Bringing Context To Legal Battles over Trans Rights – A Reply To Professor Yeargain

JONATHAN L. MARSHFIELD*

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I. INTRODUCTION

Popular and academic discourse about American public law is all too often oversimplified and reductionist. For example, many commentators and scholars view American constitutional law as mostly about the United States Constitution and how the United States Supreme Court interprets it.[1] The reality, however, is much more complex across a variety of dimensions. American constitutionalism is a nuanced, interconnected web of different texts, actors and institutions, nodes of political power, and communities of interest. One neglected dimension in the study of American constitutional law is the complex interaction between state and federal constitutional law in the protection and development of constitutional rights.

In *Litigating Trans Rights in the States*, Professor Yeargain provides an important and nuanced take on how and why trans rights advocates should take a more holistic approach to American public law.[2] Specifically, Professor Yeargain argues that trans rights advocates should pursue their claims under state constitutions while also making claims under the federal constitution.[3] I see three core arguments in Professor Yeargain's article in support of this claim. First, they argue that even when the Supreme Court finds an applicable federal constitutional right, state constitutional rights can augment the federal right in important ways and provide a failsafe against Supreme Court backtracking.[4]

* Associate Professor of Law, University of Florida Levin College of Law.

[1] *See generally, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

[2] *See generally* Quinn Yeargain, *Litigating Trans Rights in the States*, 85 OHIO ST. L. J. (forthcoming 2024).

[3] *See id.* at 6.

[4] *See id.* at 10–14.

Second, state constitutions often provide stronger arguments for expanding equality and privacy protections because they can include more detailed text, have more modern and relevant origin stories, and be applied by courts using more progressive forms of judicial review.[5] Third, as public opinion evolves regarding trans rights, state constitutions offer more accessible amendment procedures that allow for codification of trans rights by popular majorities in individual states.[6]

In making these arguments, Professor Yeargain carefully traces how state and federal rights have interacted during the twentieth and twenty-first centuries in the areas of abortion and gays rights.[7] They draw important lessons from these histories. In the abortion context, for example, Professor Yeargain shows that even under *Roe v. Wade*, state constitutional rights augmented the more general federal right with various detailed expansions and updates to abortion protections.[8] And, of course, after *Dobbs*, these state constitutional rights now provide the principal source of protection.[9] In the gay rights context, Professor Yeargain tells a more complex and dialectic story that includes state courts as first-movers in the protection and gutting of gay rights, federal and state backlash, diverse state augmentation, and, ultimately, federal consolidation around a generalized set of protections.[10] In meticulously tracing the development of these rights under both state and federal constitutions, Professor Yeargain provides a rich account of how American constitutional law truly develops.[11]

Ultimately, Professor Yeargain leverages this analysis to suggest several strategic considerations for trans rights advocates going forward. This is an important contribution, but I argue here that Professor Yeargain' article should be recognized as having broader theoretical significance. Professor Yeargain's careful and holistic analysis of abortion, gay, and trans rights intersects with various important and emerging debates in the fields of constitutional theory and constitutional design. By integrating state and federal constitutional developments, Professor Yeargain's analysis demonstrates how the study of American constitutional law and theory benefits from this more holistic and nuanced analysis of American public law. In other words, my assessment is that

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[5] *See id.* at 28–33.

[6] *See id.* at 38–41.

[7] *See id.* at 15–26.

[8] *See* Yeargain, *supra* note 2 at 10 ("Florida's story illustrates how even a favorable Supreme Court ruling on an individual right or liberty–there, *Roe v. Wade's* recognition of a right to abortion – does not obviate the value in turning to state courts for further expansion of that same right.").

[9] *See id.* at 3–4.

[10] *See id.* at 9–14.

[11] *See generally id.* To the extent that I have a quibble with Professor Yeargain's article, it is that the title sells the article short. One of the article's great strengths is that it presents American constitutional rights as instruments developed and enforced by myriad actors beyond courts. Thus, the article is about much more than "litigating" trans rights in the states. It is about advancing or developing trans rights in American public law.

Professor Yeargain's article is important not only because of its contributions to trans rights advocacy but because it illustrates a more authentic approach to American constitutionalism writ large.

To demonstrate this, my review looks at Professor Yeargain's findings and analysis through the lens of three important debates in constitutional theory and design.

II. RIGHTS AND CONSTITUTIONAL ENTRENCHMENT

We are experiencing a fundamental shakeup in American constitutional theory. Since at least the mid-twentieth century, constitutional rights were theorized primarily as extra-political constraints on democratic processes.[12] They provided guardrails within which democratic processes could safely operate. At the core of this understanding of constitutional rights was the idea that rights should be entrenched beyond the reach of ordinary political processes and that courts should enforce and construe constitutional rights in an apolitical manner.[13] The federal Bill of Rights and the federal judiciary during the civil rights era was seen as the paradigm for this theorizing.[14] Because of Article V's arduous amendment procedures, federal constitutional rights are deeply insulated from popular impulses and the ebb and flow of majoritarian preferences.[15] And, in decisions such as *Brown v. Board of Education*, the Supreme Court admirably leveraged federal constitutional rights to expand protections for vulnerable political minorities.[16]

This perspective on constitutional theory dominated American public law through most of the twentieth century because it seemed to describe how the United States Constitution functioned following the Civil Rights era.[17] That is, courts (mostly federal courts) used the power of judicial review to construe the Bill of Rights to protect vulnerable political minorities from abusive action by popular majorities.[18] Rights (and courts) saved us from ourselves, we were told.[19]

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[12] *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1792–93 (2019).

[13] *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PA. L. REV. 853, 863–65 (2022).

[14] *See* Pamela S. Karlan, *What Can Brown® Do for You*?: *Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009).

[15] *See* U.S. CONST. art. V.

[16] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[17] *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 841 (1991). *See generally* Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986) (providing an overview of judicial review of individual rights cases since 1950).

[18] *See* Tarr, *supra* note 17, at 854.

[19] *See, e.g.*, Collins & Galie, *supra* note 17, at 317–18.

But this theory of American constitutionalism was always theoretically and empirically impoverished. Theoretically, it did not provide a compelling account of how constitutional norms could be effectively entrenched.[20] Empirically, it flatly ignored that state constitutions have long approached constitutional rights from a very different perspective and that people's lived experiences with federal rights are far less stable and effective than the text of a Supreme Court opinion might suggest.[21] Comparative constitutional studies also brought attention to elites (rather than vulnerable political minorities) as the true benefactors of entrenchment.[22] In reality, American constitutional rights are complex, fluid, contextual, multi-institutional, muti-textual, and multi-jurisdictional legal constructs.

Important recent work on state constitutionalism has drawn this out and challenged dominant assumptions in American constitutional theory. Professors Emily Zackin and Mila Versteeg, for example, have argued that state constitutions are built to be un-entrenched and to empower popular political minorities over recalcitrant government officials.[23] Indeed, I have argued that state bills of rights are, at bottom, instruments of popular accountability over government and not instruments of constraint on popular majorities.[24] There is now a growing recognition that constitutional rights have a fundamentally different institutional design, purpose, and function than federal constitutional rights.[25]

Moreover, recent experiences have highlighted how unstable and fluid federal constitutional rights can be despite Article V's deep entrenchment of constitutional text. With the Supreme Court's ruling in *Dobbs*, many abortion advocates have recognized that even federal constitutional rights can fluctuate dramatically.[26] *Dobbs* has forced popular and academic reconsideration of institutional design choices regarding the content and processes for generating

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[20] *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 697–705 (2011).

[21] *See generally* JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (1998); ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 11–12 (2020).

[22] *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 15–17 (2007).

[23] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1646 (2014); Mila Versteeg & Emily Zackin, *Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design*, 110 AM. POL. SCI. REV. 657, 658 (2016).

[24] *See* Marshfield, *supra* note 13, at 891.

[25] *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1855 (2023).

[26] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022). *See generally* David S. Cohen, Greer Donley, Rachel Rebouché, *Rethinking Strategy After* Dobbs, 75 STAN. L. REV. ONLINE 1 (2022).

rights.[27] If rights are more fluid than dominant theories suggested, who should control how rights are defined and modified? Apolitical courts seemed like a good choice when rights were viewed as stable, entrenched, counter majoritarian constraints, but now that rights have been untethered from this theoretical lens, who is best suited to contribute to their development and what is their principal purpose in our constitutional order? Thus, Professor Jamal Greene has recently argued that the American obsession with rights as the work of courts is how "rights went wrong" and are polarizing American politics.[28]

Professor Yeargain's article makes important interjections to these unfolding debates in American constitutional theory. In the abortion context, for example, Professor Yeargain's careful analysis highlights how popular political processes in the states play an important role in expanding and protecting rights.[29] Professor Yeargain shows that even before *Dobbs*, federal constitutional rights were largely incomplete, and in many instances ineffective at achieving real protections without augmentation by the states.[30] In many instances, the more democratically-accountable nature of state constitutions resulted in more effective abortion rights implementation.[31] Professor Yeargain's findings emphasize that even in the abortion context before *Dobbs*, stable and universal federal rights were largely a fiction.[32] Federal constitutional rights depended on a complex network of downstream implementation that is far less stable, apolitical, and centralized.[33] In other words, Professor Yeargain's findings reveal that obtaining a favorable rights-ruling from the Supreme Court under the federal Constitution is not the windfall that dominant theories suggest.

After *Dobbs*, Professor Yeargain shows how the political responsiveness of state constitutions have enabled them to rebuild abortion rights in some states with great swiftness and political legitimacy. They note that "[i]n 2022 alone, voters in California, Michigan and Vermont ratified constitutional amendments that incorporate express rights to abortion and contraception," with more on the way.[34] In the gay rights context, Professor Yeargain shows how gay rights developed in the states through a complex dialectic process between courts, voters, legislatures, and advocates.[35] Professor Yeargain draws out the many advances, setbacks, and variations that characterized this process, which culminated with the Supreme Court's rulings in *Lawrence* and *Obergefell*.[36]

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[27] *See, e.g.*, Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 765, 776 (2024).

[28] JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 167–69 (2021).

[29] *See* Yeargain, *supra* note 2, at 9.

[30] *See id.* at 9–11.

[31] *Id.* at 11.

[32] *See id.*

[33] *See id.*

[34] *Id.* at 12.

[35] *See* Yeargain, *supra* note 2, at 14–26.

[36] *See id.* at 17, 26; Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

This analysis by Professor Yeargain presents American constitutional rights in a much more accurate, nuanced, and complex way because it accounts for the many groups, institutions, and sources of law that act upon development of American constitutional rights. Reading Professor Yeargain's analysis leaves the reader convinced that we operate within a constitutional system and not just under the authority of a supreme constitutional court.

III. RIGHTS OR POWER

A related and burgeoning theme in American constitutional theory relates to whether rights are an effective or appropriate strategy for protecting political minorities.[37] As noted above, the dominant frame in American constitutional theory has been to view entrenched rights as the best (and only) strategy for protecting political minorities from abusive majorities.[38] However, important recent scholarship has drawn attention to different strategies for protecting minority rights.[39] These strategies vary, but they share a common theme: they strive for structural solutions that empower political minorities to protect themselves.[40] Thus, Professor Daryl Levinson has argued for reforms to representation and voting that ensure minority representation in "processes of collective decisionmaking."[41] Federalism has long been offered as a structural check on abusive government by creating jurisdictions where national minorities can operate as subnational majorities.[42] Similarly, Professor Maggie Blackhawk has recently drawn on federal Indian Law to show how doctrines that protect tribal sovereignty can protect political minorities.[43] All of these models draw attention to the inadequacy of court-oriented rights frameworks in protecting political minorities and offer solutions designed to recalibrate political power to mitigate majoritarian abuses.

Here again, Professor Yeargain's article reflects a nuanced contribution to this burgeoning theoretical debate. In crafting a strategy for effectively advancing and protecting trans rights, Professor Yeargain situates trans rights within the interconnected frameworks of rights and power.[44] On the one hand, Professor Yeargain dives deep into the various court-oriented legal arguments available to advocates under state constitutions.[45] For example, they trace how state constitutions provide much stronger textual arguments in support of trans rights than the federal constitution because state constitutions often include explicit bans on "sex" or "gender" discrimination as well explicit privacy and

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[37] *See* Blackhawk, *supra* note 12, at 1797–98.
[38] *See id.* at 1797.
[39] *See id.* at 1798.
[40] *See id.* at 1798–99.
[41] Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1291 (2012).
[42] *See id.* at 1350.
[43] Blackhawk, *supra* note 12, at 1799.
[44] *See generally* Yeargain, *supra* note 2.
[45] *See id.* at 28.

autonomy protections.[46] By carefully parsing the language, structure, and context of state constitutions, Professor Yeargain shows that "[o]n the whole, state constitutions provide trans litigants with unequivocally stronger arguments than does the federal Constitution."[47]

But Professor Yeargain does not stop there. They further explain that trans advocates should carefully leverage structural opportunities and available political power to amend state constitutions.[48] Professor Yeargain's analysis here reflects the deeper theoretical debates unfolding in constitutional theory.

Professor Yeargain first notes that formal amendment of state constitutions provides a useful structural tool for trans advocates because formal amendment processes are much more accessible than federal amendment rules and they are generally tied to statewide popular opinion through referenda.[49] Professor Yeargain next observes that polling data reveal political opportunities and limits for trans advocates.[50] Most Americans believe that gender is assigned at birth, but most Americans also oppose laws that target and discriminate against trans people.[51] In light of these political realities, Professor Yeargain argues that the best approach for trans advocates is to pursue amendments that codify general prohibitions on discrimination based on "gender identity or expression" (rather than more specific rights guarantees such as a right to hormonal treatment or puberty blocking medication).[52] As Professor Yeargain explains, this proposal aims to leverage the structural power available to trans advocates (in the form of accessible state amendment processes) in ways that intersect with the parallel rights-based framework that is familiar to courts.[53] That is, by incrementally advancing the explicit text of state constitutions through political power, trans advocates shift the underlying context within which courts will decide trans rights cases in their favor.[54] Professor Yeargain's strategy reveals a nuanced understanding of how power and rights truly function in American public law.

IV. LAYERED CONSTITUTIONAL RIGHTS

One of the defining features of the American constitutional order is its "layered" construction. By this I mean that, even for the most ardent formalists, the U.S. Constitution is an "incomplete text."[55] As the political scientist Donald Lutz wrote in 1988:

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[46] *See id.* at 4–5.
[47] *See id.* at 29.
[48] *See id.* at 14.
[49] *See id.* at 28.
[50] *See* Yeargain, *supra* note 2, at 39.
[51] *See id.* Sports appears to be an exception to this popular opinion. *Id.*
[52] *See id.* at 39–40.
[53] *See id.* at 40.
[54] *See id.*
[55] *See* Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 26 (1988).

The states are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution. Anyone attempting to do a close textual analysis of the document is driven time and again to the state constitutions to determine what is meant or implied by the national Constitution.[56]

Of course, the Supremacy Clause ensures that federal law trumps state law when there is a conflict.[57] But the American constitutional order is based on the idea that the states will have their own constitutions that operate under the federal Constitution but within a protected space where they can structure government on their own terms and augment federal limits on state government power.[58] This dynamic is not unique to American constitutionalism. It appears in at least fourteen other federal systems that "protect and define the authority of subnational units within a federal system to exercise some degree of independence in structuring and/or limiting the political power reserved to them by the federation."[59]

American constitutional theory has long failed to recognize that a layered constitutional system creates different legal, political, and institutional environments for constitutions operating at different vertical levels of government. However, recent comparative work in this area has begun to explore the many faces of constitutionalism within federal systems. In this regard, Professors Tom Ginsburg and Eric Posner have argued that, from a law and economics perspective, subnational constitutions are subject to inherently different constraints and incentives.[60] Specifically, they argue that agency costs are of lesser consequence for subnational constitutions because national law provides an ever-present backstop on abuse by subnational governments.[61] Consequently, they hypothesize that subnational constitutions will generally be more volatile and experimental, and they found compelling empirical support for this by studying how constitutionalism functions across various federal systems.[62]

More recently, Professor Robinson Woodward-Burns has explored how America's layered constitutional structure influences pathways of constitutional reform.[63] He concludes that state constitutions provide an essential and more fluid site for constitutional reform that influences, absorbs, and refines pressures

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[56] *Id.* at 55–56.

[57] U.S. CONST. art. VI, cl. 2.

[58] The key case articulating this basic principle of American constitutionalism is Barron v. City of Baltimore, 32 U.S. 243, 250 (1833).

[59] *See* Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1153, 1158 n.33 (2011) (listing 14 countries).

[60] *See* Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1585 (2010).

[61] *See id.* at 1585–86.

[62] *See id.* at 1617–1618.

[63] *See* ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 3–5 (2021).

for national constitutional reform.[64] Consistent with Posner and Ginsburg's theory, Woodward-Burns has found that state constitutions are in "constant flux" because of a variety of forces that create a feedback loop in favor of formal state constitutional revision.[65]

Adding to the complexity of America's constitutional structure are the many underappreciated horizontal layers that exist within state government. It is common place, for example, to assume that state legislatures are the democratic "voice of the people" and that they are the state's exclusive lawmaking body. But recent scholarship into the structure of state government has questioned both of these assumptions. Miriam Seifter has argued, for example, that state legislatures are often countermajoritarian and perhaps the least democratic branch in state government.[66] Elizabeth Garrett has shown that legislative power in the states is not truly housed in state legislatures because of the many direct interventions available to popular majorities.[67] In a similar vein, I have argued that state legislatures and governors have developed a variety of sophisticated countermeasures to undermine direct democracy in the states.[68] All of this structural complexity means that state constitutional rights are worked out in a very complex and unique institutional environment while also operating within the overall vertical architecture of America's layered constitutionalism.

Here again, Professor Yeargain's article masterfully injects new details into a burgeoning area of American public law scholarship. In strategizing how best to advance trans rights, Professor Yeargain recognizes the complexities of American constitutional development and illustrates how those complexities can be leveraged and how they place constraints on advocates.[69]

Regarding trans rights, Professor Yeargain notes that advancing trans rights in our constitutional system requires "careful, deliberate work, so that defeats do not undermine the broader movement."[70] In making this claim, Professor Yeargain demonstrates a sophisticated understanding of the many levers and cogs that drive American constitutional development. They note, for example, that in Republican states, trans rights constitutional amendments are likely to be undermined by legislative and executive countermeasures.[71] They also note that state judicial selection methods can influence how courts approach claims regarding new and emerging rights.[72] Yet despite these obstacles, Professor

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[64] *Id.* at 6–7.

[65] *Id.* at 6.

[66] Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1733 (2021).

[67] *See* Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 (2005).

[68] *See* Jonathan L. Marshfield, *The Single-Subject Rule and the Politics of Constitutional Amendment in Initiative States*, 101 NEB. L. REV. 71, 75 (2022).

[69] *See generally* Yeargain, *supra* note 2.

[70] *See id.* at 41.

[71] *Id.* at 40.

[72] *Id.* at 13 n.110.

Yeargain argues that trans rights can be advanced if the right claims and amendments are pursued in the right states precisely because the American system is complex and interconnected.[73] Small victories in moderate states can pave the way for incremental advancements in other states. This analysis reflects both savvy strategy and a deep understanding of the American constitutional order.

V. CONCLUSION

Professor Yeargain has set out to map a strategy for advancing trans rights in the states. Their analysis in this regard is sound and savvy. But Professor Yeargain's article does much more. It reveals how dominant theories of American public law are inadequate across various dimensions, and it illustrates how the study of American public law should be conducted. Professor Yeargain's article reflects the sort of public law scholarship that America needs now. We need holistic analysis that takes state constitutionalism seriously. Professor Yeargain's article does this at every turn.

[73] *See id.* at 42.