking primarily to prevent the state legislature from imposing a health-insurance mandate of the type adopted by Massachusetts in 2006. However, supporters of health freedom acts in 2009 and 2010, with assistance from the American Legislative Exchange Council (ALEC), were primarily concerned with combating a federal mandate of the sort included in the PPACA.[123]

While state legislatures have been enacting these statutes and placing these amendments on the ballot, state attorneys general have filed two federal lawsuits challenging the constitutionality of the individual mandate. Within days of the passage of the PPACA, Virginia Attorney General Ken Cuccinelli filed suit in the U.S. District Court for the Eastern District of Virginia[124] and Florida Attorney General Bill McCollum filed suit in the U.S. District Court for the Northern District of Florida.[125] The multi-state suit brought by Florida (and since joined by twenty-five other states[126]) contains additional arguments rooted in a concern with PPACA mandates regarding state participation in the Medicaid program; however, both lawsuits seek to enjoin enforcement of the PPACA on the grounds that the individual mandate exceeds the reach of congressional power.

These federal lawsuits, with the aid of state measures that conflict with the federal law, are intended to present the Supreme Court with what the Congressional Research Service termed a "novel issue" in regard to the reach of federal power, and thereby press the Court to provide clarity regarding the degree to which the current Justices are inclined to emphasize the limited application of the commerce power in 1995 in *United States v. Lopez*[127] and in 2000 in *United States v.*

freedom measure in Colorado relied on the citizen-initiated constitutional amendment process to qualify an amendment for the November 2010 ballot, but it was defeated by voters. *Id.*

122. Dinan, *supra* note 55, at 10.

123. On the pending congressional health care legislation serving as the motivation behind the Arizona Legislature's approval of this amendment, *see Q&A with Rep. Nancy Barto*, INSIDE ALEC (Am. Leg. Exch. Council, Wash., D.C.), July 2009, at 3, *available at* http://www.alec.org/am/pdf/Inside_July09.pdf.

124. *See* Complaint, Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va.2010) (No. 3:10-CV-188).

125. *See* Complaint, Florida v. U.S. Dep't of Health & Human Services, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. 2011) (No. 3:10-CV-91).

126. Janet Zink, *Florida's Lawsuit over Health Care Law Swells to 26 States*, ST. PETERSBURG TIMES, Jan. 18, 2011, *available at* http://www.tampabay.com/news/politics/national/six-more-states-join-floridas-lawsuit-over-health-care-law/1146132.

127. United States v. Lopez, 514 U.S. 549 (1995).

Morrison[128] versus more expansive application of the commerce power. In invalidating the Gun Free School Zones Act of 1990 in *Lopez* and the civil remedy provision of the Violence Against Women Act of 1994 in *Morrison*, the Court read the commerce power as meaning something other than a general police power and as imposing some limits on the activities that Congress can regulate.[129] In upholding federal power to prohibit personal cultivation of medical marijuana in *Raich*, the Court, although not retreating from any doctrinal pronouncements in *Lopez* and *Morrison*, nevertheless signaled a more limited judicial role in policing these boundaries of the commerce power.[130] The Court has not taken the opportunity in the half-decade since *Raich*, during which time four new Justices have joined the bench, to decide another notable commerce clause case and thus to indicate whether the current Justices are prepared to impose meaningful limits on congressional power pursuant to that power.[131] State health freedom acts are intended in part to aid state attorneys general in presenting the Court with an opportunity to render such a decision.

Although a lawsuit presenting a challenge to the constitutionality of the PPACA could be filed even in the absence of these state measures, the purpose of these state acts, which by themselves are preempted by the PPACA and therefore have no independent meaningful effect, is to increase the likelihood that the Court will deem such a challenge justiciable prior to 2014 when the mandate takes effect and an individual

128. United States v. Morrison, 529 U.S. 598 (2000).

129. In *Lopez*, the Court concluded that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do." *Lopez*, 514 U.S. at 567 (internal citations omitted). In *Morrison*, the Court concluded, "[w]e accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617-18 (internal citations omitted).

130. In *Raich*, the Court concluded , "[i]n assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." Gonzales v. Raich, 545 U.S. 1, 22 (2005) (citations omitted).

131. The closest that the Court came to signaling its current position in regard to the reach of federal power came in United States v. Comstock, 130 S. Ct. 1949 (2010), where a majority relied on an expansive interpretation of the Necessary and Proper Clause.

can gain standing to sue.[132] Thus, the Virginia Attorney General complaint explains: "Although the federal mandate does not take effect for several years, ACA imposes immediate and continuing burdens on Virginia and its citizens. The collision between the state and federal schemes also creates an immediate, actual controversy involving antagonistic assertions of right."[133] In refusing to dismiss the Virginia lawsuit in the first meaningful ruling in one of these federal court proceedings, U.S. District Judge Henry Hudson on August 2, 2010 noted that passage of a state measure that conflicted with the PPACA was crucial to his determination that the lawsuit was justiciable.[134] Judge Hudson then issued a December 13, 2010 ruling siding with the Virginia Attorney General in his central complaint.[135] Additionally, in siding with the contention of the Florida Attorney General and 25 other states that the individual mandate exceeds the reach of congressional power, U.S. District Judge Roger Vinson relied on the presence of similar state statutes in Idaho and Utah in determining that at least these two plaintiff states had standing to sue.[136]

Reliance on state amendment processes for challenging the PPACA can be understood, therefore, as a means of supplementing state-filed federal lawsuits and as an alternative to passage of state statutes for this purpose. As with state medical marijuana measures, however, there is no reason why state constitutional amendments are any more effective than state statutes in generating a justiciable case that would give the Court an opportunity to invalidate the individual health-insurance mandate, leaving aside for present purposes the prospects of the Court actually taking advantage of the opportunity.

132. For an argument to this effect by an Alabama state senator defending the Alabama Senate's passage of a health freedom act, *see* David White, *Alabama Senate Passes Health Care Opt-out Bill*, BIRMINGHAM NEWS, April 1, 2010, *available at* http://blog.al.com/spotnews/2010/04/senate_passes_health_care_opt-.html. According to the news account, although "opponents said the bill was a waste of time, since by long legal precedent, state constitutions or other state laws cannot overrule, or trump, federal laws such as the health care law," state senator Scott Beason "said his bill or a similar bill from another state could serve as a vehicle for a court challenge claiming the health care law violated the U.S. constitution's Tenth amendment." *Id.*

133. Complaint at 2, Virginia v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (No. 3:10-CV-188).

134. Virginia *ex. rel*. v. Sebelius, 728 F. Supp. 2d 598 (E.D. Va. 2010) (order denying motion to dismiss).

135. *Sebelius*, 728 F.Supp.2d at 768.

136. Judge Vinson noted that "[t]he States of Idaho and Utah . . . have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors." Florida v. U.S. Dep't of Health & Human Services, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *36 (N.D. Fla. 2011).

3. Union Organizing

One of the leading items on the agenda of the 111th Congress was consideration of a proposed Employee Free Choice Act ("EFCA"),[137] which among other things would limit the use of secret balloting in union-organizing campaigns and rely more heavily on a "card-check" procedure for determining union representation.[138] The proposed bill attracted substantial support in 2009, particularly in the Democratic caucus, but also generated significant opposition in and out of Congress, including from critics who organized a Save Our Secret Ballot (SOSB) coalition.[139]

One way that the critics worked to oppose a federal card-check provision is by proposing state constitutional amendments to guarantee the right to a secret ballot in elections not only for political office but also for union representation. Legislatures in Arizona, South Carolina, South Dakota, and Utah approved constitutional amendments for placement on the November 2010 ballot and voters approved all four of them.[140] The South Dakota amendment is typical in that it stipulates: "The right of individuals to vote by secret ballot is fundamental. If any state or federal law requires or permits an election for public office, for any initiative or referendum, or for any designation or authorization of employee representation, the right of any individual to vote by secret ballot shall be guaranteed."[141]

In one sense, these amendments were intended to supplement intergovernmental lobbying against the proposed federal statute, by highlighting an unpopular aspect of the bill and aligning opponents with the popular position of supporting the secret ballot.[142] However, to the extent that this is the intent of these state measures, there is no reason

137. The House bill was The Employee Free Choice Act of 2009, H.R. 1409, 111th Cong. (2009). The Senate bill was The Employee Free Choice Act of 2009, S. 560, 111th Cong. (2009).

138. Gail Russell Chaddock, *Controversial "Card Check" Bill Back for Fourth Time*, CHRISTIAN SCIENCE MONITOR, March 12, 2009, at 25, *available at* http://www.csmonitor.com/USA/Politics/2009/0311/controversial-card-check-bill-back-for-fourth-time.

139. Marie Price, *Former Oklahoma U.S. Rep. Istook Leads Movement Calling for Preservation of Secret Ballot*, J. RECORD (Oklahoma City, Okla.), Jan. 22, 2009.

140. Steven Greenhouse, *U.S. Plans to Sue 4 States over Laws Requiring Secret Ballots for Unionizing*, N.Y. TIMES, Jan. 14, 2011, at B4, *available at* http://www.nytimes.com/2011/01/15/business/economy/15labor.html.

141. S.D. CONST., art. VI, § 28.

142. David A. Lieb, *Proposal Requires Secret Ballots for Elections*, KANSAS CITY STAR, Dec. 29, 2008, *available at* http://www.ksl.com/?nid=148&sid=5183979 (quoting a critic of a proposed state constitutional amendment, Josh Goldstein, as claiming that amendment supporters are "using this messaging point on the secret ballot to demonize the legislation").

why reliance on state constitutional amendments is any more effective—though it is no less effective—than reliance on state statutes.

In another sense, secret-ballot amendment supporters view these measures as similar to eminent domain amendments in providing greater protection for rights than is guaranteed in the federal constitution.[143] To the extent that the EFCA would have been approved and would have contained an explicit preemption clause, it would seemingly override contrary state measures, regardless of whether they are framed as constitutional amendments or statutes. However, to the extent that the EFCA would have been approved without an explicit preemption clause, then it is less certain that the federal statute would necessarily override state provisions providing greater protection for the right to a secret ballot than is guaranteed in federal law. According to this line of reasoning, secret-ballot amendments might be viewed as extending current federal guarantees by safeguarding the right to a secret ballot not only in voting for political offices but also in regard to union organizing campaigns. To the extent that these state measures might be challenged as inconsistent with federal law, therefore, defenders claim that they should be sustained on the ground that they are providing heightened protection for individual rights.[144] Even so, and leaving aside for present purposes the persuasiveness of such an argument, the crucial point for purposes of this analysis is that state constitutional amendments are no more effective than state statutes for achieving this purpose.

III. CONCLUSION

My primary purpose has been to call attention to the increasing reliance on state constitutional amendment processes for responding to federal action or inaction. Reliance on state constitutional amendments for this purpose is not unprecedented. Most notably, in the 1870s congressional failure to approve a federal constitutional amendment prohibiting public aid to religious schools led to the passage of numerous

143. *See, e.g.* Howard Fischer, *Ballot Measure Could Thwart U.S. "Card-check" Law: Legislature Takes Aim at Union Organizing*, ARIZONA DAILY STAR, Aug. 9, 2010, *available at* http://www.azstarnet.com/business/local/ article_e6f3dfe1_9b49-5626-856c-c16923ade1ac.html (noting that Goldwater Institute attorney Clint Bolick, the instigator of these secret-ballot amendments, explained the motivation behind these amendments by saying that "it could be argued states are entitled to provide a protected First Amendment right for their residents above and beyond federal law").

144. *Id.* In January 2011 the National Labor Relations Board signaled its intent to sue the four states that enacted secret ballot amendments in 2010, on the ground that these amendments contain provisions that are inconsistent with and preempted by current federal law, leading several of the state attorneys general to promise to mount a vigorous defense of the state measures. Greenhouse, *supra* note 140.

state constitutional Blaine Amendments imposing such bans.[145] Assorted other state amendments of this sort have been enacted through the years, including state equal rights amendments enacted in the 1970s when a federal equal rights amendment was under consideration and eventually rejected.[146] However, if state constitutional amendment processes have occasionally been proposed in response to federal developments in previous years, they have not previously been relied on in such a wide range of areas and such a sustained fashion as in the early twenty-first century.

Along with calling attention to this recent development, I have sought to assess the conditions under which state constitutional amendment processes can be effective in advancing state interests in the American federal system, especially in comparison with traditional mechanisms, including intergovernmental lobbying, federal lawsuits, state statutes, non-participation in federal programs, and state court rulings.

As it turns out, state constitutional amendment processes can serve in some instances as an effective supplement to intergovernmental lobbying and federal lawsuits, although it is important to note that relying on state amendments is no more effective in this regard than relying on state statutes. Thus, state constitutional amendments can be useful, alongside of lobbying, for highlighting or framing public support for certain policies so as to pressure congress to enact or reject federal statutes, as with state efforts to increase the federal minimum wage, stop federal enforcement of marijuana laws for medicinal use, and defeat federal union-organizing legislation. State constitutional amendments can also assist in the filing of federal lawsuits by creating conflicts between state and federal law and thereby generating justiciable cases that present the United States Supreme Court with opportunities for reversing precedents or invalidating federal statutes. This is seen most notably with proposed amendments challenging abortion precedents as well as amendments challenging federal health care legislation. In each of these cases, it should be stressed, state constitutional amendments are no more effective than state statutes in supplementing lobbying efforts and federal lawsuits; but they are no less effective than passage of state statutes, and therefore enactment of state amendments can be considered a viable alternative to passage of such statutes.

In other instances, state constitutional amendments can be deemed more effective than state court decisions or state statutes in advancing state interests, especially when state judges and state legislators are

145. *See* Dinan, *supra* note 23, at 235.
146. *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 47 (1998).

disinclined to support certain policies or are outright hostile to them. This is seen most clearly with efforts to limit eminent domain and ban affirmative action in the face of United States Supreme Court inaction. This is also evident in recent efforts to increase the minimum wage and fund embryonic stem cell research in the face of congressional inaction. State courts could well have interpreted existing state constitutional provisions in an expansive fashion to limit eminent domain and eliminate racial preferences; but they were generally disinclined to do so. Meanwhile, state legislatures might well have passed statutes limiting eminent domain, eliminating racial preferences, increasing the minimum wage, and funding stem cell research, and some state legislatures did so. But many other state legislatures were disinclined to pass such statutes, and moreover, there was no guarantee against future legislatures interfering with statutes that were passed, thereby leading supporters to turn to state constitutional amendment processes to secure more permanence for these rights and policies. These are situations where state constitutional amendment processes can be seen as more effective than other mechanisms for advancing state interests in the federal system.