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## State Constitutional Rights and Democratic Proportionality

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## ARTICLES

### STATE CONSTITUTIONAL RIGHTS AND DEMOCRATIC PROPORTIONALITY

*Jessica Bulman-Pozen\** & *Miriam Seifter\*\**

*State constitutional law is in the spotlight. As federal courts retrench on abortion, democracy, and more, state constitutions are defining rights across the nation. Despite intermittent calls for greater attention to state constitutional theory, neither scholars nor courts have provided a comprehensive account of state constitutional rights or a coherent framework for their adjudication. Instead, many state courts import federal interpretive practices that bear little relationship to state constitutions or institutions.*

*This Article seeks to begin a new conversation about state constitutional adjudication. It first shows how in myriad defining ways state constitutions differ from the U.S. Constitution: They protect many more rights, temper rights with attention to communal welfare, include positive rights that identify government action as necessary to liberty, and emphasize rights required to sustain democracy. These distinctive founding documents, prizing individual and collective self-determination alike, require their own implementation frameworks—not federal mimicry.*

*Although state constitutions differ markedly from their federal counterpart, they share features with constitutions around the world that courts adjudicate using proportionality review. Perhaps unsurprisingly, practices associated with proportionality already appear in some state decisions. Synthesizing and building on these practices, this Article argues for democratic proportionality review as a state-centered approach*

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*to adjudication. Such review tailors proportionality's decisional framework to state constitutions committed to popular, majoritarian self-government, and it recognizes state courts as democratically embedded actors, not countermajoritarian interlopers. After explaining how democratic proportionality review operates, the Article sketches some implications for contemporary debates about abortion, voting, occupational licensing, and more.*

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## INTRODUCTION

All eyes are on the states. As the U.S. Supreme Court retrenches, state courts are taking up many issues that matter most to Americans.<sup>1</sup> From abortion to voting, state constitutions are defining the content and scope of rights across the nation.<sup>2</sup>

For all that rides on state constitutional law, there has been little attention to some of its most basic questions. Since Justice William Brennan famously revived the field in the 1970s,<sup>3</sup> scholars of the “new judicial federalism”<sup>4</sup> have focused on whether state constitutional provisions should be interpreted in lockstep with cognate federal provisions.<sup>5</sup> There is limited discussion of other state constitutional

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1. See, e.g., Alicia Bannon, Opinion, *The Supreme Court Is Retrenching*, States Don’t Have To., Politico (June 29, 2022), <https://www.politico.com/news/magazine/2022/06/29/supreme-court-rights-00042928> [<https://perma.cc/28MN-SPMQ>] (“[I]n an era of federal rights reversal, state courts and state constitutions are about to be more important than ever.”); Reid J. Epstein, 2023’s Biggest, Most Unusual Race Centers on Abortion and Democracy, N.Y. Times (Jan. 25, 2023), <https://www.nytimes.com/2023/01/25/us/politics/wisconsin-supreme-court-election.html> (on file with the *Columbia Law Review*) (discussing the political significance of the Wisconsin Supreme Court election).

2. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (holding that the federal “Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion”); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–08 (2019) (holding that “partisan gerrymandering claims present political questions beyond the reach of the federal courts,” but that “state constitutions can provide standards and guidance”).

3. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977) [hereinafter Brennan, *Protection of Individual Rights*] (encouraging state courts to “thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms”). Justice Brennan foregrounded a revival already underway in state courts. See Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. Balt. L. Rev. 379, 396 n.70 (1980) [hereinafter Linde, *First Things First*] (collecting commentary). Justice Hans Linde was an early and influential proponent of independent state constitutional interpretation, both in his opinions for the Oregon Supreme Court and in his scholarship. E.g., Hans A. Linde, Book Review, 52 Or. L. Rev. 325, 335 (1973) (reviewing Bernard Schwartz, *The Bill of Rights: A Documentary History* (1971)) (arguing that state courts should interpret state constitutions independently of the U.S. Constitution).

4. See G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 Notre Dame L. Rev. 1097, 1097 (1997) (defining “new judicial federalism” as “the increased reliance by state judges on state declarations of rights to secure rights unavailable under the United States Constitution”).

5. Important contributions to this literature have explored alternatives to “lockstepping,” including “primacy” or “supplementary” models. See Robert F. Williams, *The Law of American State Constitutions* 140–42 (2009) [hereinafter Williams, *Law of State Constitutions*]. Scholars have also debated whether state constitutional interpretation should turn on state identities and state-specific sources of law. Compare Jeffrey S. Sutton, 51 *Imperfect Solutions: States and the Making of American Constitutional Law* 17–18 (2018) (yes), with James A. Gardner, *Interpreting State Constitutions* 79 (2005) (no), Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147, 1147–48 (1993) (no), and Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1311 (2019) (book review) (no).

clauses, the distinctiveness of state constitutions collectively, or what those differences might mean for adjudication.

While scholars and jurists have debated substantive lockstepping, a subtler but more concerning practice of methodological lockstepping has begun to take hold. Many state courts are deciding cases using techniques developed by federal courts to implement the federal Constitution. For example, they read state constitutional clauses in isolation, as if keyed to the spare federal document, despite state constitutions' layers of interacting provisions created through popular amendment.<sup>6</sup> They apply federal implementation frameworks, such as the tiers of scrutiny, that are based on inapposite assumptions about legislatures, courts, and democracy.<sup>7</sup> And they invoke the countermajoritarian difficulty and an attendant imperative of judicial restraint even though most state judges are popularly elected.<sup>8</sup>

Consider two recent examples. In January 2023, the Idaho Supreme Court upheld, under the state constitution, a "Total Abortion Ban."<sup>9</sup> After taking a narrow view of the interests at stake and concluding that a right to abortion as such was not "'deeply rooted' . . . at the time of statehood,"<sup>10</sup> the court defaulted to federal-style rational basis review.<sup>11</sup> Such review, it explained, is highly deferential to the legislature given the properly limited role of courts.<sup>12</sup> Under the toothless standard it applied, the court even accepted the law's ostensible exception for lifesaving treatment—an affirmative defense that doctors can invoke only after going to prison—as "rationally advanc[ing] the government's legitimate interests in maternal health and safety."<sup>13</sup>

Wisconsin Supreme Court rulings on redistricting also reveal reflexive importation of federal adjudicative approaches. When the state court accepted the task of devising new legislative maps after lawmakers reached an impasse, it concluded that the proper metric was a "least change" approach, rather than any measure of partisan fairness,<sup>14</sup> and that it should hew as closely as possible to existing maps that were among the most gerrymandered in the country.<sup>15</sup> The court decided on this approach by

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6. See *infra* section II.A.1.

7. See *infra* section II.A.2.

8. See *infra* section II.A.3.

9. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1147 (Idaho 2023).

10. *Id.* at 1148.

11. *Id.* at 1195.

12. See *id.* at 1196–97 ("Critically, the Idaho Constitution does not require that the Total Abortion Ban employ the *wisest* or  *method of achieving its purpose.").*

13. *Id.* at 1196.

14. See *Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 490 (Wis. 2021).

15. See Robert Yablon, *Gerrylaundersing*, 97 N.Y.U. L. Rev. 985, 998 (2022) ("In Wisconsin, Republicans controlled the redistricting process during the post-2010 cycle, and they used a 'sharply partisan methodology' to tilt the state legislative map in their favor.")

selectively attending to constitutional clauses, without considering provisions concerning voting and free government, and by relying on federal sources for the proposition that judges must exercise restraint in a democracy.<sup>16</sup> Parroting federal maxims, the court managed to hold that doubling down on a partisan gerrymander is the best way to serve democracy.

Although these examples are especially salient, problems of methodological lockstepping and a lack of state-focused constitutional adjudication are widespread. Adopting suitable doctrines, tests, and presumptions to guide our new era of state constitutional law requires greater attention to state founding documents themselves.

This Article offers a framework for understanding state constitutional rights and their adjudication. It describes how the state constitutional rights tradition differs from the federal one in multiple material ways. It then proposes a corresponding approach to state constitutional adjudication, *democratic proportionality review*, already immanent in many state cases.

Consider, first, some defining features of state constitutional rights. In contrast to the spare enumeration of rights in the federal Constitution, state constitutions contain plentiful individual rights, from the pursuit of happiness to the enjoyment of clean air to the right to hunt and fish.<sup>17</sup> At the same time, state constitutions temper expansive rights with obligations to the community.<sup>18</sup> A similar balance appears in state constitutions' approach to the relationship between individuals and government. While the federal Constitution is proverbially a charter of negative liberties, all state constitutions include both positive and negative rights; they impose affirmative duties on government and cast it as a necessary guarantor of liberty as well as a potential threat.<sup>19</sup> Finally, state constitutions are fundamentally committed to democracy and furnish numerous rights, as well as structural requirements, to ensure popular majority rule by political equals.<sup>20</sup>

Each of these parts of the state constitutional rights tradition differs from the federal. Taken together, they underlie a distinctive commitment to self-determination. State constitutions at once seek to guarantee the ability of individuals to direct their lives, free from domination and arbitrary interference or neglect, and the ability of the people to direct

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(quoting *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 844 (E.D. Wis. 2012)).

16. See *Johnson*, 967 N.W.2d at 487–88 (“To construe Article I, sections 1, 3, 4, or 22 as a reservoir of additional requirements would violate axiomatic principles of interpretation . . . while plunging this court into the political thicket lurking beyond its constitutional boundaries.”).

17. See *infra* section I.A.

18. See *infra* section I.B.

19. See *infra* section I.C.

20. See *infra* section I.D.

government so that it remains responsive to the popular will. They propose, moreover, that individual and collective self-determination are intertwined. State constitutions furnish more, and more expansive, individual rights than the U.S. Constitution while also imposing more public-regarding limits on such rights to protect the autonomy of all. They place more, and more explicit, emphasis on the good of the community while also obligating the community to attend to the welfare of each member. They demand more, and more affirmative, activity from government while also creating more checks on government to foreclose arbitrary decisions and to facilitate popular responsiveness. Embracing abundance and complexity, state constitutions suggest the possibility of mutually constitutive individual freedom and collective self-rule.

It is not only states' founding documents but also the institutions that interpret them that differ from their federal counterparts in ways that should inform constitutional adjudication. Most notably, in the states, legislatures may face a greater countermajoritarian difficulty than popularly elected courts.<sup>21</sup> And unlike the sleeping popular sovereign at the federal level, state citizens play an active and ongoing role in amending their constitutions.<sup>22</sup>

If a state-centered framework for constitutional adjudication is needed, so too is it within reach. Notwithstanding federal mimicry, all fifty state high courts already profess to read their constitutions as a whole.<sup>23</sup> Many state courts have analyzed individual rights and government purposes in a thorough, contextual way, instead of relying on federal tiers of scrutiny to generate answers. And they have engaged in balancing when rights or interests conflict, drawing on their common law remedial tradition to do justice in individual cases.<sup>24</sup>

This Article synthesizes these and related practices and describes them as together constituting a form of proportionality review. Widely used around the world,<sup>25</sup> proportionality review involves a set of judicial

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21. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. Chi. L. Rev. 689, 694 (1995) (noting that elected state courts present not the familiar countermajoritarian difficulty but rather a "majoritarian difficulty," which "asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism"); Miriam Seifter, *Countermajoritarian Legislatures*, 121 Colum. L. Rev. 1733, 1735 (2021) ("[S]tate legislatures are typically a state's least majoritarian branch. Often they are outright countermajoritarian institutions.").

22. See Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 Yale L.J. Forum (forthcoming Nov. 2023) (manuscript at 1), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4555738](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4555738) [<https://perma.cc/MSN9-3RWP>] [hereinafter Bulman-Pozen & Seifter, *Right to Amend*].

23. See *infra* note 208 and accompanying text.

24. See *infra* sections II.B, IV.A.

25. See, e.g., Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l L. 72, 112 (2008) (describing the global reach of proportionality analysis).

inquiries “designed to discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable.”<sup>26</sup> It recognizes a wide range of interests as rights deserving protection; demands engaged, contextual review of government infringements; and proposes balancing to mediate individual and collective interests. Proportionality review can be—and has been—molded to particular legal systems, and we explain how the signature steps of rights discernment, means–ends fit, minimal impairment, and balancing should be tailored to the states.<sup>27</sup> In particular, while most proportionality jurisdictions emphasize human rights such as dignity, state courts should pay particular attention to core self-determination rights of autonomy and democratic participation. While most proportionality jurisdictions equate the legislature with the collective democratic public, state constitutions’ skepticism of unrepresentative legislatures and distinct channels for the expression of popular will demand meaningful review of state laws for arbitrariness as well as engagement with positive rights claims. And while most proportionality jurisdictions understand law as “a practice distinct from politics,”<sup>28</sup> state judges’ elected position and the ease of popular constitutional amendment mean that state courts should balance interests and explain their judgments with an eye to public engagement.<sup>29</sup>

Although democratic proportionality review is a workable whole, we stress that its components can be adopted individually. It would be an improvement for state courts to discard clause-bound readings in favor of more holistic ones, to abandon unreflective reliance on tiers of scrutiny in favor of more meaningful consideration, or to acknowledge their position as democratically embedded actors with the authority to craft policy and the duty to justify their decisions. Moreover, it is critical that state courts protect rights foundational to individual autonomy and collective self-rule even as they engage in more comprehensive and discretionary review.

The Article proceeds in four Parts. In Part I, we offer a synoptic account of state constitutional rights. In Part II, we describe recurring mistakes of methodological lockstepping. In Part III, we provide an

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26. Jamal Greene, *Foreword: Rights as Trumps?*, 132 Harv. L. Rev. 28, 58 (2018).

27. See *infra* Part III.

28. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094, 3125 (2015) [hereinafter Jackson, *Age of Proportionality*].

29. The democratic proportionality review we describe is thus responsive to the call for “a modern theory of majoritarian review” in the states. See *Developments in the Law, The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1502 (1982). Although our account is specific to state constitutions, it shares common ground with a broader literature that urges a fit between adjudication frameworks and underlying constitutional values, including democracy. For one generative example, see Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* 13 (2023) (“[T]he underlying logic of judicial review will be . . . a commitment to representation-reinforcement that involves protecting and promoting the capacity of a democratic system to respond both to minority rights claims and considered majority understandings under a range of real-world, non-ideal conditions.”).

account of democratic proportionality review that better aligns with the state constitutional rights tradition. Finally, in Part IV, we sketch some implications of democratic proportionality review for current debates, including those over voting, occupational licensing, and abortion. State constitutions are not pale imitations of the federal document, and the new era of state constitutional rights jurisprudence we are entering should proceed accordingly.

## I. STATE CONSTITUTIONAL RIGHTS

We start with a simple, but often overlooked, point: State constitutions differ significantly from the U.S. Constitution. Although reams of state constitutional law literature have focused on the few clauses common to the state and federal documents,<sup>30</sup> most state constitutional provisions have no federal analogue, and state constitutions have a different orientation toward individual rights, the relationship between the individual and the community, and the role of government. Before addressing how courts should engage with state constitutions, this Part canvasses some of the most notable ways state constitutional rights differ from the familiar federal model.

Although we focus on provisions widely shared across the states, we do not deny that there are important differences among state constitutions themselves. For instance, some state constitutions contain express privacy protections, some contain equal rights amendments prohibiting sex discrimination, some include both privacy provisions and equal rights amendments, and some include neither type of provision.<sup>31</sup> To resolve any particular dispute, constitutional interpreters must attend to a state's specific text, history, practice, and more. But we should not let state-specific nuance obscure how much can be said about state constitutions as a body.<sup>32</sup> There is widespread, verbatim copying of provisions across these documents, and periods of nationwide mobilization have made their mark

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30. See, e.g., *supra* notes 3–5 and accompanying text.

31. See *infra* notes 53–54.

32. That state constitutions can be productively discussed and analyzed as a group notwithstanding variation is a widely shared premise in the field of state constitutional law. See generally John J. Dinan, *The American State Constitutional Tradition* 6 (2006) [hereinafter Dinan, *State Constitutional Tradition*] (noting that the book's "principle purpose" is "to identify, explain, and draw lessons from the ways in which the dominant trends of state constitutional development have departed from the federal constitutional model"); 1 Jennifer Friesen, *State Constitutional Law* (4th ed. 2006) [hereinafter Friesen, *State Constitutional Law*] (collecting and analyzing constitutional case law from all fifty states); G. Alan Tarr, *Understanding State Constitutions* 4 (1998) [hereinafter Tarr, *Understanding State Constitutions*] ("Explaining the distinctiveness of the state constitutional experience and assessing its implications both for state constitutional interpretation and for understanding American constitutionalism are the tasks of our book."); Williams, *Law of State Constitutions*, *supra* note 5, at 8 ("Many common themes appear in the constitutional law of all states. . . . It is the purpose of this book to focus on these common themes and issues . . .").

on many state constitutions at once. So too, these constitutions are all in dialogue with the U.S. Constitution.<sup>33</sup> Recognizing the U.S. Constitution as a shared backdrop and foil, the distinctive features of state constitutions emerge more clearly.

The discussion that follows emphasizes four such features. First, in contrast to the spare enumeration of rights in the U.S. Constitution, state constitutions list numerous individual rights, from the pursuit of happiness to the enjoyment of clean air to the right to hunt and fish. These constitutions specify a large domain for state citizens to direct their lives as rights-bearing individuals and spell out their rights in considerable detail.

Second, and tempering such rights, state constitutions situate individuals in the community. Even as these constitutions guarantee extensive individual rights, they balance and integrate such rights with obligations to others. In the state constitutional landscape, individuals are never entirely independent actors; they are citizens in the republican tradition, responsible for the public welfare as well as their own.

Third, state constitutions understand government action to potentially facilitate as well as impede the exercise of individual rights. While they partially credit the familiar paradigm that individual rights follow from restraints on government, state constitutions also embrace affirmative government activity in the service of individual rights. Most notably, every state constitution contains positive rights and articulates government duties.<sup>34</sup> State constitutions cast the government as simultaneously a potential threat and a necessary provider.

Finally, state constitutions contain many rights focused on democratic processes and participation. As we have elsewhere described, state constitutions are oriented around popular sovereignty, majority rule, and political equality.<sup>35</sup> Not content to leave questions of political representation and self-government to structural provisions, state constitutional drafters have long relied on rights to guarantee democracy. From voting to altering or abolishing government to proposing and deciding on initiatives, many constitutional rights are directed toward maintaining popular control over government. In turn, state constitutions suggest, rule by the people may safeguard individual rights in the face of unrepresentative or self-serving government actors.

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33. See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 *Mich. L. Rev.* 859, 866–67 (2021) [hereinafter *Bulman-Pozen & Seifter, Democracy Principle*].

34. See Helen Hershkoff, “Just Words”: Common Law and the Enforcement of State Constitutional Social and Economic Rights, 62 *Stan. L. Rev.* 1521, 1523–24 (2010) [hereinafter *Hershkoff, Just Words*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 *Harv. L. Rev.* 1131, 1135 (1999) [hereinafter *Hershkoff, Positive Rights*]; Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 *U. Chi. L. Rev.* 1641, 1645 (2014).

35. *Bulman-Pozen & Seifter, Democracy Principle*, supra note 33, at 864.

As these four points underscore, state constitutions contain rights that are abundant and sometimes crosscutting, they recognize government as both a potential violator and guardian of liberty, and they always privilege democracy. We refer to this as a rights tradition of self-determination, with intertwined individual and collective components.

A. *Rights, Rights, Rights*

Start with “first things first.”<sup>36</sup> Every state constitution contains a declaration or bill of rights, and the vast majority begin with these provisions before turning to such matters as the structure of government. If individual rights were a postscript to the framing of the U.S. Constitution, state constitutions that both preceded and followed the federal document have always foregrounded such rights.<sup>37</sup> In keeping with this textual primacy, the field of state constitutional law has long emphasized state protections for individuals.<sup>38</sup> Much commentary addresses rights that are also recognized by the U.S. Constitution, including freedom of speech, due process, and freedom from unreasonable search and seizure.<sup>39</sup> But state constitutions seek to foster autonomy and human flourishing across a wider range of affairs than their federal counterpart. These constitutions recognize, and spell out in detail, numerous rights that have no express analogue at the federal level.

As eighteenth-century framers sought, for the first time, to mark state constitutions as fundamental law, one way they did so was to begin with bills of rights,<sup>40</sup> each of which guaranteed some rights that came to be included in the U.S. Constitution as well as rights that have never been extended at the federal level.<sup>41</sup> For example, the influential 1776 Virginia Declaration of Rights opened with a proclamation “that all men are by nature equally free and independent, and have certain inherent rights . . . ; namely, the enjoyment of life and liberty, with the means of

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36. Linde, *First Things First*, supra note 3, at 396.

37. See Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, Publius, Winter 1982, at 11, 15.

38. E.g., Friesen, *State Constitutional Law*, supra note 32, at v (noting that “state constitutions frequently are more protective of civil liberties than federally based decisions”); Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America’s Positive Rights* 14 (2013) (describing the “existence of a coherent rights tradition” in the states); Brennan, *Protection of Individual Rights*, supra note 3, at 503 (explaining the important role that states play in protecting fundamental rights).

39. See, e.g., Sutton, supra note 5, at 42–172 (considering search and seizure, due process, and free speech).

40. See Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L.J. 911, 920–21 (1994) [hereinafter Wood, *State Constitution-Making*] (discussing early state bills of rights).

41. Tarr, *Understanding State Constitutions*, supra note 32, at 81 (“All state declarations of rights adopted during the 1790s guaranteed some specific rights not found in the federal Bill of Rights.”).

acquiring and possessing property, and pursuing and obtaining happiness and safety.”<sup>42</sup> During the ensuing decade, Pennsylvania, Vermont, Massachusetts, and New Hampshire adopted similar language, and more states followed in subsequent years.<sup>43</sup> Even in their earliest incarnations, these happiness and safety provisions were both a guarantee of negative rights against governmental interference and a commitment to more affirmative ends including “self-realization” and popular well-being.<sup>44</sup> Although the pursuit of happiness and safety never became part of the federal Constitution, it is today an express clause in most state constitutions<sup>45</sup> and has been further elaborated through more specific rights provisions.

Over the past 250 years, as state constitutional replacement and amendment have enlarged the recognized political community and extended rights beyond propertied white men, they have also yielded altogether new rights protections. For example, mid-nineteenth-century conventions adopted novel equality provisions in response to concerns about government capture and favoritism.<sup>46</sup> Reconstruction conventions recognized the need for government provision in the form of state-funded public education and poor relief.<sup>47</sup> And across the nineteenth century, as state constitutions enumerated more rights, they also began to adopt “unenumerated rights” guarantees to underscore that named rights should not be understood to exhaust individual rights protection.<sup>48</sup>

State constitutional rights have particularly expanded across the twentieth and twenty-first centuries. During the Progressive Era, for instance, many states adopted protections for workers, from western rights

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42. Va. Const. of 1776, Declaration of Rights, § 1.

43. See Joseph Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 *Hastings Const. L.Q.* 1, 2–4 (1997).

44. See *id.* at 16–17; see also Pauline Maier, *American Scripture: Making the Declaration of Independence* 134 (1997) (“For Jefferson and his contemporaries, happiness no doubt demanded safety or security, which would have been in keeping with the biblical phrase one colonist after another used to describe the good life.”).

45. See *infra* note 52.

46. See Jonathan L. Marshfield, *America’s Misunderstood Constitutional Rights*, 170 *U. Pa. L. Rev.* 853, 895–96 (2022).

47. See Tarr, *Understanding State Constitutions*, *supra* note 32, at 131. Although many of these developments were undone by white supremacist conventions held in the late 1800s, they resurfaced in other constitutions and in later periods. See, e.g., Zackin, *supra* note 38, at 67–196 (describing multiple states’ adoptions of positive rights to education, labor, and a clean environment, especially in the twentieth century).

48. See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 *Tex. L. Rev.* 7, 89 (2008) (“Eighteen out of thirty-seven state constitutions in 1868 . . . contained clauses analogous to the Ninth Amendment of the federal Constitution.”); Louis Karl Bonham, Note, *Unenumerated Rights Clauses in State Constitutions*, 63 *Tex. L. Rev.* 1321, 1325 (1985) (examining state court recognition of unenumerated individual rights).

for miners to New York's collective bargaining provisions.<sup>49</sup> In subsequent decades, constitutional conventions turned their attention to social and economic rights, and many adopted positive rights, including rights to welfare and to clean air and water.<sup>50</sup> Between 1968 and 2016, Professor Jonathan Marshfield recounts, more than 330 rights amendments caused "state bills of rights to balloon in length, scope, and detail."<sup>51</sup>

Consider just some of the rights that appear in state constitutions and lack a federal analogue. The following do not all appear in every state constitution, but every state constitution contains at least some of them, and many have been widely adopted:

- The right to pursue happiness or safety<sup>52</sup>
- The right to privacy<sup>53</sup>
- The right to sex equality or freedom from sex-based discrimination.<sup>54</sup>
- The right to dignity<sup>55</sup>
- The right to hunt and fish<sup>56</sup>

49. John Dinan, *State Constitutional Politics: Governing by Amendment in the American States 188–205* (2018) [hereinafter Dinan, *State Constitutional Politics*]; Tarr, *Understanding State Constitutions*, *supra* note 32, at 148–49.

50. Dinan, *State Constitutional Politics*, *supra* note 49, at 205–21; see also *infra* section I.C (discussing positive rights).

51. Marshfield, *supra* note 46, at 868. If amendments related to elections and suffrage are included, there were more than 200 additional amendments during this period. See *id.* at 868 n.74; see also Dinan, *State Constitutional Politics*, *supra* note 49, at 3–5 (describing a wide range of state constitutional amendments); *infra* section I.D (discussing democratic rights).

52. Ala. Const. art. I, § 1; Alaska Const. art. I, § 1; Ark. Const. art. II, § 2; Cal. Const. art. I, § 1; Colo. Const. art. II, § 3; Fla. Const. art. I, § 2; Haw. Const. art. I, § 2; Idaho Const. art. I, § 1; Ill. Const. art. I, § 1; Ind. Const. art. I, § 1; Iowa Const. art. I, § 1; Kan. Const. Bill of Rights, § 1; Ky. Const. Bill of Rights, § 1; Me. Const. art. I, § 1; Mass. Const. amend. art. CVI; Mo. Const. art. I, § 2; Mont. Const. art. II, § 3; Neb. Const. art. I, § 1; Nev. Const. art. I, § 1; N.H. Const. pt. I, art. 2; N.J. Const. art. I, para. 1; N.M. Const. art. II, § 4; N.C. Const. art. I, § 1; N.D. Const. art. I, § 1; Ohio Const. art. I, § 1; Okla. Const. art. II, § 2; Or. Const. art. I, § 1; Pa. Const. art. I, § 1; R.I. Const. art. I, § 2; S.D. Const. art. VI, § 1; Tenn. Const. art. I, §§ 1–2; Vt. Const. ch. I, art. 1; Va. Const. art. I, § 1; W. Va. Const. art. III, § 1; Wis. Const. art. I, § 1; Wyo. Const. art. I, §§ 1–2.

53. Alaska Const. art. I, § 22; Ariz. Const. art. II, § 8; Cal. Const. art. I, § 1; Fla. Const. art. I, §§ 12, 23; Haw. Const. art. I, § 6; Ill. Const. art. I, §§ 6, 12; La. Const. art. I, § 5; Mont. Const. art. II, § 10; N.H. Const. pt. I, art. 2-b; S.C. Const. art. I, § 10; Wash. Const. art. I, § 7.

54. Alaska Const. art. I, § 3; Cal. Const. art. I, §§ 8, 31; Colo. Const. art. II, § 29; Conn. Const. art. V; Del. Const. art. I, § 21; Fla. Const. art. I, § 2; Haw. Const. art. I, § 3; Ill. Const. art. I, § 18; Iowa Const. art. I, § 1; Md. Const. Declaration of Rights, art. 46; Mass. Const. amend. art. CVII; Mont. Const. art. II, § 4; Nev. Const. art. I, § 24; N.H. Const. pt. I, art. 2; N.M. Const. art. II, § 18; Okla. Const. art. II, § 36A; Or. Const. art. I, § 46; Pa. Const. art. I, § 28; R.I. Const. art. I, § 2; Tex. Const. art. I, § 3a; Utah Const. art. IV, § 1; Va. Const. art. I, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. I, §§ 2–3.

55. Ill. Const. art. I, § 20; La. Const. art. I, § 3; Mont. Const. art. II, § 4.

56. Ala. Const. art. I, § 36.02; Alaska Const. art. VIII, §§ 3–4; Cal. Const. art. I, § 25; Ga. Const. art. I, § I, para. XXVIII; Idaho Const. art. I, § 23; Ind. Const. art. I, § 39; Kan.

- The right to public education<sup>57</sup>
- The right to public welfare<sup>58</sup>
- The right to enjoy clean air and water or a healthy environment<sup>59</sup>
- Workers' rights, including minimum-wage and maximum-hour provisions<sup>60</sup>
- Victims' rights<sup>61</sup>

Const. Bill of Rights, § 21; Ky. Const. § 255A; La. Const. art. I, § 27; Mont. Const. art. IX, § 7; N.C. Const. art. I, § 38; N.D. Const. art. XI, § 27; Okla. Const. art. II, § 36; R.I. Const. art. I, § 17; S.C. Const. art. I, § 25; Tenn. Const. art. XI, § 13; Tex. Const. art. I, § 34; Utah Const. art. I, § 30; Vt. Const. ch. II, § 67; Va. Const. art. XI, § 4; Wis. Const. art. I, § 26; Wyo. Const. art. I, § 39.

57. See Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § 1, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. VIII, pt. 1, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. II, ch. V, § II; Mich. Const. art. VIII, § 2; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1(3); Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. II, art. 83; N.J. Const. art. VIII, § IV, para. 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 2; Okla. Const. art. I, § 5; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. II, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, §§ 1–2; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. 7, § 1.

58. Alaska Const. art. VII, § 5; Kan. Const. art. VII, § 1; Mich. Const. art. IV, § 51; N.Y. Const. art. XVII, § 1; N.C. Const. art. XI, §§ 3–4; S.C. Const. art. XII, § 1; Wyo. Const. art. 7, §§ 18, 20. Some states protect a public welfare right by requiring the legislature to provide forms of public assistance. See Ala. Const. art. IV, § 88; Haw. Const. art. IX, § 1; Ky. Const. § 244A; Miss. Const. art. IV, § 86; Nev. Const. art. VIII, § 1; Ohio Const. art. VII, § 1; Okla. Const. art. XXI, § 1; Wash. Const. art. XIII, § 1.

59. Haw. Const. art. XI, §§ 1, 3, 7, 9; Ill. Const. art. XI, §§ 1–2; La. Const. art. IX, § 1; Mass. Const. amend. art. XLIX; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV, §§ 1, 4; N.C. Const. art. XIV, § 5; Pa. Const. art. I, § 27; Va. Const. art. XI, § 1.

60. Ala. Const. art. I, § 36.05; Ariz. Const. art. XXV; Haw. Const. art. XIII, § 1; Idaho Const. art. XIII, § 2; Miss. Const. art. VII, § 198A; Mo. Const. art. I, § 29; Neb. Const. art. XV, § 13; N.J. Const. art. I, para. 19; N.Y. Const. art. I, § 17; Okla. Const. art. XXIII, § 1A; S.D. Const. art. VI, § 2; Utah Const. art. XVI, §§ 1, 6–8; Wyo. Const. art. 1, § 22.

61. Ala. Const. art. I, § 6.01; Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1; Cal. Const. art. I, § 28; Colo. Const. art. II, § 16a; Conn. Const. amend. art. XXIX(b); Ga. Const. art. I, § I, para. XXX; Idaho Const. art. I, § 22; Ill. Const. art. I, § 8.1; Kan. Const. art. XV, § 15; Ky. Const. § 26A; La. Const. art. I, § 25; Md. Const. Declaration of Rights, art. 47; Mich. Const. art. I, § 24; Mo. Const. art. I, § 32; Neb. Const. art. I, § 28; Nev. Const. art. I, § 8A; N.J. Const. art. I, para. 22; N.M. Const. art. II, § 24; N.C. Const. art. I, § 37; N.D. Const. art. I, § 25; Ohio Const. art. I, § 10a; Okla. Const. art. II, § 34; Or. Const. art. I, §§ 42–43; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24; S.D. Const. art. VI, § 29; Tenn. Const. art. I, § 35; Tex. Const. art. I, § 30; Utah Const. art. I, § 28; Va. Const. art. I, § 8-A; Wash. Const. art. I, § 35; Wis. Const. art. I, § 9m.

- The right to vote and participate in free elections<sup>62</sup>
- The right to participate in initiatives and referenda<sup>63</sup>
- The right to access government records and deliberations<sup>64</sup>

Beyond recognizing the sheer number of rights given constitutional protection in the United States only at the state level, two points bear emphasis. First, these rights are often spelled out in detail. Even guarantees shared with the federal Constitution, such as liberty and equality, frequently find more expansive and specific elaboration in state constitutions. For example, while the Fourteenth Amendment to the U.S. Constitution recognizes “equal protection of the laws,” many state equality clauses specify relevant characteristics (such as race, color, religion,

62. Ala. Const. art. VIII, § 177; Alaska Const. art. V, § 1; Ariz. Const. art. VII, § 2; Ark. Const. art. III, §§ 1–2; Cal. Const. art. II, § 2; Colo. Const. art. VII, § 1; Conn. Const. art. VI, § 1; Del. Const. art. V, § 2; Fla. Const. art. VI, § 2; Ga. Const. art. II, § I, para. II; Haw. Const. art. II, § 1; Idaho Const. art. VI, § 2; Ill. Const. art. III, § 1; Ind. Const. art. II, § 1; Iowa Const. art. II, § 1; Kan. Const. art. V, § 1; Ky. Const. § 145; La. Const. art. I, § 10; Me. Const. art. II, § 1; Md. Const. art. I, § 1; Mass. Const. Declaration of Rights, art. IX; Mich. Const. art. II, § 1; Minn. Const. art. VII, § 1; Miss. Const. art. XII, § 241; Mo. Const. art. VIII, § 2; Mont. Const. art. IV, § 2; Neb. Const. art. I, § 22; Nev. Const. art. II, § 1; N.H. Const. pt. I, art. 11; N.J. Const. art. II, § 1, para. 2; N.M. Const. art. VII, § 1; N.Y. Const. art. II, § 1; N.C. Const. art. VI, § 1; N.D. Const. art. II, § 1; Ohio Const. art. V, § 1; Okla. Const. art. III, § 1; Or. Const. art. II, §§ 1–2; Pa. Const. art. VII, § 1; R.I. Const. art. II, § 1; S.C. Const. art. I, § 5; S.D. Const. art. VI, § 19; Tenn. Const. art. IV, § 1; Tex. Const. art. VI, § 2; Utah Const. art. IV, § 2; Vt. Const. ch. I, art. 8; Va. Const. art. I, § 6; Wash. Const. art. VI, § 1; W. Va. Const. art. IV, § 1; Wis. Const. art. III, § 1; Wyo. Const. art. 6, §§ 1–2.

63. For initiative provisions, see Alaska Const. art. XI, § 1; Ariz. Const. art. IV, pt. 1, § 1; Ark. Const. art. V, § 1; Cal. Const. art. II, § 8; Colo. Const. art. V, § 1; Fla. Const. art. XI, § 3; Idaho Const. art. III, § 1; Ill. Const. art. XIV, § 3; Me. Const. art. IV, pt. 3, § 18; Mass. Const. amend. art. XLVIII; Mich. Const. art. II, § 9; Miss. Const. art. XV, § 273; Mo. Const. art. III, § 49; Mont. Const. art. III, § 4; Neb. Const. art. III, § 1; Nev. Const. art. XIX, § 2; N.D. Const. art. III, § 1; Ohio Const. art. II, § 1; Okla. Const. art. V, §§ 1–2; Or. Const. art. IV, § 1; S.D. Const. art. III, § 1; Utah Const. art. VI, § 1; Wash. Const. art. II, § 1; Wyo. Const. art. 3, § 52. For referendum provisions, see Table 1.2: States With Legislative Referendum (LR) for Statutes and Constitutional Amendments, Initiative & Referendum Inst., <http://www.iandrinstitute.org/docs/Legislative-Referendum-States.pdf> [<https://perma.cc/PU5U-G4NJ>] (last visited Oct. 21, 2023) (identifying states with constitutional or legislative referenda).

64. Ark. Const. art. V, § 13; Colo. Const. art. V, § 14; Conn. Const. art. III, § 16; Fla. Const. art. III, § 4(b)–(c), (e); Ga. Const. art. III, § IV, para. XI; Haw. Const. art. III, § 12; Idaho Const. art. III, § 12; Ill. Const. art. IV, § 5(c); Ind. Const. art. IV, § 13; Iowa Const. art. III, § 13; La. Const. art. III, § 15; Md. Const. art. III, § 21; Mich. Const. art. IV, § 20; Minn. Const. art. IV, § 14; Miss. Const. art. IV, § 58; Mo. Const. art. III, § 20; Mont. Const. art. V, § 10(3); Nev. Const. art. IV, § 15; N.H. Const. pt. II, art. 8; N.M. Const. art. IV, § 12; N.Y. Const. art. III, § 10; N.C. Const. art. II, § 17; N.D. Const. art. IV, § 14; Ohio Const. art. II, § 13; Or. Const. art. IV, § 14; Pa. Const. art. II, § 13; S.C. Const. art. III, § 23; S.D. Const. art. III, § 15; Tenn. Const. art. II, § 22; Tex. Const. art. III, § 16; Utah Const. art. VI, § 15; Vt. Const. ch. II, § 8; Wash. Const. art. II, § 11; Wis. Const. art. IV, § 10; Wyo. Const. art. 3, § 14. For more specific rights to information, see Haw. Const. art. I, § 24; Mont. Const. art. II, § 9; N.H. Const. pt. I, art. 8; N.D. Const. art. XI, §§ 5–6.

national origin, sex, and disability) and domains (such as civil and political rights, employment, and property).<sup>65</sup>

Second, these rights have been added to state constitutions at different times by different publics. Some of these layered rights reflect concerns of Jacksonian democracy, others of Progressivism, others of the Civil Rights movement, and more, and the amendment process has generally been one of addition rather than replacement.<sup>66</sup> Given the number of state constitutional rights protections adopted during different periods, it is unsurprising that these rights do not point in a single direction. State constitutions contain rights to collective bargaining but also the “right to work”;<sup>67</sup> they contain rights for criminal defendants but also victims’ rights;<sup>68</sup> they include rights to privacy but also rights to know.<sup>69</sup> In some instances, constitutional provisions themselves seek to resolve such tensions, delineating a balance between individual and community, as we discuss in next section. Other times, the work of reconciling multiple rights provisions falls to judges or other constitutional expositors, part of the interpretive project we address in Part III. The simple starting observation is that state constitutions contain abundant rights provisions that address a wide and ever-expanding range of human affairs. Understanding state constitutions requires considering the full extent of these provisions.

#### B. *Community-Regarding Rights*

Even as state constitutions protect individual rights, they also seek to advance the public good, and they situate the individual in the community as a rights-bearing citizen who in turn bears responsibilities to others. Differing from the federal Constitution, state constitutions offer a meditation not only on the relationship between the people and their government but also on the relationship between the individual and the community.

From their inception, state constitutions have expressed commitments to the public welfare. Eighteenth-century bills of rights were not limited to individual protections but also included the community as a whole.<sup>70</sup> In part, this followed from the project of creating republican governments: Constitutions, including Virginia’s and Pennsylvania’s,

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65. E.g., Conn. Const. art. I, § 20; Ill. Const. art. I, § 17.

66. See Tarr, *Understanding State Constitutions*, supra note 32, at 193 (noting “the influence of disparate political movements” over time and pointing out that “[t]he amendment process often involves neither deletion nor replacement but rather the addition of provisions”).

67. See *id.* at 149.

68. See, e.g., S.D. Const. art. VI, § 7 (providing right for the accused); *id.* § 29 (providing rights to victims).

69. E.g., Haw. Const. art. I, §§ 6, 24; Mont. Const. art. II, §§ 9–10; *id.* art. V, § 10; N.H. Const. pt. I, arts. 2-b, 8.

70. See Tarr, *Understanding State Constitutions*, supra note 32, at 77.

insisted that government existed “for the common benefit, protection, and security of the people, nation or community” rather than for the benefit of any “man, or set of men.”<sup>71</sup> They also specifically recognized the right of the people to consult for the “common good.”<sup>72</sup>

These early state constitutions went further in recognizing mutual obligations among the individuals who constituted the community. Pennsylvania’s Declaration of Rights, for example, provided: “That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expense of that protection, and yield his personal service when necessary, or an equivalent thereto . . . .”<sup>73</sup> Like other constitutions of its time, Pennsylvania’s “considered the communal right to qualify liberties as important as the individual’s right to be free from government interference. . . . Liberties in this constitution were social contract liberties, all qualified by entry into society.”<sup>74</sup>

Over time, state constitutions have continued to recognize individual liberty in the context of communal welfare. Both “common benefit” and “common good” provisions widely appear in contemporary state constitutions.<sup>75</sup> Some state constitutions also expressly designate limits on individual rights based on social needs. For instance, New Hampshire’s constitution provides: “When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is

71. Va. Const. of 1776, Declaration of Rights, §§ 3–4; see also Pa. Const. of 1776, ch. I, art. V; Vt. Const. of 1777, ch. I, art. VI (“That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . .”).

72. E.g., Pa. Const. of 1776, Declaration of Rights, art. XVI (“That the people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address petition, or remonstrance.”).

73. *Id.* art. VIII.

74. Robert C. Palmer, *Liberties as Constitutional Provisions: 1776–1791*, in William E. Nelson & Robert C. Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* 55, 64, 68 (1987) (footnotes omitted).

75. For common benefit clauses, see Ark. Const. art. II, § 1; Conn. Const. art. I, § 2; Idaho Const. art. I, § 2; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights, § 2; Me. Const. art. I, § 2; Mich. Const. art. I, § 1; Minn. Const. art. I, § 1; Nev. Const. art. I, § 2; N.H. Const. pt. I, art. 10; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; S.D. Const. art. VI, § 26; Tenn. Const. art. I, § 2; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 7; Va. Const. art. I, § 3; W. Va. Const. art. III, § 3. For rights to assemble for the common good, see Ala. Const. art. I, § 25; Colo. Const. art. II, § 24; Conn. Const. art. I, § 14; Ky. Const. Bill of Rights, § 1; Mo. Const. art. I, § 9; N.D. Const. art. I, § 5; Pa. Const. art. I, § 20; Tenn. Const. art. I, § 23; Tex. Const. art. I, § 27; Wash. Const. art. I, § 4. For rights to consult for the common good, see Ark. Const. art. II, § 4; Idaho Const. art. I, § 10; Ill. Const. art. I, § 5; Ind. Const. art. I, § 31; Iowa Const. art. I, § 20; Kan. Const. Bill of Rights, § 3; Me. Const. art. I, § 15; Mass. Const. pt. I, art. XIX; Mich. Const. art. I, § 3; Neb. Const. art. I, § 19; Nev. Const. art. I, § 10; N.H. Const. pt. I, art. 32; N.J. Const. art. I, para. 18; N.C. Const. art. I, § 12; Ohio Const. art. I, § 3; Or. Const. art. I, § 26; S.D. Const. art. VI, § 4; Vt. Const. ch. I, art. 20; W. Va. Const. art. III, § 16; Wis. Const. art. I, § 4.

void.”<sup>76</sup> Illinois’s “Fundamental Principles” section similarly provides that the “blessings of liberty” “cannot endure unless the people recognize their corresponding individual obligations and responsibilities.”<sup>77</sup> More recently adopted provisions recognize individual obligations alongside specific individual rights. For instance, the two newest states, Alaska and Hawaii, protect individual liberty, property, happiness, and equality rights at the same time that they expressly insist upon “corresponding obligations” of individuals.<sup>78</sup> Montana’s 1972 constitution added to its inalienable rights provision a clause recognizing “corresponding responsibilities” at the same time that it enumerated more such rights, including a clean and healthful environment.<sup>79</sup>

Most state constitutions also qualify particular rights to ensure that “these rights should be construed to promote the common good, rather than to ‘trump’ it.”<sup>80</sup> For example, in recognizing free speech rights, state constitutions hold individuals “responsible for the abuse of the right.”<sup>81</sup> Some states protect free exercise of religion insofar as it is consonant with public safety and peace.<sup>82</sup>

Consistent with the understanding that individuals bear responsibilities to the community, a number of states have recognized that their constitutions limit private interference with other individuals’ rights.<sup>83</sup> Unlike the federal Constitution’s express framing of most rights as

76. N.H. Const. pt. I, art. 3.

77. Ill. Const. art. I, § 23; cf. Dinan, *State Constitutional Tradition*, supra note 32, at 224 (noting that, across the centuries, there has been a consistent “state constitutional commitment to the formation of citizen character that stands in marked contrast to the dominant understanding of the American constitutional tradition,” which is more libertarian).

78. Alaska Const. art. I, § 1; Haw. Const. art. I, § 2.

79. Mont. Const. art. II, § 3.

80. G. Alan Tarr, *Constitutional Theories and Constitutional Rights: Federalist Considerations*, Publius, Spring 1992, at 93, 105.

81. E.g., Ohio Const. art. I, § 11; see also Alaska Const. art. I, § 5; Ariz. Const. art. II, § 6; Ark. Const. art. II, § 6; Cal. Const. art. I, § 2; Fla. Const. art. I, § 4; Idaho Const. art. I, § 9; Ind. Const. art. I, § 9; Iowa Const. art. I, § 7; Kan. Const. Bill of Rights, § 11; La. Const. art. I, § 7; Mich. Const. art. I, § 5; Minn. Const. art. I, § 3; Mont. Const. art. II, § 7; Nev. Const. art. I, § 9; N.J. Const. art. I, para. 6; N.M. Const. art. II, § 17; N.Y. Const. art. I, § 8; N.D. Const. art. I, § 4; Okla. Const. art. II, § 22; Or. Const. art. I, § 8; S.D. Const. art. VI, § 5; Utah Const. art. I, § 1; Va. Const. art. I, § 12; Wash. Const. art. I, § 5; Wis. Const. art. I, § 3; Wyo. Const. art. I, § 20.

82. E.g., N.Y. Const. art. I, § 3; Wash. Const. art. I, § 11.

83. This is commonly called “horizontal effect” in other legal systems. See, e.g., Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 Buff. L. Rev. 455, 456 (2011) (describing the “principle of horizontality,” which applies public rights to private conduct “depending on the relationships and interests involved”); Helen Hershkoff, *State Common Law and the Dual Enforcement of Constitutional Norms*, in *New Frontiers of State Constitutional Law: Dual Enforcement of Norms* 151, 154 (James A. Gardner & Jim Rossi eds., 2010) (“One such practice, in Europe and elsewhere . . . concerns the enforcement of constitutional rights in private disputes between nongovernmental litigants[,] [v]ariously called the *horizontal* or *third-party* application of constitutional rights . . .”).

limitations on government, state constitutions often enumerate rights without specifying who must respect them,<sup>84</sup> and some rights have accordingly been deemed enforceable against private as well as governmental actors.<sup>85</sup> For instance, state courts have recognized that “threats to the complete enjoyment of freedom of speech and to privacy from other private entities are fully as serious as threats from elected and appointed officials.”<sup>86</sup>

### C. *Positive Rights*

State constitutions also adopt a distinctive understanding of the relationship between the individual and government. In keeping with the federal model, they seek to guard against government infringement of individual rights. As they spell out negative rights in considerable detail, however, state constitutions also recognize that individual enjoyment of rights depends on exercises of government power.<sup>87</sup> Consistent with the eighteenth-century emphasis on government facilitation of happiness and safety—but supplemented by waves of amendment—today, “every state constitution in the United States . . . contains some explicit commitment to positive rights.”<sup>88</sup> In contrast to the prevailing understanding that the U.S. Constitution does not impose any requirement on the government to take affirmative action to guarantee negative rights,<sup>89</sup> state constitutions broadly impose duties on government and mandate its intervention in a number of domains. Every state constitution seeks to strike a balance between prohibiting government infringement and requiring government provision.

The earliest specific positive rights guaranteed in state constitutions concerned public schooling. To inculcate moral citizenship, twelve

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84. Friesen, *State Constitutional Law*, supra note 32, § 9.02.

85. See id. §§ 9.01–.07; John Devlin, *Constructing an Alternative to “State Action” as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 *Rutgers L.J.* 819, 833–34 (1990) (“In the wake of [the California Supreme Court’s decision in] *PruneYard*, the highest courts of New Jersey, Pennsylvania and Washington rendered decisions abandoning a threshold requirement of state action for claims arising under their state guarantees of speech, assembly and petition.”).

86. Friesen, *State Constitutional Law*, supra note 32, § 9.02; see also, e.g., *State v. Robertson*, 649 P.2d 569, 589 (Or. 1982) (“The right of free expression is as important to many people in their personal and institutional relationships as it is in the narrower ‘civil liberties’ related to politics, and nothing in [the state constitution’s free expression clause] suggests that it is limited to the latter.”).

87. See Zackin, supra note 38, at 67–196 (discussing positive rights arising under state constitutions to education, workers’ rights, and environmental protection).

88. Hershkoff, *Just Words*, supra note 34, at 1523.

89. See, e.g., *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment imposes an affirmative obligation on states to protect life, liberty, and property).

eighteenth-century state constitutions included education clauses.<sup>90</sup> Pennsylvania, for example, required the state legislature to establish and fund common schools in each county of the state.<sup>91</sup> During the Jacksonian period, new concerns about child labor, economic inequality, and the assimilation of immigrants supplemented the republican concern with citizen character, and increasing numbers of states began to adopt common-school provisions guaranteeing free public education.<sup>92</sup> Today, every state constitution provides in some way for public schools, and most include affirmative funding requirements.<sup>93</sup>

Between Reconstruction and the New Deal, a number of state constitutions also began to require government financial assistance for the poor.<sup>94</sup> In 1938, for example, New York adopted amendments recognizing state provision for “the aid, care, and support of the needy” and authorizing state-provided housing for low-income citizens.<sup>95</sup> Today, approximately half of the states recognize a positive right of welfare provision.<sup>96</sup>

In addition, state constitutions recognize other positive rights, including a range of labor protections<sup>97</sup> and government mandates for the “protection and promotion of the health of the inhabitants of the state”<sup>98</sup> and protection of the environment.<sup>99</sup> In their approach to government and embrace of positive rights, state constitutions more closely resemble constitutions around the globe than they do the U.S. Constitution.<sup>100</sup>

#### D. *Democratic Rights*

State constitutions seek to guarantee not only individuals’ ability to direct their own lives while attending to the common good but also the people’s collective ability to direct government. Democratic self-rule lies

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90. Hershkoff, *Just Words*, supra note 34, at 1535; see also, e.g., Mass. Const. pt. II, ch. V, § II.

91. See Pa. Const. of 1776, § 44.

92. See Versteeg & Zackin, supra note 34, at 1689–90.

93. See Zackin, supra note 38, at 67–68.

94. See Dinan, *State Constitutional Tradition*, supra note 32, at 211–12.

95. N.Y. Const. art. XVII; id. art. XVIII; see also Ohio Const. art. VIII, § 16.

96. See Hershkoff, *Just Words*, supra note 34, at 1536 n.72 (citing William C. Rava, *State Constitutional Protections for the Poor*, 71 Temp. L. Rev. 543, 551–52, app. A (1998)).

97. See supra note 60 and accompanying text; see also Zackin, supra note 38, at 106–45 (discussing state constitutional provisions concerning working conditions and other labor rights).

98. N.Y. Const. art. XVII, § 3; see also Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. Pa. J. Const. L. 1325, 1347–68 (2010) (surveying state constitutional provisions regarding health).

99. See supra note 59 and accompanying text; see also Tarr, *Understanding State Constitutions*, supra note 32, at 149–50 (“[E]very state constitution[] written from 1959 to the present has committed the state to protection of the environment, and six states have also amended their constitutions to do so.”); Zackin, supra note 38, at 146–96.

100. See Versteeg & Zackin, supra note 34, at 1698. The same is true with respect to state constitutions and horizontal effect. See supra note 83 and accompanying text.

at the “heart” of the state constitutional project.<sup>101</sup> These constitutions are oriented around majoritarian democracy in a way the federal Constitution is not,<sup>102</sup> and they are shot through with rights provisions directed at maintaining popular control over government.

As we have elaborated in prior work, a “democracy principle”<sup>103</sup> animates state constitutions. Unlike the federal Constitution that celebrates “We the People” but sharply constrains the people’s ability to engage in self-rule, state constitutions have always contained operative clauses recognizing that political power resides in the people, and they have been repeatedly amended to expand channels for unmediated, popular self-rule.<sup>104</sup> Today, forty-nine constitutions include an express commitment to popular sovereignty, most commonly stating that “all political power is inherent in the people.”<sup>105</sup> State constitutions also seek to facilitate ongoing popular control of government institutions, attempting to “approximate direct democracy in their systems of representative government.”<sup>106</sup> They provide for popular majority vote for numerous positions in the executive and judicial branches, from

101. See *N.C. State Conf. of the NAACP v. Moore*, 876 S.E.2d 513, 527 (N.C. 2022) (“[W]e begin and end with the principles codified in numerous provisions of our constitution that function as the beating heart of North Carolina’s system of government: the principles of popular sovereignty and democratic self-rule.”).

102. Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33, at 887–89.

103. *Id.* at 861–62; see also Jessica Bulman-Pozen & Miriam Seifter, *Countering the New Election Subversion: The Democracy Principle and the Role of State Courts*, 2022 *Wis. L. Rev.* 1337, 1340 [hereinafter Bulman-Pozen & Seifter, *Countering the New Election Subversion*].

104. Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33, at 896.

105. Ala. Const. art. I, § 2; Alaska Const. art. I, § 2; Ariz. Const. art. II, § 2; Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Conn. Const. art. I, § 2; Fla. Const. art. I, § 1; Idaho Const. art. I, § 2; Iowa Const. art. I, § 2; Kan. Const. Bill of Rights, § 2; Ky. Const. Bill of Rights, § 4; Mich. Const. art. I, § 1; Nev. Const. art. I, § 2; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; S.D. Const. art. VI, § 26; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Wash. Const. art. I, § 1. Other states provide slightly different formulations, including that “all political power is vested in and derived from the people” or that “all power is inherent in the people.” Colo. Const. art. II, § 1; Ga. Const. art. I, § II, para. I; Ind. Const. art. I, § 1; La. Const. art. I, § 1; Mass. Const. pt. I, art. V; Me. Const. art. I, § 2; Minn. Const. art. I, § 1; Miss. Const. art. III, § 5; Mo. Const. art. I, § 1; Mont. Const. art. II, § 1; N.H. Const. pt. I, art. 8; N.M. Const. art. II, § 2; N.C. Const. art. I, § 2; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; S.C. Const. art. I, § 1; Tenn. Const. art. I, § 1; Va. Const. art. I, § 2; Vt. Const. ch. I, art. 6; W. Va. Const. art. III, § 2; Wyo. Const. art. I, § 1. For other formulations of the principle, see Del. Const. pmbl.; Ill. Const. art. I, § 1; Md. Const. Declaration of Rights, art. I; Neb. Const. art. I, § 1; R.I. Const. art. I, § 1; Wis. Const. art. I, § 1.

106. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in *Democracy: How Direct? Views From the Founding Era and the Polling Era* 87, 91 (Elliott Abrams ed., 2002) [hereinafter Tarr, *For the People*]; see also Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 165 (1998) (noting that state constitutional drafters wanted representative government to “be in miniature an exact portrait of the people at large” (internal quotation marks omitted) (quoting then-Massachusetts delegate John Adams)).

governors and lieutenant governors to attorneys general and secretaries of state to judges.<sup>107</sup> So too, they constrain the exercise of government power in the service of popular accountability.<sup>108</sup> Experience with unrepresentative legislatures in the nineteenth century yielded an ongoing focus on making legislators responsive to the popular will, including by imposing term limits and detailed procedural requirements on lawmaking.<sup>109</sup>

In privileging popular majority rule, state constitutions also endorse political equality in both the inputs and outputs of government decisionmaking.<sup>110</sup> A salient fear driving state constitutional drafting and revision over time has been that the few might capture government and use it to serve their own ends. This concern with “[m]inority faction”<sup>111</sup> led eighteenth-century constitution writers to guarantee equal participation in government elections among those understood to constitute the political community.<sup>112</sup> State constitutions have also required equal treatment of members of the political community by the government. For example, provisions widely adopted during the nineteenth century sought to check legislative favoritism.<sup>113</sup> Today, most state constitutions limit special legislation and seek to foreclose other forms of government partiality.<sup>114</sup>

The democracy principle bears directly on how state constitutions frame individual rights. State constitutions recognize popular sovereignty, majority rule, and political equality as cornerstones for rights as well as government structure, and they reject a common premise that individual rights and majoritarian democracy stand in tension with one another. Not

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107. See Bulman-Pozen & Seifter, *Democracy Principle*, supra note 33, at 872–73 & nn.62–66.

108. See, e.g., Williams, *Law of State Constitutions*, supra note 5, at 258.

109. See Bulman-Pozen & Seifter, *Democracy Principle*, supra note 33, at 874–75 & nn.74–79 (describing state constitutional mechanisms that attempt to keep legislators responsive to the popular will); Tarr, *For the People*, supra note 106, at 93 (“By the 1830s, citizens in most states . . . believed that state legislators remained more responsive to the wealthy and well-connected than to the general public. This prompted a wave of constitutional reform.”).

110. See Bulman-Pozen & Seifter, *Democracy Principle*, supra note 33, at 890 (“Together with their commitments to popular sovereignty and majority rule, state constitutions also embrace a commitment to political equality, a commitment that entails both equal access to political institutions by members of the political community and equal treatment of members of the political community by those institutions in turn.”).

111. Tarr, *Understanding State Constitutions*, supra note 32, at 78.

112. See Bulman-Pozen & Seifter, *Democracy Principle*, supra note 33, at 890 & nn.178–80 (collecting examples).

113. See *id.* at 892–94 (“[P]rovisions guaranteeing equality, prohibiting special legislation, and imposing public-purpose requirements attempt to foreclose special treatment for the privileged few.”).

114. See *id.* at 875 n.80 (collecting provisions); Marshfield, supra note 46, at 859 (“[I]f there is a single thread that connects state constitutions across jurisdictions and time, it is a populist fear that government is prone towards capture and recalcitrance.”).

only do state constitutions seek to guarantee democracy through robust guarantees of the right to vote, participate in direct democracy, and more, but they also propose that popular majority rule is the best way to safeguard individual rights in the face of unrepresentative or otherwise untrustworthy government actors.<sup>115</sup>

From the start, state constitutions have insisted on a tight connection between democracy and rights. Eighteenth-century bills of rights, for example, framed statements of political principle as rights.<sup>116</sup> Virginia's widely emulated Declaration of Rights not only provided that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community"<sup>117</sup> but also recognized that "whenever any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal."<sup>118</sup> Nearly every eighteenth-century bill of rights similarly recognized the people's right to abolish or alter the governments they had created.<sup>119</sup> These provisions remain in place to this day and have also been adopted by states that joined the Union in later centuries.<sup>120</sup>

Eighteenth-century state constitutions likewise recognized the right of the people to remove public officials from office. In the words of the Massachusetts Declaration of Rights, "In order to prevent those who are vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life."<sup>121</sup> In a similar spirit, these early bills of rights declared that government officials are but the people's agents and recognized a popular right to petition and instruct representatives.<sup>122</sup> As Marshfield concludes based on his study of

115. See, e.g., Hershkoff, *Just Words*, *supra* note 34, at 1539–40; Marshfield, *supra* note 46, at 890–91.

116. See Tarr, *Understanding State Constitutions*, *supra* note 32, at 76–77.

117. Va. Const. of 1776, Declaration of Rights, § 3.

118. *Id.*

119. See Marshfield, *supra* note 46, at 884–85.

120. See Ark. Const. art. II, § 1; Cal. Const. art. II, § 1; Colo. Const. art. II, § 2; Conn. Const. art. I, § 2; Del. Const. pmbl.; Ga. Const. art. I, § II, paras. I–II; Idaho Const. art. I, § 2; Ind. Const. art. I, § 1; Iowa Const. art. I, § 2; Ky. Const. Bill of Rights, § 4; Me. Const. art. I, § 2; Md. Const. Declaration of Rights, art. 1; Mass. Const. pt. I, art. VII; Minn. Const. art. I, § 1; Miss. Const. art. III, § 6; Mo. Const. art. I, § 3; Mont. Const. art. II, § 2; Nev. Const. art. I, § 2; N.H. Const. pt. I, art. 10; N.J. Const. art. I, para. 2.a; N.D. Const. art. I, § 2; Ohio Const. art. I, § 2; Okla. Const. art. II, § 1; Or. Const. art. I, § 1; Pa. Const. art. I, § 2; R.I. Const. art. I, § 1; S.C. Const. art. I, § 1; S.D. Const. art. VI, § 26; Tenn. Const. art. I, § 1; Tex. Const. art. I, § 2; Utah Const. art. I, § 2; Vt. Const. ch. I, art. 7; Va. Const. art. I, § 3; W. Va. Const. art. III, § 3; Wyo. Const. art. I, § 1.

121. Mass. Const. pt. I, art. VIII; see also Vt. Const. of 1777, ch. I, art. VII ("[T]he people have a right, at such periods as they may think proper, to reduce their public officers to a private station . . ."); Md. Const. of 1776, Declaration of Rights, § XXXI (requiring rotation in office).

122. Marshfield, *supra* note 46, at 883 & nn.177–178.

early state constitutional conventions, “state bills of rights were designed to facilitate popular control over wayward government officials and policy,”<sup>123</sup> and over time the states have converged “on an approach that prioritizes rights as instruments of popular control over government.”<sup>124</sup>

As state constitutions have been amended across the decades, drafters have continued to rely on rights provisions to advance democratic government. Most significantly, today every state constitution confers an affirmative right to vote.<sup>125</sup> At state conventions, participants have recognized that voting rights are “foundational” rights “without which all others are meaningless.”<sup>126</sup> State constitutions have also bolstered the right to vote through linked provisions, including rights to participate in free, or free and open, elections<sup>127</sup> and rights not to be arrested while participating in elections.<sup>128</sup> Approximately half of the states have also adopted the initiative or referendum to enable direct lawmaking by the people.<sup>129</sup> Although direct democracy provisions are often framed as carve-outs to the legislature’s power, state courts have recognized these guarantees of popular lawmaking as “fundamental rights.”<sup>130</sup> Both by locating democracy protections in bills of rights and by expressly casting many of these protections as rights, state constitutions propose a mutually constitutive relationship between democracy and rights.

Indeed, the connections state constitutions propose between rights and democratic self-rule are not limited to rights directly concerning elections, political representation, or even equality. The state constitutional tradition is imbued with the recognition that rights and democracy are more deeply intertwined. In their opening clauses, illustratively, state constitutions routinely recognize that governments exist to protect individual rights and welfare<sup>131</sup> and also that such rights are the

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123. *Id.* at 877.

124. *Id.* at 862; see also *id.* at 887–89 (reviewing early convention records and showing that participants saw bills of rights as facilitating the people’s ability “to realize and perpetuate their sovereignty over government”).

125. See *supra* note 62 and accompanying text.

126. *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58, 65 & n.13 (Mont. 2022) (quoting James Grady, *Mont. Const. Convention Comm’n, Suffrage and Elections: Constitutional Convention Study No. 11*, at 25 (1971)).

127. Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33, at 871 & n.59 (collecting provisions).

128. *Id.* at 871–72 & n.61 (collecting provisions).

129. See *supra* note 63 and accompanying text.

130. *Reclaim Idaho v. Denney*, 497 P.3d 160, 181–82 (Idaho 2021) (“[L]ike voting, the Idaho Constitution plainly expresses the initiative and referendum power as a positive right—‘*The people reserve to themselves the power . . .*’ This alone requires us to interpret the people’s initiative and referendum rights as fundamental rights.” (citation omitted) (quoting Idaho Const. art. III, § 1)).

131. See, e.g., Mich. Const. art. I, § 1 (“All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.”); *supra* note 75.

foundation of rule by the people.<sup>132</sup> Amendments adopted over the centuries have been intended to guarantee rights for workers, women, welfare recipients, and others—and to guarantee such rights in part by ensuring government responsiveness to popular control rather than special interests.<sup>133</sup> Because the people always stand apart from their representatives, rights provisions may at once protect individuals from government and protect popular self-rule. If a defining aim of federal constitutional rights is to shield individuals from the whims of majorities,<sup>134</sup> a defining aim of state constitutional rights is to simultaneously enhance individual autonomy and majoritarian democracy.

E. *In Sum: Individual and Collective Self-Determination*

Now we are in a position to see state constitutional rights in full. In the number and kind of rights they elaborate, their attention to community as well as individual, and their conceptualization of government power and constraint, state constitutions differ markedly from the U.S. Constitution. They furnish more individual rights while imposing public-regarding limits on these rights. They place more emphasis on communal welfare while obligating the community to attend to each of its members. They demand more activity from government while creating checks to ensure popular responsiveness. And they do all of this while structuring state institutions to guarantee democratic self-governance.

As a result, state constitutions do not mimic the federal Constitution in emphasizing fundamental rights and the fear of majority faction, but

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132. See, e.g., Wis. Const. art. I, § 1 (“All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.”).

133. See, e.g., Hershkoff, *Just Words*, *supra* note 34, at 1540–41 (arguing that twentieth-century state constitutional amendments guaranteeing social and economic rights sought to “ensure enactment of majoritarian reforms despite opposition by special interest groups”); Versteeg & Zackin, *supra* note 34, at 1664 (proposing that the detail included in state constitutions, including positive rights provisions, “reflects constitutional drafters’ attempts to maintain tighter control over their governments”); see also Tarr, *Understanding State Constitutions*, *supra* note 32, at 94–101 (describing nineteenth-century state constitutional changes designed to protect the people from the wealthy, well-connected few and government capture); James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *Rutgers L.J.* 819, 820 (1991) (exploring how Progressive-era reformers adopted amendments “to reestablish popular sovereignty in an urban and industrial society in which concentrations of power and wealth had corrupted the democratic process” and to secure “popular rights” in state constitutions (quoting James Quayle Dealey, *Growth of American State Constitutions* 258 (1915))).

134. See, e.g., William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 *Val. U. L. Rev.* 1, 12 (1991) (arguing that the federal Bill of Rights’ “salient purpose is to . . . protect minorities . . . from the passions or fears of political majorities”); see also Marshfield, *supra* note 46, at 863–67 (contrasting this federal approach with the state constitutional approach).

neither do they resemble populist constitutions that privilege political decisions at the expense of individual rights. They embrace both individual and collective will.<sup>135</sup> State constitutions conceive of rights robustly—not as a sparse set of negative liberties but as an expansive framework allowing individuals to direct their lives, free from domination and arbitrary interference or neglect. At the same time, they contemplate an active popular sovereign; they prioritize the ability of the people in their collective capacity to direct government and to continually revise their fundamental law.

Following state courts, we adopt the label “self-determination” to describe these intertwined commitments.<sup>136</sup> Although the term does not itself appear in any state constitution—an absence that underscores our focus on these documents as a whole—many state courts have recognized constitutional principles of both individual<sup>137</sup> and collective<sup>138</sup> self-determination. In the words of one supreme court, “[a]bove all, the Florida Constitution embodies the right of self-determination for *all* Florida’s citizens.”<sup>139</sup> By valuing individual and collective self-determination alike, state courts carry forward the republican traditions that gave rise to early state constitutions<sup>140</sup> while accommodating traditions

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135. See generally Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Tex. L. Rev. 1587, 1607 tbl.1 (2011) (typologizing constitutional democracies in terms of their weak or strong protection of fundamental rights and their weak or strong protection of democratic participation).

136. E.g., Advisory Op. to the Att’y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) (“[T]he Florida Constitution embodies the right of self-determination for *all* Florida’s citizens.”).

137. See, e.g., *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 466 (Kan. 2019); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977); *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999); see also *infra* notes 259–263 and accompanying text (discussing these cases).

138. See, e.g., *Right to Treatment*, 818 So. 2d at 494; see also *infra* notes 256–257 (discussing this and related cases).

139. *Right to Treatment*, 818 So. 2d at 494 (noting further that the court has therefore “been reluctant to interfere with this right by barring citizens from formulating their own organic law”). As the description of the constitutional initiative as a form of self-determination suggests, self-determination is also a term that speaks to processes of constitutional change in the states, where constitutions are readily and frequently amended by the people. We explore this facet of self-determination in other work. See Bulman-Pozen & Seifter, *Right to Amend*, *supra* note 22 (manuscript at 2) (“Together with other democratic rights that appear in state constitutions but not the federal charter—from affirmative rights to vote to rights to alter and abolish government—the right to amend recognizes the people’s sovereignty as an active, ongoing commitment. It is a cornerstone of state constitutions.”).

140. See, e.g., Tarr, *Understanding State Constitutions*, *supra* note 32, at 90 (discussing republican influences on early state constitutions); Wood, *State Constitution-Making*, *supra* note 40, at 914 (same).

that have informed their development, including the negative liberties of natural rights and the affirmative obligations of civil and human rights.<sup>141</sup>

The state constitutional commitment to individual and collective self-determination underscores a few basic points that adjudication should accommodate and that Parts III and IV further explore. First, individual autonomy (“liberty to follow one’s will”<sup>142</sup>) is the starting point for analysis across the wide range of activity protected by state constitutions. State constitutions contain robust and plentiful rights, and the layering of provisions over time indicates that courts should read these documents holistically rather than piecemeal, assuming a generous posture when first ascertaining the rights at stake in a dispute.

At the same time, state constitutional rights are not absolute and may be subject to limitations. Even beyond rights articulated together with community-regarding constraints,<sup>143</sup> individual rights may be limited through certain exercises of the popular will. But government action is not to be automatically equated with the popular will; the people always stand apart from their representatives, and state constitutions express particular concern with unrepresentative and otherwise arbitrary government action. Any framework seeking to understand, or to make decisions about, state constitutional rights must offer balanced attention to the people in both their individual and collective capacities.

Finally, to say that state constitutional rights are abundant and complex is not to say that they are all the same. Certain core rights are prerequisites to individual and collective self-determination and properly receive special weight in state constitutional analysis.<sup>144</sup> As described

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141. For philosophical accounts of self-determination that are particularly resonant in the state constitutional context, see generally Philip Pettit, *Republicanism: A Theory of Freedom and Government* 51–79 (1997) (proposing freedom as nondomination and arguing that domination consists in someone’s capacity to interfere on an arbitrary basis in another’s choices); Iris Marion Young, *Justice and the Politics of Difference* 37–38 (1990) (arguing that self-determination consists in “participating in determining one’s action and the conditions of one’s action” and that its contrary is domination). Professor Iris Marion Young emphasizes the connection between individual and collective forms of self-determination. See Iris Marion Young, *Inclusion and Democracy* 33 (Will Kymlicka, David Miller & Alan Ryan eds., 2000) (arguing that “participation in making the collective regulations designed to prevent domination” is necessary to individual self-determination, and that “[d]emocracy in that respect is entailed by self-determination, though the value of self-determination does not reduce to democratic participation”).

142. Autonomy, *Oxford English Dictionary* (3d ed. 2023).

143. See *supra* notes 80–85 and accompanying text.

144. See *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984) (discussing rights “without which other constitutionally guaranteed rights would have little meaning”); Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 *Mich. L. Rev.* 1307, 1319 (2022) (“[S]ome rights are closely associated with the status of free and equal members of a democracy—especially rights to bodily integrity, freedom of conscience, free expression, [and] the right to vote . . . [—while others] may not be tied as closely to guaranteeing the conditions necessary for cooperative self-governance.”).

further below, state courts have convincingly located voting<sup>145</sup> and bodily integrity,<sup>146</sup> among other rights, in this category, though they have worked out the contours of the category incrementally and contextually.<sup>147</sup> There is, then, much that state courts can do to implement state constitutions committed to self-determination. What they should not do is adopt inapt federal frameworks, as the next Part explains.

## II. FROM METHODOLOGICAL LOCKSTEPPING TO STATE-CENTERED ADJUDICATION

Despite the distinctive state constitutional rights tradition, state courts liberally import practices, doctrinal frameworks, and rhetoric from the pages of the *U.S. Reports* when deciding state constitutional rights claims. This sort of methodological lockstepping has gone largely unremarked.<sup>148</sup> Although substantive lockstepping in the interpretation of particular constitutional provisions has been a preoccupation of state constitutional law scholars for decades, there has been no sustained attention to the problem of state interpreters copying federal methods of judicial decisionmaking.

Insofar as state constitutional rights claims are litigated through federal frameworks, courts are likely to make mistakes. This Part highlights three of particular importance. Rather than focus on federally fashionable debates over originalism and textualism—which would replicate the problem of reflexive federal mimicry—we focus on three errors that are likely to receive less attention and to be more outcome-determinative.<sup>149</sup>

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145. See, e.g., *Tully v. Edgar*, 664 N.E.2d 43, 48 (Ill. 1996) (“[T]he right to vote is a fundamental constitutional right, essential to our system of government.”); *League of Women Voters of Kan. v. Schwab*, 525 P.3d 803, 820 (Kan. Ct. App. 2023) (explaining that all “basic civil and political rights depend on the right to vote,” which serves as the “foundation of a representative government”); *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58, 65 (Mont. 2022) (“[The right to vote] is perhaps the most foundational of our Article II rights and stands, undeniably, as the pillar of our participatory democracy.”).

146. See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 424 (Mass. 1977) (recognizing every person’s “strong interest in being free from nonconsensual invasion of his bodily integrity”); *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985) (“Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination, if you will.”); *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999) (noting that the right to personal autonomy is “a long-standing and . . . integral part of this country’s jurisprudence”).

147. See *infra* sections III.A.2, IV.B.

148. A notable exception is Helen Hershkoff, *State Courts and the “Passive Virtues”: Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1838 (2001) [hereinafter Hershkoff, *Passive Virtues*] (arguing that federal justiciability doctrine is inappropriate for state courts and proposing a state-centered approach).

149. As scholars and jurists across the ideological spectrum have recognized, state constitutional text and history are too abundant and complex to make approaches sounding in original intent, original public meaning, or plain text decisive. See *State v. Roundtree*, 952 N.W.2d 765, 793 (Wis. 2021) (Hagedorn, J., dissenting) (noting that while “[j]udicial application of the original public meaning is sometimes quite easy, . . . the more vaguely

First, state courts may engage in clause-bound interpretations of the interests at stake instead of reading constitutional provisions together. The abundance of state constitutional rights and the popular amendment processes that have shaped these rights underscore that clauses must often be combined to recognize the full scope of a right as well as its limits.

Second, state courts following the federal lead may use rigid tiers of scrutiny rather than more balanced frameworks. Federal rational basis review is too deferential to state legislatures and executives, whom state constitutions sharply distinguish from the people themselves, while strict scrutiny is often too absolutist in its conception of rights and fails to situate the individual within the community as state constitutions require.

Third, following federal approaches may lead state courts to shy away from appearances of policymaking or discretion. These decisions are misplaced to the extent they rely on a purported countermajoritarian difficulty, which does not exist as such in the states. State courts are generally majoritarian, elected institutions, and their decisions are readily countermanded. They are entries in an ongoing popular conversation, not the final word on constitutional questions.

#### A. *Ill-Fitting Federal Approaches*

1. *Clause-Bound Interpretation.* — One way reflexively following federal practice stunts state constitutional adjudication is by artificially limiting the understanding of rights at stake in a particular controversy. Despite calls to interpret the U.S. Constitution holistically or synthetically<sup>150</sup> and

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worded protections in the Bill of Rights[] often demand some legal framework or test that enables a court to apply the law to the facts of a case”); Jack L. Landau, A Judge’s Perspective on the Use and Misuse of History in State Constitutional Interpretation, 38 Val. U. L. Rev. 451, 452 (2004) (“[I]t must be recognized that resorting to history unavoidably involves a number of value judgments that cannot be resolved by reference to history itself.”); Caleb Stegall, Assoc. Just., Kan. Sup. Ct., Keynote Address to the Society for Law & Culture: Originalism and the Individual Jurist (May 2018), <https://kirkcenter.org/essays/originalism-and-the-individual-jurist/> [<https://perma.cc/N3PT-9UPF>] (“I find it vitally important to dispel the myth that originalism is a panacea that can easily solve the dilemmas facing the constitutional interpreter. . . . I say that as a committed original public meaning jurist.”); see also Jane Schacter, The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 150, 153 (1995) (explaining that it is “futile” for courts to attempt to uncover popular intent behind state constitutional amendments and that it is “problematic” to rely on the plain meaning of text that “voters neither read, nor necessarily comprehend”); Glen Staszewski, Interpreting Initiatives Sociologically, 2022 Wis. L. Rev. 1275, 1279 (arguing that initiatives seldom support a single original public meaning).

150. See, e.g., Vicki C. Jackson, Holistic Interpretation: *Fitzpatrick v. Bitzer* and Our Bifurcated Constitution, 53 Stan. L. Rev. 1259, 1262 (2001) (“[H]olistic interpretation . . . will make for better constitutional interpretation than one that narrowly focuses on particular clauses or words considered apart from their position and presence in the overall constitutional structure.”); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 Harv. L. Rev. 947, 949 (2002) (advocating a “synthetic reading of the Fourteenth and Nineteenth Amendments”).

occasional examples of “combination analysis” in federal courts,<sup>151</sup> federal constitutional adjudication tends to proceed in a more clause-bound fashion. As Professor Michael Coenen describes, in the ordinary federal case, “[c]onstitutional adjudication . . . involves the tasks of identifying the constitutional provision most relevant to the case, looking up the clause-specific doctrinal rules associated with that provision, and then resolving the case in accordance with those rules.”<sup>152</sup>

Recent state court decisions offer examples of a similar clause-bound approach. In the Idaho abortion litigation, for example, the petitioners asked the court to consider state clauses concerning due process, inalienable rights, privacy, and unenumerated rights<sup>153</sup>—a request the court side-stepped.<sup>154</sup> In the Wisconsin gerrymandering decision, similarly, the court rejected the idea that redistricting might be informed by the state constitution’s provisions regarding equality and inherent rights, freedom of expression, freedom of association, and maintenance of free government.<sup>155</sup> It instead considered only provisions concerning the equipopulation and compactness of electoral districts.<sup>156</sup>

Whatever the merits of such a clause-bound approach to the U.S. Constitution, it is an error when it comes to state constitutions. Rigid, clause-bound readings ignore state constitutions’ emphasis on democratic constitutional change, their expansive commitment to rights, and their recognition of relationships among individual, community, and government. As these constitutions have been amended over time, more and more rights provisions have been introduced. Sometimes, state constitutional provisions—and in rarer circumstances, state constitutions as a whole—have been replaced altogether. But far more commonly, state constitutional amendment is an accretive process; rights first guaranteed in the eighteenth century sit alongside twentieth- and twenty-first-century provisions.<sup>157</sup>

For some distinguished state constitutional commentators, this very complexity cuts in favor of clause-bound interpretation. Thirty years ago, Professor Alan Tarr argued that state constitutional interpreters do best to

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151. Michael Coenen, Combining Constitutional Clauses, 164 U. Pa. L. Rev. 1067, 1070 (2016); see also, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 670–76 (2015) (citing both the Due Process and Equal Protection Clauses to recognize federal constitutional protection for gay marriage). Perhaps unsurprisingly, the Court’s combining of these clauses tracked an earlier state constitutional law decision. See *infra* text accompanying note 237 (discussing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

152. See Coenen, *supra* note 151, at 1069.

153. See Petitioners’ Brief in Support of Verified Petition for Writ of Prohibition and Application for Declaratory Judgment at 2, *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132 (Idaho 2023) (No. 49615-2022), 2022 WL 1462971.

154. See *Planned Parenthood Great Nw.*, 522 P.3d at 1161.

155. See *Johnson v. Wis. Elections Comm’n*, 967 N.W.2d 469, 485–87 (Wis. 2021).

156. See *id.* at 481, 487.

157. See Tarr, *Understanding State Constitutions*, *supra* note 32, at 193.

consider provisions in isolation, with attention to “the historical circumstances out of which the constitutional provision arose” but without trying to make sense of multiple provisions together or of the constitution as a whole.<sup>158</sup> Although we agree with Tarr that reading provisions together can be a demanding and sometimes indeterminate inquiry, we do not find that reason enough to shrink from the project.

To the contrary, as many state courts have themselves recognized, it will frequently be only by considering multiple provisions that state courts can effectuate the popular will, expressed by the people over time in response to multiple political and social movements and different salient concerns. In principle, all fifty state high courts have committed to reading state constitutional provisions together to achieve “constitutional harmony,” in the formulation of the North Carolina Supreme Court.<sup>159</sup> Such harmony-seeking not only is relevant to identifying constitutional rights—it is, for example, also a way to think about the balancing of such rights and justifications for government action<sup>160</sup>—but also is an important component of articulating the constitutional interests at stake in the first instance. Section III.A discusses this practice further.

2. *Tiers of Scrutiny.* — Properly identifying the rights at stake in litigation is an important piece of the constitutional puzzle, but state courts must also decide whether a law or policy challenged as infringing such rights is permissible. Generally, this will mean applying an established framework—and in federal adjudication the choice of framework is often decisive. Courts and scholars alike recognize the significance of such implementing frameworks; they subsume much of what colloquially passes for constitutional interpretation.<sup>161</sup> Because implementation doctrines are

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158. *Id.* at 194 (noting that “[f]or state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been for federal judges seeking coherence in the federal Constitution,” meaning “something much closer to ‘clause-bound’ interpretation is required” for state constitutions).

159. *Hoke Cnty. Bd. of Educ. v. State*, 879 S.E.2d 193, 229 (N.C. 2022); see also *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018) (“We consider a constitutional amendment ‘as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions . . . .’” (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996))); *Ocean Energy, Inc. v. Plaquemines Par. Gov’t*, 880 So. 2d 1, 7 (La. 2004) (suggesting that constitutional “provisions should be harmonized if possible”); *State ex inf. McKittrick v. Bode*, 113 S.W.2d 805, 808 (Mo. 1938) (discussing “the rule that the provisions of the Constitution should be harmonized”); *We the People Nev. ex rel. Angle v. Miller*, 192 P.3d 1166, 1171 (Nev. 2008) (“This court has recognized that ‘[t]he Nevada Constitution should be read as a whole, so as to give effect to and harmonize each provision.’” (alteration in original) (quoting *Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006))); *infra* note 208.

160. See *infra* section III.C.

161. See, e.g., *State v. Roundtree*, 952 N.W.2d 765, 793 (Wis. 2021) (Hagedorn, J., dissenting) (noting the need for a “legal framework or test that enables a court to apply the law to the facts of a case” and suggesting that the law “is replete with these implementing doctrines”). For accounts discussing the importance of these implementing frameworks,

judicial creations, they rely not only on constitutional text or history but also on “empirical and predictive assessments.”<sup>162</sup> They reflect the court’s understanding of its own role and the legislature’s, pragmatic concerns about administrability, and policy views about who should get the benefit of the doubt.

Federal implementation approaches are a poor fit for the state constitutional rights tradition that Part I describes. Yet, for decades, many state courts have simply borrowed federal frameworks.<sup>163</sup> Despite the “new judicial federalism” literature’s concern with substantive lockstepping, it has not attended to such methodological lockstepping. And the current movement of federal litigation into state high courts threatens to make state practice still more closely track the federal model.

We focus here on the most prevalent and well-known implementation doctrine: the federal tiers of scrutiny, under which there is strict scrutiny for fundamental rights and suspect classifications, and rational basis review for most everything else.<sup>164</sup> State litigants and courts frequently invoke this framework, but it is ill suited to state constitutions. It is too deferential to state legislatures and executives, whom state constitutions task state courts with monitoring on behalf of the people, and too absolutist in its conception of individual rights, which must be understood in the context of other rights and communal welfare.

Consider first the deferential end of the tiers of scrutiny. In federal constitutional adjudication, rational basis usually amounts to a free pass to the government.<sup>165</sup> Although courts sometimes engage in more searching variants, the hallmarks of rational basis review, which ostensibly asks whether the government’s action is reasonably related to a legitimate governmental purpose, are that the purpose need not in fact be real (a

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see, e.g., Richard H. Fallon, Jr., *Implementing the Constitution* 76 (2001) (noting that “it is largely through the formulation (and subsequent application) of tests that the Court discharges its responsibilities for constitutional implementation”); Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 8 (2004) (“[S]cholars and courts have come increasingly to appreciate that judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning . . .”); Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 Const. Comment. 95, 96 (2010) (arguing that there is a “real and fundamental” difference between how courts “discover[] linguistic meaning or semantic content of the legal text” and “give[] a text legal effect”).

162. See Fallon, *supra* note 161, at 31.

163. See Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 Notre Dame L. Rev. 1065, 1067 (1997) (criticizing the practice); Hans A. Linde, *Are State Constitutions Common Law?*, 34 Ariz. L. Rev. 215, 225 (1992) (criticizing state courts for “replacing state constitutions with generic Supreme Court formulas”).

164. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (introducing twentieth-century tiers of scrutiny).

165. See, e.g., Maria Ponomarenko, *Administrative Rationality Review*, 104 Va. L. Rev. 1399, 1408–12 (2018).

purpose can be hypothesized post-hoc by the court) and that understandings of legitimacy are very thin.<sup>166</sup>

The potential for ludicrous rulings under this framework is well known.<sup>167</sup> So it was that the Idaho Supreme Court was able to agree that the Total Abortion Ban was rationally related to the state's interests, which included women's health and safety, when the law included lifesaving exceptions to the ban only as an affirmative defense.<sup>168</sup> Under the relevant provision, a doctor could raise the defense only after being "charged, arrested, and confined until trial."<sup>169</sup> Rational basis weighed heavily in the court's analysis: Citing its case law on rational basis review, the court stressed that "the Idaho Constitution does not require that the [ban] employ the *wisest* or *fairest* method of achieving its purpose."<sup>170</sup>

At the federal level, a deferential test for judicial review of most federal legislation makes sense. Among other reasons, Congress is a representative body, and the federal courts are not.<sup>171</sup> But this is not true in the states, where judges are generally elected statewide and participate in a common law tradition of policymaking, and where legislatures are frequently the least representative branch of government because of districting, geographical clustering, and extreme gerrymandering.<sup>172</sup> State constitutions task state courts with reviewing the legislature's work on behalf of the people, and state courts should not simply accept "any plausible justification—however speculative, and however minimally furthered by the state's chosen means."<sup>173</sup>

Rational basis review is also a poor fit for state constitutions because of their inclusion of positive rights. As Professor Helen Hershkoff has convincingly explained, rational basis review is not a sensible way to review

166. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

167. See, e.g., Ponomarenko, *supra* note 165, at 1411.

168. *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1152–53 (Idaho 2023) ("[I]n place of exceptions, the Total Abortion Ban allows for *legally justified abortions* through affirmative defenses to prosecution . . . [including when] '[t]he physician determined, in his good faith medical judgment . . . that the abortion was necessary to prevent the death of the pregnant woman' . . . ." (quoting Idaho Code § 18-622 (2023))).

169. *Id.* at 1196 ("[A] physician who performed an 'abortion' . . . could be charged, arrested and confined until trial *even if* the physician initially claims they did it to preserve the life of the mother . . . . Only later, at trial, would the physician be able to raise the affirmative defenses available in the Total Abortion Ban . . . .").

170. *Id.*

171. Federalism concerns might likewise justify rational basis review of state legislation by federal courts, although that argument is not as strong.

172. See Seifter, *supra* note 21, at 1762–68 (explaining that state legislatures are frequently controlled by the state's minority party while state governors and state courts are generally chosen by simple statewide elections); cf. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 Va. L. Rev. 953, 1009–15 (2016) (arguing that political representation may be furthered by state and federal executive policymaking).

173. Ponomarenko, *supra* note 165, at 1411.

positive rights claims, such as a right to welfare.<sup>174</sup> These rights demand affirmative government provision and require courts to elaborate norms and foster compliance by other institutions.<sup>175</sup> Given that many positive rights may be read conjointly with negative rights—for instance, in the example of educational opportunity and equality<sup>176</sup>—state courts play this role more often than the relatively small number of positive rights in most constitutions might suggest.<sup>177</sup>

At the other end of the tiered approach, reflexive importation of strict scrutiny is also inappropriate. State constitutional rights are often multifaceted, including both individual and collective aspects. Instead of giving particular rights automatic victory, state courts do state constitutions (and litigants) more justice if they acknowledge competing interests at stake. As we have described above, a number of rights provisions in state constitutions contain their own community-regarding limits that effectively demand balancing in particular applications.<sup>178</sup> More generally, the conjunction of individual rights clauses with common-good and communal welfare provisions, and the overarching insistence on both individual and collective self-determination, suggests the need for possible accommodation of and reconciliation among competing interests rather than the treatment of rights as trumps.<sup>179</sup> To be sure, as we elaborate below, there are some rights on which burdens will be significantly harder to justify,<sup>180</sup> but that does not require absolutism.

The need for a more flexible approach is especially apparent when the rights involved are expressed as principles rather than rules, as are many of the most significant state constitutional rights. From liberty to the pursuit of happiness to dignity, some of the most foundational state constitutional rights are not rules that can be satisfied. Instead, and consistent with the state positive rights tradition, they are better seen as what German political theorist Robert Alexy calls “optimization requirements”: “norms which require that something be realized to the greatest extent possible given the legal and factual possibilities.”<sup>181</sup> Just as rational basis

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174. See Hershkoff, *Positive Rights*, *supra* note 34, at 1169 (“A cluster of arguments concerning positive rights, democratic legitimacy, and federalism supports the view that federal rationality review fails to comport with the institutional position of state courts that are asked to review state constitutional welfare claims.”).

175. See *id.*

176. See *infra* notes 233–236 and accompanying text.

177. See generally Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 *Penn. St. L. Rev.* 923 (2011) (exploring state court enforcement of constitutional socio-economic rights and lessons that can be learned from their remedial approaches).

178. See *supra* notes 80–86 and accompanying text.

179. See Greene, *supra* note 26, at 32 (describing the U.S. Supreme Court’s categorical approach to federal constitutional rights).

180. See *infra* section III.A.2.

181. Robert Alexy, *A Theory of Constitutional Rights* 47 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

review does not allow courts to meaningfully engage with positive rights, so too a strict scrutiny framework may short-circuit meaningful judicial engagement with constitutional principles.

3. *The Countermajoritarian Difficulty*. — If there is one constitutional “obsession” that holds rhetorical sway over federal implementation frameworks, it is the countermajoritarian difficulty.<sup>182</sup> Time and again, federal courts applying deferential rational basis review invoke their relative lack of democratic legitimacy.<sup>183</sup> So too, they decline to engage in judgments that may sound like policymaking<sup>184</sup> or to recognize positive rights<sup>185</sup> because of their institutional position. However disingenuous scholars may believe these invocations of judicial restraint to be, they have substantially shaped federal doctrine and discourse.

State judges now regularly parrot these ideas. They invoke the dreaded possibility of “judicial activism”<sup>186</sup> or equate policy consideration with self-evidently inappropriate judicial lawmaking,<sup>187</sup> often contrasting the state court with the democratic state legislature. The recent Wisconsin gerrymandering opinion offers an example. There, the court insisted that, although it had an obligation to serve as a fallback decisionmaker when the legislature and governor reached an impasse, it lacked “a prerogative to make law.”<sup>188</sup> Citing Justice Neil Gorsuch’s book, the majority emphasized that “the judicial power has long been kept distinct from the legislative power”<sup>189</sup> and that the court must adhere to a “properly limited role in redistricting.”<sup>190</sup> Based on these premises—and unlike other courts

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182. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty* (pt. 5), 112 *Yale L.J.* 153, 155–59 (2002) (“For decades, legal academics have struggled with the ‘countermajoritarian difficulty’: the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy.”).

183. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’” (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876))).

184. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (“Consideration of the impact of today’s ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.”).

185. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973) (“[T]he Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.”).

186. E.g., *Brandt v. Pompa*, 200 N.E.3d 286, 287–88 (Ohio 2022) (Fischer, J., dissenting from the denial of motion for reconsideration).

187. See Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 *N.Y.U. L. Rev.* 1, 9 & nn.46–48 (1995) (describing this attitude among state courts).

188. *Johnson v. Wis. Elections Comm’n*, 967 N.W.2d 469, 488 (Wis. 2021).

189. *Id.* at 489 (citing Neil Gorsuch, *A Republic, If You Can Keep It* 52–53 (2019)).

190. *Id.* at 490.

that have enlisted experts to draw neutral maps when the legislature and executive cannot agree<sup>191</sup>—the Wisconsin Supreme Court claimed itself bound to accept the maps that marked the “least change” from the legislature’s prior gerrymander.<sup>192</sup>

Such echoes of the federal judicial role are inapt in the states. Today, the vast majority of state judges are chosen or retained through popular election,<sup>193</sup> and their rulings can be revisited through popular processes of constitutional amendment. In critical respects, then, state courts do not resemble their federal counterparts: They are majoritarian, not counter-majoritarian; their judges are elected and recallable rather than insulated; and their decisions are readily countermanded rather than “infallible [because they] are final.”<sup>194</sup>

The popular cast of state courts is itself a product of state constitutional revision. In the eighteenth century, state and federal selection models resembled one another: All state judges were appointed by governors or legislatures.<sup>195</sup> Beginning in the nineteenth century, however, reformers proposed judicial elections largely to constrain unrepresentative state legislatures.<sup>196</sup> Consistent with other constitutional reform efforts of the period, tying state judges to the people was thought

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191. See Rob Yablon, *Explainer: Wisconsin’s New State Legislative Maps Compare Unfavorably to Other Court-Adopted Maps on Partisan Equity*, State Democracy Rsch. Initiative (Apr. 18, 2022), <https://statedemocracy.law.wisc.edu/featured/2022/explainer-wisconsins-new-state-legislative-maps-compare-unfavorably-to-other-court-adopted-maps-on-partisan-equity/> [https://perma.cc/L6N5-C9AH].

192. *Johnson*, 967 N.W.2d at 490–91.

193. The Council of State Gov’ts, *Book of the States 203–05 tbl.5.6* (2021), [https://issuu.com/csg\\_publications/docs/bos\\_2021\\_issuu](https://issuu.com/csg_publications/docs/bos_2021_issuu) [https://perma.cc/96Y4-DRMM]; *Judicial Selection: Significant Figures*, Brennan Ctr. for Just. (May 8, 2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures> [https://perma.cc/WD3G-CNHP] (last updated Apr. 14, 2023).

194. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the judgment) (“We are not final because we are infallible, but we are infallible only because we are final.”). On the different role of state courts, see generally Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* (2012) (exploring the relationship between state judicial elections and judicial independence); Croley, *supra* note 21, at 694 (considering whether “elected/accountable judges can be justified in a regime committed to constitutionalism”); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 *Colum. L. Rev.* 2047, 2050 (2010) (arguing that elective judiciaries at the state level provide a “systemic and pervasive mechanism for popular constitutionalism”); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 *Rutgers L.J.* 871, 887–88 (1999) (explaining that the main difference between federal and state judiciaries is the “penetrability by democratic majorities” of state judiciaries).

195. See Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 *Am. J. Legal Hist.* 190, 190 (1993) (“While every state that entered the Union before 1845 had done so with an appointed judiciary, every state that entered between 1846 and 1912 provided for judicial elections.”).

196. See *id.* at 203.

to facilitate intergovernmental checks.<sup>197</sup> In the words of one proponent, “[U]nless your judges are elected by the sovereign body, by the constituent, you will look in vain for judges [who] can stand by the constitution of the State against the encroachments of power.”<sup>198</sup> After Mississippi adopted partisan elections in 1832, numerous other states amended their constitutions, and by the early twentieth century, thirty-five states used partisan elections to select judges.<sup>199</sup> Constitutional revision continued apace, as Progressive-era concerns about partisanship yielded new worries about judicial selection. At a spate of constitutional conventions in the 1910s and 1920s, twelve additional states adopted nonpartisan elections.<sup>200</sup> Later in the century, reformers proposed merit selection in the form of gubernatorial appointment of judges vetted by nominating commissions, as well as periodic retention elections.<sup>201</sup> By the 1980s, nearly half of the states had adopted a version of this so-called Missouri Plan for their highest courts.<sup>202</sup>

Today, most state judges run in popular elections to obtain or retain their positions: Thirty-eight states use some form of judicial election for their high courts.<sup>203</sup> In the small number of states that rely on appointment alone, term limits, rather than life tenure, are the norm.<sup>204</sup> Judges in almost half of the states are also subject to recall by popular vote.<sup>205</sup>

In addition to choosing judges, state populations also respond to their decisions, including by countermanning them through constitutional amendment. From maximum-hour protections to prohibitions on same-sex marriage, there is a long history of popular mobilization in response to judicial constitutional interpretations.<sup>206</sup> This interplay between judicial rulings and electoral responses has yielded a distinct state “popular constitutionalism” described by Professor Douglas Reed as a “dialectical ex-

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197. See *id.*

198. Shugerman, *supra* note 194, at 97 (alterations in original) (internal quotation marks omitted) (quoting Michael Hoffman); see also Croley, *supra* note 21, at 718 n.86, 720.

199. See Charles Gardner Geyh, *Methods of Judicial Selection and Their Impact on Judicial Independence*, *Dædalus*, Fall 2008, at 86, 88.

200. See *id.*

201. See *id.* at 88–89.

202. See Shugerman, *supra* note 194, at 197, 208; Geyh, *supra* note 199, at 89.

203. See *Judicial Selection: Significant Figures*, *supra* note 193.

204. Rhode Island is the only state with life-tenured appointments. See *id.*

205. See *The Council of State Gov'ts*, *supra* note 193, at 266–67 tbl.6.18. We do not include this history to endorse judicial elections as such. State judicial elections not only raise a possible “majoritarian difficulty,” Croley, *supra* note 21, at 694, but also present serious questions about campaign finance, politicization, and a lack of diversity on the bench. See Alicia Bannon, Brennan Ctr. for Just., *Rethinking Judicial Selection in State Courts* 1 (2016), [https://www.brennancenter.org/sites/default/files/publications/Rethinking\\_Judicial\\_Selection\\_State\\_Courts.pdf](https://www.brennancenter.org/sites/default/files/publications/Rethinking_Judicial_Selection_State_Courts.pdf) [<https://perma.cc/YZ9G-S7X8>]. The point is simply that state judges occupy a distinct electoral position as a result of centuries of popular constitutional revision.

206. See, e.g., Henretta, *supra* note 133, at 826–31; Reed, *supra* note 194, at 873–74.

change between judicial rulings based on state constitutional provisions and popular initiative politics that seek to redefine or reinterpret those same or other provisions.”<sup>207</sup> If federal Supreme Court decisions are generally regarded as the endgame of constitutional meaning, state supreme court decisions are often closer to opening moves.

For all of these reasons, it does not make sense to speak of state courts as sharing the democratic profile of the federal courts. Federal counter-majoritarian anxieties have no place in state constitutional decision-making. And without them, it likewise makes little sense to assume that state courts should not meaningfully review legislative enactments, express judgments about competing interests, or draw difficult lines. State constitutional adjudication instead requires frameworks that recognize state courts’ democratically embedded role.

#### B. *Toward Proportionality Review*

Although methodological lockstepping with federal courts is common, some state courts have already begun to embrace more apt implementation frameworks. For example, all fifty state high courts purport to interpret their state constitutions as a whole, rather than clause by clause.<sup>208</sup> A number of state courts have rejected toothless rational basis

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207. Reed, *supra* note 194, at 890; see also Pozen, *supra* note 194, at 2090–91 (arguing that “the mutability of constitutional text, the prevalence of direct democracy, and the frequency of legislative and popular reversal of judicial interpretations” in the states “yield a fundamentally different model of constitutionalism”).

208. See *Hornsby v. Sessions*, 703 So. 2d 932, 939 (Ala. 1997); *Forrer v. State*, 471 P.3d 569, 585 (Alaska 2020); *Kilpatrick v. Super. Ct. in & for Maricopa Cnty.*, 466 P.2d 18, 24 (Ariz. 1970); *Richardson v. Martin*, 444 S.W.3d 855, 858 (Ark. 2014); *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1362 (Cal. 1991); *Bruce v. City of Colo. Springs*, 129 P.3d 988, 992 (Colo. 2006); *Sheff v. O’Neill*, 678 A.2d 1267, 1281 (Conn. 1996); *State ex rel. Biggs v. Corley*, 172 A. 415, 417 (Del. 1934); *Physicians Healthcare Plans, Inc. v. Pfeiffer*, 846 So. 2d 1129, 1134 (Fla. 2003); *Thompson v. Talmadge*, 41 S.E.2d 883, 896–97 (Ga. 1947); *Hanabusa v. Lingle*, 93 P.3d 670, 677 (Haw. 2004); *Boise-Payette Lumber Co. v. Challis Indep. Sch. Dist. No. 1 of Custer Cnty.*, 268 P. 26, 27 (Idaho 1928); *Gregg v. Rauner*, 124 N.E.3d 947, 953 (Ill. 2018); *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000); *Gallarno v. Long*, 243 N.W. 719, 725 (Iowa 1932); *State ex rel. Arn v. State Comm’n of Revenue & Tax’n*, 181 P.2d 532, 540 (Kan. 1947); *Wood v. Bd. of Educ. of Danville*, 412 S.W.2d 877, 879 (Ky. 1967); *Succession of Lauga*, 624 So. 2d 1156, 1166 (La. 1993); *In re Op. of the Justs.*, 16 A.2d 585, 586 (Me. 1940); *Miles v. State*, 80 A.3d 242, 250 (Md. 2013); *Op. of the Justs. to the House of Representatives*, 32 N.E.3d 287, 297 n.26 (Mass. 2015); *In re Probert*, 308 N.W.2d 773, 780 (Mich. 1981); *Butler Taconite v. Roemer*, 282 N.W.2d 867, 870 (Minn. 1979); *Van Slyke v. Bd. of Trs. of State Insts. of Higher Learning*, 613 So. 2d 872, 876 (Miss. 1993); *State ex rel. Mathewson v. Bd. of Election Comm’rs of St. Louis Cnty.*, 841 S.W.2d 633, 635 (Mo. 1992); *Jones v. Judge*, 577 P.2d 846, 849 (Mont. 1978); *Banks v. Heineman*, 837 N.W.2d 70, 78 (Neb. 2013); *Educ. Freedom PAC v. Reid*, 512 P.3d 296, 302 (Nev. 2022); *Carrigan v. N.H. Dep’t of Health & Hum. Servs.*, 262 A.3d 388, 397 (N.H. 2021); *Gangemi v. Berry*, 134 A.2d 1, 7 (N.J. 1957); *Griego v. Oliver*, 316 P.3d 865, 870 (N.M. 2014); *People ex rel. McClelland v. Roberts*, 42 N.E. 1082, 1084 (N.Y. 1896); *Harper v. Hall*, 868 S.E.2d 499, 558–59 (N.C. 2022); *State ex rel. City of Minot v. Gronna*, 59 N.W.2d 514, 540 (N.D. 1953); *City of Cleveland v. State*, 136 N.E.3d 466, 475 (Ohio 2019); *Okla. Nat. Gas Co. v. State ex*

review, refusing to “ride the vast range of conceivable purposes,” and have insisted instead on actually reasonable and nonarbitrary government purposes.<sup>209</sup> Other courts have adopted sliding scales of scrutiny, considering in a “fluid” manner both “the importance of the individual rights asserted” and “the degree of suspicion with which [the court] view[s] the resulting classification scheme.”<sup>210</sup> Many state courts also engage in case-specific, contextual balancing to determine outcomes and remedies, accepting that their democratically embedded and common-law role differs from that of federal courts.<sup>211</sup>

Courts and scholars have yet to describe an approach to state constitutional adjudication that makes sense of these practices. State cases that decline to isolate clauses and that eschew rigid all-or-nothing implementing frameworks are readily overlooked. One aim of our discussion is, accordingly, to theorize and defend existing practices, showing that

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rel. Vassar, 101 P.2d 793, 796 (Okla. 1940); Bd. of Dirs. of Payette-Or. Slope Irrigation Dist. v. Peterson, 128 P. 837, 840 (Or. 1912); In re Bruno, 101 A.3d 635, 660 (Pa. 2014); In re Request for Advisory Op. from House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 936 n.8 (R.I. 2008); Johnson v. Piedmont Mun. Power Agency, 287 S.E.2d 476, 479 (S.C. 1982); In re Dugaard, 801 N.W.2d 438, 440 (S.D. 2011); Barrett v. Tenn. Occupational Safety & Health Rev. Comm’n, 284 S.W.3d 784, 787 (Tenn. 2009); Collingsworth County v. Allred, 40 S.W.2d 13, 15 (Tex. 1931); Univ. of Utah v. Shurtleff, 144 P.3d 1109, 1114 (Utah 2006); State v. Lohr, 236 A.3d 1277, 1281 (Vt. 2020); City of Portsmouth v. Weiss, 133 S.E. 781, 785 (Va. 1926); Grp. Health Coop. of Puget Sound v. King Cnty. Med. Soc’y, 237 P.2d 737, 764 (Wash. 1951); Howard v. Ferguson, 180 S.E. 529, 531 (W. Va. 1935); Wagner v. Milwaukee Cnty. Election Comm’n, 666 N.W.2d 816, 831 (Wis. 2003); In re Neely, 390 P.3d 728, 744 (Wyo. 2017).

209. E.g., *Att’y Gen. v. Waldron*, 426 A.2d 929, 950 (Md. 1981); see also, e.g., *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408, 419 (Ky. 2005) (describing Kentucky’s “reasonable basis” or “substantial and justifiable reason” tier), modified by *Calloway Cnty. Sheriff’s Dep’t v. Woodall*, 607 S.W.3d 557, 564 (Ky. 2020); *State v. Russell*, 477 N.W.2d 886, 889 (Minn. 1991) (rejecting crack/powder disparity under test in which the court has “required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals”); *Butte Cmty. Union v. Lewis*, 712 P.2d 1309, 1312–13 (Mont. 1986) (noting the problems of a “two-tier system” and developing the state’s “own middle-tier test”).

210. E.g., *State, Dep’t of Revenue, Permanent Fund Dividend Div. v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (internal quotation marks omitted) (quoting *State v. Otrsky*, 667 P.2d 1184, 1192–93 (Alaska 1983)) (describing its “sliding scale” approach to equal protection as “considerably more fluid than under its federal counterpart”); see also *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 791–92 (Cal. 1981) (describing analysis for burdens on “procreative choice” in which courts “realistically assess the importance of the state interest . . . and the degree to which the restrictions actually serve such interest,” “carefully evaluate the importance of the constitutional right,” and gauge the practical burdens on the right); *In re T.R.*, 731 A.2d 1276, 1280 (Pa. 1999) (“Privacy claims must be balanced against state interests. . . . [The] ‘government’s intrusion into a person’s private affairs is constitutionally justified when the government interest is significant and there is no alternate reasonable method of lesser intrusiveness to accomplish the governmental purpose.’” (quoting *Denoncourt v. Pa. State Ethics Comm’n*, 470 A.2d 945, 949 (Pa. 1983))).

211. See *infra* section IV.A.

they comport with state constitutional rights and urging their wider adoption.

In the pages that follow, we synthesize several existing practices and describe them as together constituting a state-specific form of proportionality review. Widely used around the world, proportionality is both a general principle demanding justifications for government intrusions on rights and a specific doctrinal approach to constitutional adjudication.<sup>212</sup> Although the precise questions the doctrinal framework poses are differently articulated, and to some extent differently understood and weighted,<sup>213</sup> a shared commitment of the many jurisdictions that employ such review is that proportionality “discipline[s] the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable.”<sup>214</sup>

In light of the “global ascendancy” of proportionality review,<sup>215</sup> a number of scholars have considered its place in the United States. Although some distinguished commentators have drawn attention to latent proportionality approaches in the *U.S. Reports* and advocated greater reliance on proportionality principles,<sup>216</sup> most deem proportionality review a poor fit for U.S. constitutional law.<sup>217</sup> But they have

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212. See Jackson, *Age of Proportionality*, supra note 28, at 3098–99 (“Proportionality can be understood as a legal principle, as a goal of government, and as a particular structured approach to judicial review.”). As a method of constitutional interpretation, proportionality review involves a shared sequence of questions. In brief, courts first seek to delineate the right at issue; if a right has been infringed, they ask whether the government has a legitimate and sufficiently important purpose and if the means by which it is pursuing this purpose are rational and minimally impair the right; finally, if these questions are answered in the affirmative, courts engage in “proportionality as such,” asking whether the intrusion is justified by the benefits of the government action. See, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, 139–40 (Can.); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 179–210 (2012) [hereinafter Barak, *Rights and Their Limitations*].

213. E.g., Jackson, *Age of Proportionality*, supra note 28, at 3120–21 n.118 (“Although the three doctrinal components of proportionality review of means are similarly framed in most jurisdictions that use the doctrine, these elements may be applied somewhat differently by different courts or judges.”); see also, e.g., Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *U. Toronto L.J.* 383, 389–95 (2007) (noting “striking difference[s]” between German and Canadian approaches); Niels Petersen, *Proportionality and the Incommensurability Challenge in the Jurisprudence of the South African Constitutional Court*, 30 *SAJHR* 405, 406–07 (2014) (comparing German, Canadian, and South African approaches to proportionality review).

214. Greene, supra note 26, at 58.

215. *Id.* at 38; see also Stone Sweet & Mathews, supra note 25, at 159–60 (considering the diffusion of proportionality review across “most of the world’s most powerful high courts” in the late twentieth century).

216. See Greene, supra note 26, at 58, 65 (“The core claim of this Foreword is that a proportionality-like approach is better suited to adjudication of rights disputes within a rights-respecting democracy.”); Jackson, *Age of Proportionality*, supra note 28, at 3098 (“U.S. constitutional law would benefit from a moderate increase in the use of proportionality.”).

217. See, e.g., Kai Möller, *U.S. Constitutional Law, Proportionality, and the Global Model* [hereinafter Möller, *U.S. Constitutional Law*], in *Proportionality: New Frontiers*, New

ignored the states.<sup>218</sup> The features of the U.S. Constitution that they cite as reasons for proportionality's ill fit—its small list of rights, lack of horizontal effect, and conception of rights as negative<sup>219</sup>—do not hold at the state level. To the contrary, among the most distinctive features of state constitutions are abundant rights, community-regarding rights, and positive rights that impose affirmative duties of provision on government.<sup>220</sup> Proportionality review is deployed worldwide to make sense of constitutions that share these features, by courts that share some other doctrinal approaches with state, but not federal, courts.<sup>221</sup>

In the next Part, we draw on well-established proportionality approaches as well as existing state case law to propose a form of review tailored to state constitutional democracy. State courts need not adopt a Canadian, or German, or South African model. Proportionality is a family of principles rather than one particular approach, and it can be “custom

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Challenges 130, 130–31 (Vicki C. Jackson & Mark Tushnet eds., 2017) [hereinafter *New Frontier, New Challenges*].

218. For instance, an important recent volume includes five chapters considering proportionality and the American legal system, but not one explores state constitutions. See *New Frontiers, New Challenges*, supra note 217. For a brief and persuasive argument that state courts should use proportionality review, see Jud Mathews & Stephen Ross, *Proportionality Review in Pennsylvania Courts*, 92 Pa. Bar Ass'n Q. 109, 112 (2021); see also Hershkoff, *Just Words*, supra note 34, at 1551 (noting that state courts “explicitly engage in a form of interest balancing that sits comfortably with European-style proportionality analysis”).

219. See Möller, *U.S. Constitutional Law*, supra note 217, at 131–33; see also Jackson, *Age of Proportionality*, supra note 28, at 3121–29 (offering an “account for why proportionality as a general principle or doctrine has not emerged in the United States,” including the U.S. Constitution's smaller number of rights, failure to include positive rights, and absence of positive obligations).

220. See supra Part I; see also Versteeg & Zackin, supra note 34, at 1644–45 (arguing that state constitutions are more similar to constitutions around the world than to the U.S. Constitution). Limitations clauses are a common, though not universal, feature of constitutions in proportionality jurisdictions and bear a resemblance to state constitutions' community-regarding provisions. See supra section I.B; see also Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.) (guaranteeing rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”); S. Afr. Const., 1996, § 36(1) (“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors . . . .”); Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, para. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (“Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”); Stone Sweet & Mathews, supra note 25, at 90–91 (quoting constitutional rights clauses containing limitations).

221. E.g., Greene, supra note 26, at 64 (“Proportionality jurisdictions tend to have muted or nonexistent political question doctrines and often have much lower standing requirements than would be conceivable in U.S. federal courts.”).

fit” to different legal systems.<sup>222</sup> State courts have already begun to experiment with forms of proportionality review, and we seek to build on their work, highlighting components most resonant for the states.

### III. DEMOCRATIC PROPORTIONALITY REVIEW

Defining features of state constitutions—including their extensive catalogues of rights, community-regarding limitations on individual liberties, and recognition of affirmative government duties—distinguish them from the U.S. Constitution and reveal why proportionality review is a better fit than familiar federal approaches. Even as they share these features with jurisdictions committed to proportionality review, however, states are distinctively oriented around popular, majoritarian democracy. In this Part, we consider how proportionality review should be tailored to the states. Beginning with proportionality’s standard decisional framework, we explore how the inquiry should account for state constitutions’ commitment to democracy as well as rights and for the position of state courts and other government actors. In brief, we propose a *democratic proportionality review* suited to state constitutions and institutions.

Proportionality review begins with the identification of the right at issue.<sup>223</sup> Even as proportionality frameworks ratchet down the pressure on identifying a particular interest as a right—because recognition of the right does not mean it is untouchable—this stage presents an opportunity to clarify the scope and weight of constitutional rights. Most proportionality jurisdictions adopt a human rights orientation of post–World War II constitutional drafting and emphasize values such as dignity. State constitutions prioritize a different, if often overlapping, set of rights: those core to autonomy and democratic participation. In state constitutions, these self-determination rights stand apart from the many less significant enumerated rights (such as rights to play bingo<sup>224</sup>), even if both sorts of rights may elicit proportionality review when infringed.

The next several stages of proportionality review turn to the infringing action, asking whether the government is pursuing an acceptable purpose and whether its means are rational and minimally impair the right. Although these inquiries constitute distinct steps of proportionality review, we explore them together because each concerns the legitimacy of the government’s action. As we have discussed, the popular, democratic commitments of state constitutions make federal rational basis review a poor fit;<sup>225</sup> proportionality review’s thorough engagement with government action is more appropriate. Here too,

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222. E. Thomas Sullivan & Richard S. Frase, *Proportionality Principles in American Law* 7 (2009).

223. See *supra* note 212 (describing the usual steps of proportionality review).

224. See *State v. \$223,405.86*, 203 So. 3d 816, 843 (Ala. 2016) (listing seventeen bingo amendments in Alabama’s constitution).

225. See *supra* notes 165–177 and accompanying text.

however, states differ from most proportionality jurisdictions. In particular, as proportionality jurisdictions seek to strike a balance between protecting rights and recognizing legitimate democratic limits on those rights, they generally equate democratic limits with the legislature. These jurisdictions further recognize that, as a less representative institution, the reviewing court should partially defer to the legislature even as it establishes bounds for that body's reasoned decisions. State constitutions, meanwhile, always distinguish the people themselves from their governments. They express skepticism of unrepresentative legislatures and recognize distinct channels for the expression of popular will, including through direct democracy and judicial elections. In the states, legislatures are not necessarily more democratic actors than courts, and courts are tasked with monitoring legislatures on behalf of the people. These institutional characteristics inform state proportionality, demanding meaningful review of laws for arbitrariness and facilitating engagement with positive rights claims.

This observation about state courts, legislatures, and direct democracy also bears on the final stage of proportionality review: proportionality as such. In many proportionality systems, comfort with judicial balancing follows from an "epistemological optimism"<sup>226</sup> about "the possibility of law as a practice distinct from politics."<sup>227</sup> Even if judging is not a technocratic exercise, on such accounts it may rely upon reasoned inquiry and values understood to lie beyond political contestation. American legal culture does not embrace such epistemological optimism,<sup>228</sup> but state constitutions neither expect nor celebrate an insulated judicial role. They generally make state judges elected officials, and they furnish ready channels for the people to amend their constitutions. These features suggest that the dialogic function of proportionality review is different in the states and that state courts should understand their role as creating a conversation not only with legislatures<sup>229</sup> but also with the broader public.

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226. Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* 90 (2013).

227. Jackson, *Age of Proportionality*, *supra* note 28, at 3125.

228. See Cohen-Eliya & Porat, *supra* note 226, at 82–94 (identifying "American epistemological skepticism" in contrast to European optimism).

229. See, e.g., Jackson, *Age of Proportionality*, *supra* note 28, at 3144–47 (noting that "structured proportionality" can "provide a bridge between decision making in courts and decision making by the people, legislatures, and public officials"); Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *Law & Ethics Hum. Rts.* 140, 163 (2010); see also Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 *Osgoode Hall L.J.* 75, 101–04 (1997).

### A. *Understanding Rights*

The first step of proportionality review requires identifying the right at issue. Although this step generally receives less attention than the ensuing review of the government's action for rationality, suitability, and necessity, it is a critical inquiry. In the state context, this step requires judges to consider constitutional rights holistically and to assess their content and scope before considering infringements. The substantive commitments of state constitutions suggest, moreover, that courts have correctly given special weight to a set of rights that undergird democratic self-governance.

1. *Reading Provisions Together.* — As they ascertain the right at issue, state courts properly engage in more holistic, rather than clause-bound, consideration. All fifty state high courts have recognized that the ongoing enterprise of collective constitution-making requires reading these documents as a whole rather than piecemeal.<sup>230</sup> Within state declarations of rights, abundant provisions, added over time by amendments, may work together to enhance a right.<sup>231</sup> For instance, the Tennessee Supreme Court has explained how reading multiple provisions of its Declaration of Rights—including rights to due process, rights to alter government and resist oppression, and rights to freedoms of worship, speech, and conscience—yields the conclusion that “the concept of liberty plays a central role” in the state’s constitutional order and must be given special treatment.<sup>232</sup>

In other contexts, too, state courts have recognized that the conjunction of multiple clauses may define and deepen a right. Cases concerning educational opportunity have frequently offered “conjoint”<sup>233</sup> readings of constitutional provisions.<sup>234</sup> From West Virginia to California, courts have held that children’s educational rights are informed not only by clauses focused on schools and educational adequacy but also by clauses requiring equal protection or prohibiting segregation.<sup>235</sup> For instance, in *Sheff v. O’Neill*, the Connecticut Supreme Court held that the state’s education obligation was “informed by” the separately enumerated prohibition on segregation and that, accordingly, “the existence of extreme

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230. See *supra* note 208.

231. Robert F. Williams, *Enhanced State Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 *Wis. L. Rev.* 1001, 1001 [hereinafter Williams, *Enhanced Rights*] (offering a “preliminary analysis” of “applying two or more state constitutional provisions together as ‘enhancing’ each other”).

232. *Davis v. Davis*, 842 S.W.2d 588, 599 (Tenn. 1992), *reh’g* in part granted on other grounds, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992).

233. *Sheff v. O’Neill*, 678 A.2d 1267, 1281 (Conn. 1996).

234. See, e.g., *Serrano v. Priest*, 557 P.2d 929, 949–50, 950 n.42 (Cal. 1976) (looking to “three sections of our state Constitution”); *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979) (“[B]oth our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system.”).

235. See, e.g., Williams, *Enhanced Rights*, *supra* note 231, at 1004.

racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity.”<sup>236</sup>

The path-marking state court role with respect to gay marriage likewise involved reading provisions together to recognize the full scope of a right. As the Supreme Judicial Court of Massachusetts explained in *Goodridge v. Department of Public Health*, the state constitution’s liberty and equality clauses “overlap,” because “[t]he liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification,” limit only certain individuals from marrying their chosen partners.<sup>237</sup>

Courts have also attended to how later-added provisions supplement existing rights. For example, Montana’s supreme court has recognized that the state constitutional right to privacy, added in the 1970s, “augments” the earlier-adopted protection against unreasonable searches and seizures.<sup>238</sup> And it has held that the dignity provision, also ratified in the 1970s, should be read “together with” the prohibition on cruel and unusual punishment to confer greater protection for state citizens.<sup>239</sup>

Joint readings may also limit the scope of particular rights. Even before factoring in government justifications for limiting a right, that is, multiple rights clauses may themselves present tensions that courts must reconcile. Sometimes this will involve addressing conflicts between two or more rights as such; other times, courts will work to resolve conflicts internal to the definitions of particular rights.<sup>240</sup> In either case, the need to resolve tensions follows from the number and specificity of rights contained in state constitutions.

State courts have already grappled with these challenges as well. For example, they have considered how rights to privacy may be tempered by rights to know information held by the government, and vice versa.<sup>241</sup> They have addressed constitutional speech rights that run into a constitutional

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236. *Sheff*, 678 A.2d at 1281–84 (focusing on the “special nature of the affirmative constitutional right embodied in article eighth, § 1” and the “explicit prohibition of segregation contained in article first, § 20[,]” and noting that the “contemporaneous addition” of the two provisions evinced a commitment to end segregation through “interrelated constitutional rights”).

237. 798 N.E.2d 941, 953, 959 (Mass. 2003).

238. See *State v. \$129,970*, 161 P.3d 816, 821 (Mont. 2007) (“The right to privacy in Article II, Section 10 of the Montana Constitution augments the protection against unreasonable searches and seizures.”); see also *State v. Siegal*, 934 P.2d 176, 183 (Mont. 1997) (finding that the right to privacy in Montana’s Constitution grants greater protections in search and seizure cases than the federal Constitution).

239. See *Walker v. State*, 68 P.3d 872, 882–83 (Mont. 2003).

240. See *infra* section IV.A (providing examples of conflicts between individual rightsholders).

241. See, e.g., *Havre Daily News, LLC v. City of Havre*, 142 P.3d 864, 870 (Mont. 2006) (considering the interaction between the Montana Constitution’s right of privacy and right to know, which gives the people a right to examine public documents).

“right of reputation.”<sup>242</sup> They have explored tensions between state provisions supporting hunting and others supporting resource conservation.<sup>243</sup> And more.<sup>244</sup>

The task state courts face in combining clauses is not mechanical but requires judgment. In asking state judges to consider possible synergies and tensions across state constitutional provisions, we acknowledge that this will generally be a more demanding task than addressing a single clause. But, as we address below, this task is suited to state judges’ institutional position.<sup>245</sup> And, however difficult, only such a synthetic approach honors the fact that each state constitution is best understood not as a “cook book of disconnected and discrete rules” but rather as “a cohesive set of principles.”<sup>246</sup>

*2. Core Rights.* — Although state courts should read their constitutions holistically to determine the content and scope of rights at issue, it does not follow that all rights must be treated the same in the ensuing review. Global proportionality review is often associated with “rights inflation”—the use of constitutional rights to protect a wide range of interests rather than particularly important ones.<sup>247</sup> But recognizing a broad set of rights need not mean a one-size-fits-all treatment. As proportionality scholars have noted, and tend to endorse, courts around the world recognize some rights as weightier than others even as they decline to replicate rigid tiers of scrutiny.<sup>248</sup>

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242. See *Norton v. Glenn*, 860 A.2d 48, 58 (Pa. 2004) (citing *Sprague v. Walter*, 543 A.2d 1078, 1084–85 (1988)) (observing that the “free expression rights guaranteed by the Pennsylvania Constitution . . . are in tension with another right guaranteed by our commonwealth’s constitution, namely the right to protect one’s reputation”).

243. Cf. *McDowell v. State*, 785 P.2d 1, 10 (Alaska 1989) (discussing the “tension between the limited entry clause of the state constitution and the clauses of the constitution which guarantee open fisheries” (internal quotation marks omitted) (quoting *Johns v. Com. Fisheries Entry Comm’n*, 758 P.2d 1256, 1266 (Alaska 1988))); *Pa. Game Comm’n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (noting that the state constitution’s environmental conservation amendment informs the scope of an alleged due process right to hunt).

244. See, e.g., *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544, 551–52 (W. Va. 1980) (addressing the conflict between the state constitution’s fair trial and public trial provisions).

245. See *infra* section III.C.

246. *Armstrong v. State*, 989 P.2d 364, 383 (Mont. 1999).

247. See George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* 126 (2007); Möller, *U.S. Constitutional Law*, *supra* note 217, at 137.

248. See, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391, 418–19 (2008) (“The German and South African constitutional courts, together with the ECtHR, have made clear that infringements of certain (i.e., the most important) rights carry a more rigorous burden of justification under the proportionality test than others.”); Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 201, 235–36 (2008) (“Canadian and European courts have developed a sort of hierarchy of rights—favored rights receive more judicial protection than others.”).

In particular, around the world, most proportionality jurisdictions are oriented around a post–World War II human rights framework that prioritizes human dignity and related rights. Some constitutions and commentators describe human dignity as “inviolable”<sup>249</sup> or understand it as an absolute right not subject to any limit;<sup>250</sup> others recognize the propriety of balancing without derogating the right to dignity.<sup>251</sup> Despite such differences, there is a widely shared understanding that human dignity is central to the constitutional order.<sup>252</sup>

Although a handful of state constitutions recognize an express right to dignity<sup>253</sup> (and others might be said to recognize it through combinations of liberty and equality, or other enumerated rights as described above<sup>254</sup>), a right to dignity does not similarly animate state constitutional law. But other rights do. As we have described, state constitutions prioritize individual autonomy and collective self-government. Although there will always, and properly, be contestation about this category of self-determination rights, there is clarity at the poles. For example, no one would reasonably place Alabama’s seventeen constitutional amendments recognizing rights to play bingo within the

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249. E.g., Grundgesetz [GG] [Basic Law], art. 1 (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html) [https://perma.cc/P3WG-G45N] (“Human dignity shall be inviolable.”). Constitutional limitations clauses sometimes expressly invoke “dignity.” See, e.g., § 2, Basic Law: Human Dignity and Liberty, SH 1391 (1992) (Isr.), <https://www.refworld.org/docid/3ae6b52618.html> [https://perma.cc/3ZXJ-3YES] (“There shall be no violation of the life, body or dignity of any person as such.”); S. Afr. Const., 1996, § 36(1) (guaranteeing an “open and democratic society based on human dignity, equality and freedom”).

250. E.g., Barak, Rights and Their Limitations, *supra* note 212, at 27–29 (explaining that some jurisdictions view human dignity as an absolute right that cannot be limited).

251. See Mattias Kumm & Alec D. Walen, Human Dignity and Proportionality: Deontic Pluralism in Balancing, *in* Proportionality and the Rule of Law 67, 89 (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014) (“Human dignity is not primarily about rule-like absolutes and balancing is not primarily about simple interest balancing. . . . Once the potentially complex nature of the balancing exercise is understood, there is no tension between human dignity and balancing. Indeed, respect for human dignity requires balancing.”).

252. See, e.g., *State v. Makwanyane* 1995 (3) SA 391 (CC) at para. 144 (S. Afr.) (“The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the Bill of Rights].”); Jackson, Age of Proportionality, *supra* note 28, at 3158 (noting that on some accounts, “core” aspects of rights are considered non-abrogable, and including as examples “[j]udicial elaborations of human dignity” in Germany and Israel).

253. See *supra* note 55.

254. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948, 959 (Mass. 2003) (recognizing the intertwining of liberty and equality clauses and stating that “[t]he Massachusetts Constitution affirms the dignity and equality of all individuals”); see also *supra* text accompanying note 237.

category.<sup>255</sup> A wide range of constitutional rights may trigger proportionality review without being core self-determination rights.

Meanwhile, other rights are widely recognized as the sort of rights “without which other constitutionally guaranteed rights would have little meaning.”<sup>256</sup> With respect to democratic processes, such rights most clearly include rights to vote, as well as rights of free expression and association.<sup>257</sup> More distinctively, in the states, core collective self-determination rights also include rights to participate in popular processes of constitutional amendment, as well as the statutory initiative and referendum in states that have adopted these direct-democracy processes.<sup>258</sup>

State constitutional interpreters have also recognized autonomy as essential to individual self-determination and as a necessary precondition for democratic self-government. State courts have focused especially on the “core right of personal autonomy—which includes the ability to control one’s own body [and] to assert bodily integrity.”<sup>259</sup> Indeed, bodily autonomy is the domain in which state courts have most often invoked “self-determination” as such. In the words of the Massachusetts Supreme Judicial Court, the right to autonomy in declining medical treatment follows from “the sanctity of individual free choice and self-determination as fundamental constituents of life.”<sup>260</sup> The Mississippi Supreme Court has emphasized the constitutional “right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination,”<sup>261</sup> while the Kansas Supreme Court has asserted that “self-determination” in the form of “one’s control over one’s own person stands at the heart of the concept of liberty.”<sup>262</sup> The Montana Supreme Court has aligned itself with “America’s historical legal tradition acknowledging the

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255. This is not to deny that disputes over the definition of bingo have been highly charged. See *Recent Case*, *State v. \$223,405.86*, 203 So. 3d 816 (Ala. 2016), 130 Harv. L. Rev. 1064 (2017) (describing the “bingo wars”).

256. *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984); cf. *Tebbe & Schwartzman*, *supra* note 144, at 1318 (“Some rights are closely associated with the status of free and equal members of a democracy.”).

257. See, e.g., *Alderwood Assocs. v. Wash. Env’t Council*, 635 P.2d 108, 116–17 (Wash. 1981).

258. See *Advisory Op. to the Att’y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses*, 818 So. 2d 491, 494 (Fla. 2002) (describing the deep commitment to “self-determination” in the context of initiated constitutional amendments); see also *Pope v. Gray*, 104 So. 2d 841, 842 (Fla. 1958) (“There is no lawful reason why the electors of this State should not have the right to determine the manner in which the Constitution may be amended. . . . Sovereignty resides in the people and the electors have a right to approve or reject a proposed amendment . . .”). See generally *Bulman-Pozen & Seifter*, *Right to Amend*, *supra* note 22 (exploring the right to amend state constitutions).

259. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 492 (Kan. 2019).

260. *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977) (recognizing right to decline life-prolonging medical treatment).

261. *In re Brown*, 478 So. 2d 1033, 1039–40 (Miss. 1985).

262. *Hodes & Nauser*, 440 P.3d at 480.

fundamental common law right of self-determination” by understanding “the right to make personal medical decisions as inherent in personal autonomy.”<sup>263</sup>

Although rights to vote, to participate more broadly in democratic processes, and to enjoy control over one’s body are core self-determination rights, they can also be framed as human rights. So it is unsurprising that judges around the world have also prioritized rights of political participation and individual autonomy.<sup>264</sup> But rights that merit special consideration in European, South African, Canadian, and other proportionality systems because of a human rights orientation receive special weight in the states because of their commitment to self-determination.<sup>265</sup> This has implications not only for the scope, content, and weight of such rights but also for how individual rights should be understood in relation to the collective will—as potentially but not necessarily reflected in acts of government—the issue we now take up.

#### B. *Evaluating Government Action and Inaction*

Once the constitutional right at issue is discerned, several stages of proportionality review focus on the government before turning to proportionality in the sense of balancing. In various formulations, these intermediate steps ask whether there is a legitimate governmental objective, whether the government is pursuing this objective through appropriate means, and whether the government could have adopted a less rights-impairing approach.<sup>266</sup> These contextual inquiries are a better fit for state constitutional law than are rigid tiers of scrutiny.

In this section, at the expense of highlighting the orderly progression of proportionality review, we do not work through the specific steps of such review but rather direct attention to distinctive considerations for state courts. Although proportionality review demands inquiry into governmental objectives and means, courts around the world tend to defer to the legislature as a relatively more democratic institution, even as courts establish the boundaries of the legislature’s choices.<sup>267</sup> For similar reasons,

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263. *Armstrong v. State*, 989 P.2d 364, 379 (Mont. 1999).

264. See, e.g., Stephen Gardbaum, *Limiting Constitutional Rights*, 54 *UCLA L. Rev.* 789, 836 (2007) (noting that the European Court of Human Rights “is developing a hierarchy of rights with those at the top including political expression, the right to private life (at least regarding ‘a most intimate part of an individual’s private life’), and freedom of association to form political parties”).

265. But see Mattias Kumm, *Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution*, in *New Frontiers, New Challenges*, *supra* note 217, at 51, 74 (describing a “requirement internal to universalist human rights practice itself to respect the values of democratic self-government and sovereign self-determination”).

266. See *supra* note 212; see also, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, 139–40 (Can.) (describing the proportionality test).

267. See, e.g., *Irwin Toy Ltd. v. Quebec (Att’y Gen.)*, [1989] 1 S.C.R. 927, 991–94 (Can.) (“[A]s courts review the results of the legislature’s deliberations, particularly with

courts have proven reluctant to extend proportionality review to affirmative government duties.<sup>268</sup> But state constitutions express skepticism of legislatures as representative institutions and recognize distinct channels for the expression of popular will, including through judicial elections. These constitutions task state courts with monitoring state legislatures on behalf of the people. In reviewing a state law's objectives and means, then, state courts must engage in meaningful review for arbitrariness rather than assume the legislature speaks for the people. They must also enforce affirmative government duties, recognizing government inaction as well as action as potentially problematic.

1. *Nonarbitrariness.* — Although proportionality review requires careful inquiry into both the ends and means of government action, courts and commentators around the globe have noted the relative democratic legitimacy of legislatures as compared to courts and suggested an appropriately cabined review. In offering a “democratic defense of constitutional balancing,” for instance, Professor Stephen Gardbaum argues that constitutional rights are properly limited, in some circumstances, by political institutions because of a deep normative commitment to democracy.<sup>269</sup> On his account, consistent with the makeup of most governments around the world, allowing the legislature to place (appropriately justified) limits on rights recognizes popular self-rule and also reduces the “disabling of today’s citizens from deciding how to resolve many of the most fundamental moral-political issues that they face.”<sup>270</sup> More generally, scholars argue, when a case demands empirical predictions or accommodations among competing values, “legislatures may be more empirically competent and democratically legitimate than courts.”<sup>271</sup>

Understanding the legislature as more democratic than the courts is appropriate in most jurisdictions, including the United States, but the calculus is more complicated in the states. Most state judges are elected and many are also recallable; in many states, judicial elections are arguably better gauges of popular sentiment than legislative elections because judges are elected in popular majoritarian votes statewide, while legislators

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respect to the protection of vulnerable groups, they must be mindful of the legislature’s representative function.”).

268. See Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality’s Next Frontier or a Bridge Too Far?*, in *New Frontiers, New Challenges*, supra note 217, at 221, 222 [hereinafter Gardbaum, *Positive and Horizontal Rights*] (“[Proportionality] is employed far less in the types of rights cases that help to define the ‘global model’ than in the more conventional ones pitting a negative individual right against the state’s conflicting public policy reasons for limiting it.”).

269. Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 *Law & Ethics Hum. Rts.* 79, 89–90 (2010).

270. *Id.* at 90–91.

271. Jackson, *Age of Proportionality*, supra note 28, at 3145 (citing Alexy, supra note 181, at 399–401, 411–18).

come from gerrymandered districts.<sup>272</sup> If this does not necessarily make courts superior democratic actors (for instance, because of their smaller size and decisionmaking processes), it at least complicates the legislature's claim.

Moreover, judicial elections are just one of many changes that have been made to state constitutions because of skepticism about legislative representation of the people. The direct democracy institutions of initiative, referenda, and recall that were widely adopted beginning in the Progressive Era reflect similar concerns; they underscore the limits of the legislature as the voice of the people and seek to allow the people to speak for themselves.<sup>273</sup> As Professor Robert Williams has shown, "one of the most important themes in state constitutional law" is skepticism of state legislative power.<sup>274</sup> Time and again, constitutions have been amended to empower other actors—including state courts—to act as popular checks on the legislature and to provide avenues for the people to override and circumvent their representatives.<sup>275</sup>

State constitutions also impose restraints directly on the legislature, evidencing special concern with partial or arbitrary government action. From the start, state bills of rights sought to limit oppressive or corrupt government action. For instance, Virginia provided for frequent elections of legislatures and executives to restrain them "from oppression, by feeling and participating the burdens of the people."<sup>276</sup> During the nineteenth century, many states adopted prohibitions on legislative grants of special privileges and immunities.<sup>277</sup> Some also adopted express prohibitions on arbitrary power.<sup>278</sup>

The ways in which state constitutions distinguish the people from their representatives and never treat the legislature as an unproblematic democratic actor—at the same time that state constitutions generally make state courts themselves democratic (if also not unproblematic) actors—underscore why federal anything-goes rational basis review is inappropriate at the state level.<sup>279</sup> State constitutions require courts to inquire into the actual justifications for a particular action, relying on reasons

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272. See Seifter, *supra* note 21, at 1771–74.

273. See *supra* notes 106–109, 129–130, and accompanying text.

274. Robert F. Williams, *State Constitutional Law Processes*, 24 *Wm. & Mary L. Rev.* 169, 201 (1983).

275. See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33, at 881–87.

276. Va. Const. of 1776, Declaration of Rights, § 5; see also Pa. Const. of 1776, ch. I, art. VI.

277. See, e.g., Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 *Tex. L. Rev.* 1195, 1207 (1985) (describing state constitutional amendments responding to legislative abuses).

278. See, e.g., Ky. Const. Bill of Rights, § 2 ("Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."); see also Md. Const. Declaration of Rights, art. 6; N.H. Const. pt. I, art. 10; Tenn. Const. art. I, § 2.

279. See *supra* Part II.

articulated by the legislature and not simply judicially imagined. They also require courts to interrogate the reasons the legislature offers. To ensure that government remains an agent of the people and does not arbitrarily interfere in their lives or self-governance, state courts must distinguish the legislature from the collective democratic public, and they should demand only nonarbitrary government regulation, even when the right involved is not a core self-determination right but a relatively frivolous one like playing bingo. Indeed, as we discuss below, a focus on arbitrariness offers a better way to think about recent cases involving economic rights than efforts to cast such rights as fundamental.<sup>280</sup>

Democratic proportionality review does not mean that courts should decline to grant any deference to the legislature or assume its functions. In contrast to the democratic legitimacy argument, for instance, an institutional competence argument for deference may be persuasive, particularly with respect to empirical questions. That determination is a contingent one, as the relative resources and competencies of courts and legislatures vary by state. But even when deference is appropriate, a prohibition against arbitrary government action stands in all fifty states.

2. *Affirmative Provision.* — State constitutions’ refusal to equate democratic representation with the legislature also bears on affirmative government duties. Although positive rights appear in constitutions administered through proportionality review worldwide,<sup>281</sup> scholars find that proportionality is meaningfully employed far less with respect to such rights in practice.<sup>282</sup> There are a number of plausible reasons for this, but to the extent at least one is “legitimacy/separation of powers concerns” about courts requiring legislatures to act,<sup>283</sup> the relative democratic positions of state courts and legislatures suggest these concerns should not similarly derail state proportionality review.

As we have described, state constitutions contain many, and many expansive, rights guarantees, most of which are cast as negative rights.<sup>284</sup> At the same time, state constitutions do not treat government action only as a threat but also as a necessary prerequisite to the possession and enjoyment of individual rights. The real threat is not government action as such, but arbitrary government. And in some instances, a lack of government provision or other affirmative measures may be just as harmful as government overreach to individuals’ ability to direct their

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280. See *infra* section IV.B.2.

281. See generally Kai Möller, *The Global Model of Constitutional Rights* (2012) (noting positive rights as part of this emerging global model associated with proportionality).

282. See, e.g., Gardbaum, *Positive and Horizontal Rights*, *supra* note 268, at 234–35.

283. *Id.* at 243.

284. See *supra* section II.A. Some state constitutions also furnish rights enforceable against private actors, described as “horizontal effect” in the comparative literature. See *supra* note 83 and accompanying text.

lives.<sup>285</sup> Although positive rights provisions generally require government action rather than foreclose it, they too reflect a popular interest in ensuring nonarbitrary, responsive government.<sup>286</sup> To guarantee popular rights in the face of potentially hostile or apathetic government actors, state constitutional provisions spell out positive, as well as negative, rights with specificity and connect these rights to the project of popular self-government.<sup>287</sup>

State courts should not shy away from using democratic proportionality review to condemn legislative inaction as well as action. In many contexts, they have not. In cases involving education, welfare, and the environment (among other things), state courts have recognized constitutional problems of inadequate government provision as well as government overreach—problems that may be as much about means as ends. As Hershkoff has explained, it is entirely appropriate for state courts to “share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues.”<sup>288</sup> To be sure, requiring legislatures to act as well as abstain may place the court in a sort of policymaking role that is discordant with federal conceptions, but for the reasons we have begun to elaborate—and more that we turn to now—state judicial policymaking is neither novel nor inherently problematic.<sup>289</sup>

### C. *Balancing*

The ultimate step in proportionality analysis, often called “proportionality as such,” requires balancing the achievement of the government’s objectives against the harm to rights.<sup>290</sup> In most proportionality systems, comfort with judicial balancing follows from recognizing “law as a practice distinct from politics.”<sup>291</sup> This is not a plausible account in the states, which do not insulate judges or their opinions from the rough and tumble of political contestation. But the institutional position of state courts suggests a different, public-engaging

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285. Cf. *State v. Schmid*, 423 A.2d 615, 627 (N.J. 1980) (“[T]he State Constitution imposes upon the State government an affirmative obligation to protect fundamental individual rights.”).

286. See Hershkoff, *Just Words*, *supra* note 34, at 1540–41.

287. See *supra* section I.C.

288. Hershkoff, *Positive Rights*, *supra* note 34, at 1138.

289. Cf. David Landau, *Aggressive Weak-Form Remedies*, 5 *Const. Ct. Rev.* 244, 253 (2014) (describing how courts can condemn legislative inaction and noting that they tend to encounter problems only when they require specific, and costly, solutions).

290. Aharon Barak, *Proportionality* (2), in *The Oxford Handbook of Comparative Constitutional Law* 739, 746 (Michel Rosenfeld & Andr s Saj  eds., Joel Linsider trans., 2012) [hereinafter Barak, *Proportionality*] (describing balancing as the “central element of proportionality”); see also, e.g., *R. v. Oakes*, [1986] 1 S.C.R. 103, 139–40 (Can.).

291. Jackson, *Age of Proportionality*, *supra* note 28, at 3125. See generally Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (2013) (comparing U.S. and German understandings).

justification for such balancing, as well as a set of expositional commitments that attend this project.

1. *From Expertise to Popularity.* — Around the world, proportionality review sits comfortably within legal and political cultures that Professors Moshe Cohen-Eliya and Iddo Porat label “epistemologically optimistic.”<sup>292</sup> In these systems, judges may impose “rationality and reasonableness” because they are “insulated from populism” and the legal culture is optimistic about “the human capacity to discern right from wrong and to achieve moral progress” and less suspicious of “intellectual elites.”<sup>293</sup> The study of constitutional law is “a science.”<sup>294</sup> And proportionality review—including balancing—may “compare and evaluate interests and ideas, values and facts, that are radically different in a way that is both rational and fair.”<sup>295</sup>

American legal culture is not epistemologically optimistic in these ways. To the contrary, whether at the state or federal level, it is more “epistemologically skeptical” about top-down or expert-imposed conceptions of the good.<sup>296</sup> But precisely insofar as state constitutions seek to make courts politically accountable rather than insulated, they suggest that proportionality review may be part of broader political contestation rather than a practice falling outside of it. If proportionality review always reflects a balance between protecting rights and allowing democratic publics to limit those rights, state courts undertake this project as participants.

Begin with the fact that many state courts already have recognized that, at least in some cases, balancing individual rights and government purposes in a thoroughgoing way, instead of allowing tiers of review to furnish answers, better comports with state constitutions—even if they have not called what they are doing proportionality.<sup>297</sup> As the Supreme Court of California described, a state court should “realistically assess the importance of the state interest” and the degree to which the law “actually serve[s] such interest” and then “carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual’s ability to exercise that right is threatened or impaired, as a practical matter, by the specific statut[e] . . . at issue.”<sup>298</sup> This sort of proportionality review acknowledges potential conflicts and tensions between individual and collective that permeate state constitutions and seeks to engage them

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292. Cohen-Eliya & Porat, *supra* note 226, at 90 (focusing on German legal culture).

293. *Id.*

294. Robert C. Post, *Constitutional Scholarship in the United States*, 7 *Int’l J. Const. L.* 416, 422 (2009) (discussing Continental scholarship).

295. David M. Beatty, *The Ultimate Rule of Law* 169 (2004).

296. See Cohen-Eliya & Porat, *supra* note 226, at 82–90 (identifying “American epistemological skepticism” in contrast to European optimism).

297. See *supra* notes 209–210 and accompanying text.

298. *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 791–92 (Cal. 1981); cf. *Davis v. Davis*, 842 S.W.2d 588, 603 (Tenn. 1992).

rather than shy away from them. As an Ohio court similarly explained, “under the Constitution, there are no absolutes; each right, no matter how fundamental or basic it may appear to be, must be balanced against the rights of others, including the rights of the public generally.”<sup>299</sup>

Such balancing may elicit a common criticism of proportionality review: that it gives judges excessive discretion and usurps legislators’ role.<sup>300</sup> To the extent these concerns demand an answer, the response is different in the states from the “epistemologically optimistic” answers that may be furnished abroad. State judges do not stand outside of democracy but are always active participants in it. As elected and often recallable actors, we should expect most state judges to take into account popular sentiment as they engage in balancing, especially in politically charged cases. Their gauge of popular opinion need not determine their decisions, but, in the words of former Justice Otto Kaus of the California Supreme Court, “ignoring the political consequences of visible decisions is ‘like ignoring a crocodile in your bathtub.’”<sup>301</sup> The design of state courts makes state constitutional adjudication a relatively majoritarian, popular enterprise.<sup>302</sup>

Importantly, though, even the strong form of this claim need not align state judges with the government’s side in proportionality review. State constitutions always conceptualize the people as distinct from legislatures, and by making state judges elected they seek to provide a direct connection between the people and their courts.<sup>303</sup> If state judges are considering political consequences, they should be attending to the views of the people who elect them, not those of other government actors. Insofar as they act in accordance with popular sentiment rather than government views, this is consistent with the state conception of rights as popular guarantees against government rather than individual guarantees against majorities.<sup>304</sup> Even in the small number of states with appointed

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299. *Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 575 (Ohio Ct. App. 1993).

300. See Barak, *Proportionality*, *supra* note 290, at 750 (describing, though not endorsing, this common critique); see also Francisco J. Urbina, *A Critique of Proportionality and Balancing 2* (2017) (criticizing proportionality tests applied by judges in the human rights context).

301. Julian N. Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994) (quoting Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58); see also Chris W. Bonneau & Melinda Gann Hall, *In Defense of Judicial Elections 15* (2009) (calling on “justices to draw upon public perceptions and the prevailing state political climate when resolving difficult disputes”); Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 Stan. L. Rev. 1629, 1659–71 (2010) (arguing that state justices have both the incentive and capacity to consider public opinion in rendering decisions).

302. See Pozen, *supra* note 194, at 2050.

303. See *supra* notes 193–205 and accompanying text.

304. See Marshfield, *supra* note 46, at 857–59.

judiciaries, this distinction between democratic majorities and government counsels attention to the people's views.

Moreover, state constitutions can be popularly amended; if state courts get the balance of individual rights and government regulation wrong, the people can respond.<sup>305</sup> We do not mean to overstate the ease of amendment. Certainly, the public cannot be expected to monitor, let alone respond to, every constitutional decision. But popular amendment occurs in the states in a way that is simply not plausible at the federal level. For the approximately 12,000 amendments proposed to the federal Constitution and the approximately 12,000 proposed to state constitutions, 27 federal amendments have been ratified, while more than 7,500 state amendments have been ratified.<sup>306</sup> And state judicial decisions have been a particular spur to popular amendment over time.<sup>307</sup> In part, this suggests, state court decisions may contribute to popular ownership of the state constitution by provoking a contrary response. Backlash may be where the people's collective will resides.<sup>308</sup> But the people may also refine or reinforce a right recognized by the court; if a popular right appears vulnerable, or simply unclear, the attention litigation has provided may generate more affirmative mobilization.<sup>309</sup> Mindful of these possibilities, as well as their institutional place, state courts should attend to several expositional obligations as they go about their work.

2. *A Culture of Justification.* — Proportionality review is celebrated for its discursive and dialogic possibilities. For example, because judges at the balancing stage seek to ensure that all factors of significance on both sides have been considered, proportionality's proponents argue that it allows courts to demonstrate respect and consideration for the losing side.<sup>310</sup> So

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305. E.g., Mathews & Ross, *supra* note 218, at 118–19 (noting that proportionality review's “transparent approach will facilitate constitutional amendment if the judicial balancing is fundamentally inconsistent with Pennsylvanians’ values”).

306. See, e.g., Dinan, *State Constitutional Politics*, *supra* note 49, at 23–24 (“As of the start of 2017, the current state constitutions have been amended 7,586 times, an average of just over 150 amendments per state.”).

307. See, e.g., Reed, *supra* note 194, at 873 (“State constitutions and state supreme courts now stand as key elements in activists’ strategies for legal, political and social change.”).

308. See Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *Harv. C.R.-C.L. L. Rev.* 373, 374–75 (2007) (“If courts interpret the Constitution in terms that diverge from the deeply held convictions of the American people, Americans will find ways to communicate their objections and resist judicial judgments. These historically recurring patterns of resistance reflect a deep logic of the American constitutional order . . .”).

309. See, e.g., *infra* section IV.B.3 (discussing abortion initiatives).

310. E.g., Stone Sweet & Mathews, *supra* note 25, at 89 (noting that proportionality review “provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties” and to state “in effect, that each side has some significant constitutional right on its side”); see also Jud Mathews, *Proportionality Review in Administrative Law*, in *Comparative Administrative Law* 405, 412–13 (Susan Rose-Ackerman, Peter L. Lindseth & Blake Emerson eds., 2d ed. 2017) (“In

too, many argue that proportionality review promotes the consideration of constitutional principles outside of the courts, creating a rights-regarding conversation between courts and legislatures.<sup>311</sup> These values may readily be served at the state level as well, but courts should be mindful of audiences beyond the parties and the legislature. In particular, they should attend to the broader public, both in offering accounts of their decisions and in stirring popular engagement with the constitutional project of democratic self-government.

Around the world, proportionality review has come to be associated with a “culture of justification,” a term introduced by South African human rights attorney and scholar Etienne Mureinik.<sup>312</sup> According to Mureinik, government must justify all acts, not only those infringing on fundamental rights, and government legitimacy inheres in the provision of reasons, not the authority of government actors.<sup>313</sup> These ideas resonate with proportionality review, which “requires that the government provide substantive justification for all of its actions, in that it must show the rationality and reasonableness of those actions and the tradeoffs they necessarily entail.”<sup>314</sup> Courts, on such accounts, deploy proportionality review to ensure that other government actors, especially legislatures, justify their actions.

Moreover, courts not only demand reason-giving from others through proportionality review but also directly participate in this project.<sup>315</sup> As they assess individual and governmental interests and balance them against one another, courts must explain their reasoning and considerations. This may be especially salient when judges are reviewing positive rights claims or insisting on affirmative government action and the judicial policymaking role becomes more apparent, but it is a pervasive requirement. This reason-giving constitutes a form of nonarbitrary judicial action, and, in the states, it must be directed at the public. Rather than hide

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working their way through the proportionality subtests, courts can build a reasoned justification for their rulings, acknowledging the competing interests on either side and explaining why, ultimately, one side prevails.” (citation omitted)).

311. See, e.g., Hogg & Bushell, *supra* note 229, at 101 (“Canadian legislators are engaging in a self-conscious dialogue with the judiciary.”); Jackson, *Age of Proportionality*, *supra* note 28, at 3146 (“Legislators who understand that statutes will be evaluated under proportionality standards if challenged as infringing on individual constitutional rights will have reason to give attention to the rationality of the means . . .”); Mathews & Ross, *supra* note 218, at 117 (“Proportionality review’s transparency encourages constitutional dialogue between courts and legislatures.”).

312. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31, 32 (1994) (“If [South Africa’s 1993 Interim] Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification—a culture in which every exercise of power is expected to be justified . . .”).

313. See *id.*

314. Cohen-Eliya & Porat, *supra* note 226, at 7. Cohen-Eliya and Porat argue that the U.S. legal culture is one of authority rather than justification.

315. See Jackson, *Age of Proportionality*, *supra* note 28, at 3142 (“[S]tructured proportionality review provides a stable framework for persuasive reason-giving . . .”).

behind claims of judicial restraint of the sort that populate the *U.S. Reports* and are best understood as part of a “culture of authority,”<sup>316</sup> state courts should embrace a culture of justification vis-à-vis the public.

As they do so, moreover, state judges can facilitate the ongoing project of constitutional self-rule. Proportionality’s proponents argue that this form of review can “provide a better bridge between courts and other branches of government, offering criteria for constitutional behavior that are usable by, and open to input from, legislatures and executives.”<sup>317</sup> This is plausible in the states as well: Insofar as legislatures and executives recognize that courts will review their ultimate actions under proportionality standards, they may attend more closely to the rationality of their proposed actions, to the fit between these actions and the interests they are seeking to serve, and to the burdens such actions will impose and whether such burdens can reasonably be understood as justified.<sup>318</sup> But the dialogue may also invite more popular participation in the states.

Unlike their federal counterpart, which issues constitutional decisions assuming they will be final, state supreme courts issue decisions knowing they are subject to popular revision or countermand.<sup>319</sup> They should take this possibility of public engagement seriously and not only justify their decisions but also explain them in a way that facilitates the public’s evaluation and deliberation. Explicating their work through a framework like proportionality that clearly spells out the respective rights and interests involved as well as their relative weights and interaction is one way to do so. On a basic level, this sort of judicial reason-giving may serve as a means of electoral and popular accountability. Former Oregon Supreme Court Justice Jack Landau, for example, has urged state judges to “be candid about the elements of judgment.”<sup>320</sup> He concludes, “[B]ecause of the fact that so many state court judges are elected, it becomes especially important for them to lay bare their decisions in a candid way, so that those decisions may be fairly evaluated by the electorate.”<sup>321</sup>

More ambitiously, beyond enabling the people to change their judges, thorough and transparent decisions can help the people become better at constitutional self-governance, including by amending their constitutions.

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316. Mureinik, *supra* note 312, at 32.

317. Jackson, *Age of Proportionality*, *supra* note 28, at 3103.

318. Cf. Mathews & Ross, *supra* note 218, at 117 (arguing that proportionality encourages legislators to consider alternative approaches with a lesser impact on rights).

319. See Helen Hershkoff, Foreword: Positive Rights and the Evolution of State Constitutions, 33 *Rutgers L.J.* 799, 803, 805 (2002) (describing “the state constitutional text as a site of political contest and social meaning” and arguing that the “state constitution amendment processes create important occasions for public dialogue, value formation, and social reform”); Hershkoff, *Positive Rights*, *supra* note 34, at 1163 (describing state decisions as “only the opening statement in a public dialogue with the other branches of government and the people”).

320. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 *Penn St. L. Rev.* 837, 838 (2011).

321. *Id.* at 873–74.

Insofar as judicial decisions offer a framework to consider individual rights, government action, and communal welfare, they may shape the thinking and argumentation not only of other government actors but also of the broader public. Proportionality frameworks, that is, may be used by the people themselves as they consider how to advance constitutional government. In this way, state courts can honor the state judicial role “not . . . to thwart, but . . . to advance [the state constitution’s] main object, the continuance and orderly conduct of government by the people.”<sup>322</sup>

#### IV. CONTEMPORARY DEBATES

In this Part, we illustrate democratic proportionality review with examples, drawing on both the substantive commitments and adjudicative frameworks described above. We first show, with reference to familiar cases, that democratic proportionality review is already playing out in state courts. In cases involving conflicts between individual rightsholders, courts have carefully ascertained the rights at stake, sensitively balanced competing interests, and offered public-facing explanations of their decisions. Looking beyond existing cases, we take up three active areas of litigation—voting, occupational licensing, and abortion—to argue that democratic proportionality review would enrich state constitutional adjudication. Even with respect to contentious debates, this Part suggests, democratic proportionality may foster both personal security and greater public reason.

##### A. *Existing Cases*

We begin by emphasizing a point we have noted throughout: Although methodological lockstepping has permeated much state constitutional practice, the components of democratic proportionality review are already part of state case law. More fully recognizing such review does not require stark departures from accepted practice. Moreover, the techniques we urge are widely applicable, not limited to specific issues or specific states, even as they must be tailored to particular cases and jurisdictions. Here, we describe three prominent conflicts between individual rightsholders. In such cases—the heartland of proportionality review<sup>323</sup>—state courts have already demonstrated their capacity to carefully ascertain and prudently balance constitutional rights and to deploy broad remedial powers, rooted in the common-law tradition.<sup>324</sup>

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322. *In re Op. of the Justs.*, 16 A.2d 585, 586 (Me. 1940).

323. See Greene, *supra* note 26, at 84 (endorsing proportionality review as an approach to rights–rights conflicts).

324. See Hershkoff, *Passive Virtues*, *supra* note 148, at 1875–76 (describing distinctive state justiciability doctrines); see also Bulman-Pozen & Seifter, *Countering the New Election Subversion*, *supra* note 103, at 1356 (discussing the role of state courts).

Take first a clash of rights familiar from first-year property courses: What happens when state constitutional speech rights come into conflict with the rights of property owners? In *State v. Schmid*, the New Jersey Supreme Court famously considered an individual's argument that he had a state constitutional right to distribute political literature on the campus of Princeton University.<sup>325</sup> The court engaged in state-focused interpretation, finding "exceptional vitality" in the state constitution's speech and assembly provisions<sup>326</sup> and concluding that state speech rights may apply against private actors.<sup>327</sup> But those rights were not absolute, and they did not automatically trigger a decisive tier of scrutiny. Rather, the court recognized that "the heart of the problem" was "the need to balance within a constitutional framework legitimate interests in private property with individual freedoms of speech and assembly."<sup>328</sup>

The court noted its "strong traditions which prize the exercise of individual rights and stress the societal obligations that are concomitant to a public enjoyment of private property."<sup>329</sup> And so it adopted a "multi-faceted test" focused on both the property and the speech at issue, with attention to the reasonableness of the property owner's exclusion and the speaker's alternatives for expressive activity.<sup>330</sup> Considering the details of Schmid's and Princeton's respective interests, the court concluded that a trespass conviction could not be sustained.<sup>331</sup> Rather than resort to clause-bound readings, absolute pronouncements, or judicial minimalism, the court engaged directly with the rights on both sides of the case and expressly justified its nuanced resolution.

Or take another prominent state case: *Davis v. Davis*, an early case involving assisted reproduction in which the Tennessee Supreme Court faced a conflict between two individuals' rights to procreative autonomy.<sup>332</sup> The plaintiff and defendant had used in vitro fertilization services prior to their divorce but then reached an impasse as to what to do with the frozen embryos. Junior Davis wanted them discarded while Mary Sue wanted to donate them to another couple.<sup>333</sup> Bioethics and health scholars have considered the case's implications for the emerging law of reproductive technologies;<sup>334</sup> we reference it here because of its decisional structure.

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325. 423 A.2d 615 (N.J. 1980).

326. *Id.* at 626.

327. *Id.* at 628.

328. *Id.* For a similar approach, see *Alderwood Assocs. v. Wash. Env't Council*, 635 P.2d 108, 117 (Wash. 1981) (adopting a balancing approach that could accommodate the rights to free speech and ballot-initiative participation as well as property rights).

329. *Schmid*, 423 A.2d at 630.

330. *Id.* at 630.

331. *Id.* at 633.

332. 842 S.W.2d 588, 589 (Tenn. 1992).

333. *See id.* at 590.

334. *See, e.g.,* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 *Stan. L. Rev.* 1135, 1144 & n.25 (2008) (citing *Davis*, 842 S.W.2d at 603–04, in discussion of

The court began by discerning the rights at stake, noting that the Tennessee Constitution's multiple liberty-inflected provisions protect procreative autonomy, even though that phrase does not appear in the text.<sup>335</sup> But the case was a classic rights clash: Each party possessed a procreative autonomy right. The court accordingly balanced their rights, noting that "[r]esolving disputes over conflicting interests of constitutional import is a task familiar to the courts" and observing that "[o]ne way of resolving these disputes is to consider the positions of the parties, the significance of their interests, and the relative burdens that will be imposed by differing resolutions."<sup>336</sup> In deciding for Junior Davis, the court considered these interests and burdens quite concretely<sup>337</sup> and elaborated the bases for its decision. Providing guidance for lower courts, it also cautioned that the guidance should not serve as an "automatic veto" in future cases,<sup>338</sup> consistent with proportionality principles that require attention to context.

Finally, consider a state case loosely resembling *Masterpiece Cakeshop*.<sup>339</sup> A municipal court judge in Wyoming refused to perform same-sex marriages based on her "sincere belief that marriage is the union of one man and one woman."<sup>340</sup> The Wyoming Commission on Judicial Conduct and Ethics recommended that the judge be removed from her position as a result; the judge responded that her state constitutional right to religious freedom prohibited any discipline for her refusal.<sup>341</sup>

The Wyoming Supreme Court first considered together multiple clauses of the state constitution to determine the rights involved. On one hand, it recognized that the state's two express clauses dedicated to the freedom of religion "may offer broader protections than does the United States Constitution."<sup>342</sup> On the other hand, the court doubted that the judge's freedom of belief (as opposed to judicial conduct) was really at issue, a conclusion that was "reinforced by an examination of the entire Wyoming Constitution," which also "recognizes the importance of equal

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one solution to conflicts between "various conceptions of procreative rights"); Dov Fox, *Reproductive Negligence*, 117 Colum. L. Rev. 149, 175 (2017) ("Courts have similarly held that people's 'interest in the nature of ownership' over embryos lies in 'decision-making authority concerning [their] disposition.'" (quoting *Davis*, 842 S.W.2d at 597)).

335. *Davis*, 842 S.W.2d at 600.

336. *Id.* at 603.

337. *E.g.*, *id.* at 604 ("In light of his boyhood experiences, Junior Davis is vehemently opposed to fathering a child that would not live with both parents.").

338. *Id.*

339. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (considering a baker's assertion of First Amendment rights that clashed with equality rights); see also Greene, *supra* note 26, at 120–24 (criticizing the Supreme Court's decision in *Masterpiece Cakeshop* and advocating a proportionality approach).

340. *In re Neely*, 390 P.3d 728, 732–33 (Wyo. 2017).

341. See *id.* at 735.

342. *Id.* at 742.

rights for all.”<sup>343</sup> The state constitution’s multiple overlapping equality provisions, the court observed, citing precedent, likewise confer greater protection than the federal Constitution.<sup>344</sup> Faced with conflicting rights, the court rejected the judge’s position that the liberty right could “trump” the equality right.<sup>345</sup> But the court also rejected the Commission’s recommendation of removal from office as excessive and instead adopted a narrower remedy: public censure and a choice for the judge between performing no marriages or refraining from discriminating in their performance.<sup>346</sup> Like the New Jersey and Tennessee courts, the Wyoming Supreme Court showcased the sorts of balancing and remedial tailoring embraced by democratic proportionality review yet foreclosed by familiar federal frameworks.

#### B. *New Directions*

Although components of democratic proportionality review have appeared prominently in cases involving conflicts between rightsholders, this state-centered approach to constitutional adjudication has yet to take hold more generally. In this section, we consider three burgeoning areas of state constitutional litigation—voting, occupational licensing, and abortion—and suggest that democratic proportionality review would yield sounder decisions, grounded in state constitutions and the distinctive balances they strike among individuals, community, and government. Our discussions are brief and positioned at a high level of generality; we seek to begin a conversation about the promise of democratic proportionality review rather than to resolve particular controversies.

1. *Voting.* — Democratic proportionality indicates several new directions for constitutional adjudication of voting rights. It situates the franchise within a broader context of democratic rights. It reveals that the federal test for reviewing voting regulations fails to properly appreciate and balance the state constitutional interests at stake. And it proposes that state governments may have the obligation to furnish appropriate infrastructure for the exercise of voting rights and not merely to desist from undue infringements.

The first step of democratic proportionality review is to discern the rights at issue. Superficially, this is an easy task when it comes to laws regulating voting: Every state constitution expressly and affirmatively guarantees the right to vote.<sup>347</sup> Consistent with existing judicial

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343. *Id.* at 735, 744.

344. *Id.* at 744.

345. *Id.*

346. *Id.* at 753.

347. See *supra* note 62.

recognition of the right as “fundamental,”<sup>348</sup> “precious,”<sup>349</sup> and “bed-rock,”<sup>350</sup> voting is readily classified a core self-determination right, a necessary precondition to democratic self-governance in the states.<sup>351</sup>

Even as the force of the right to vote is evident in isolation, the electoral context requires courts to read constitutional clauses together. All state constitutions include not only the right to vote but also additional protections to safeguard popular participation in and control over elections. For instance, they guarantee rights to free and fair elections, rights against interference in voting, and more.<sup>352</sup> Together these clauses undergird a powerful state constitutional commitment to democracy. Under this democracy principle,<sup>353</sup> courts should resolve cases “in relation to the fundamental purpose of the constitution as a whole, to wit: to create and define the institutions whereby a representative democratic form of government may effectively function.”<sup>354</sup> Reading state constitutions’ many election-related clauses together underscores the weight and expansive scope of state voting rights and suggests the range of cases that may implicate these rights.<sup>355</sup>

Although voting rights could hardly be weightier, courts evaluating laws that allegedly infringe these rights must also take seriously the government’s interest in regulating elections. State constitutional provisions,<sup>356</sup> as well as “common sense,”<sup>357</sup> reveal a strong collective interest in accurate, well-run elections. Contrary to some legislatures’ claims, constitutional clauses empowering legislatures to regulate elections do not insulate their laws from scrutiny,<sup>358</sup> but they do underlie the judicial obligation to engage with both the individual and collective interests at stake, consistent with the balances state constitutions strike among individuals, community, and government.

348. E.g., *Ferry v. City of Montpelier*, 296 A.3d 749, 758 (Vt. 2023).

349. E.g., *Chelsea Collaborative, Inc. v. Sec’y of Commonwealth*, 100 N.E.3d 326, 331 (Mass. 2018) (citing *Swift v. Registrars of Voters of Quincy*, 183 N.E. 730, 732 (Mass. 1932)).

350. E.g., *Socialist Workers Party v. Sec’y of State*, 317 N.W.2d 1, 6 (Mich. 1982).

351. See *supra* section III.A.2.

352. See *supra* section I.D.

353. See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33.

354. *State ex rel. Reynolds v. Zimmerman*, 126 N.W.2d 551, 558 (Wis. 1964).

355. See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 33, at 907–32 (addressing the democracy principle’s application to cases involving gerrymandering, lame-duck legislative entrenchment, the regulation of popular initiatives, and more).

356. See, e.g., *Ariz. Const. art. VII, § 12* (“There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.”).

357. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

358. See, e.g., *Mont. Democratic Party v. Jacobsen*, 518 P.3d 58, 65 (Mont. 2022); *Driscoll v. Stapleton*, 473 P.3d 386, 393 (Mont. 2020); *League of Women Voters of Wis. Educ. Network, Inc. v. Walker*, No. 11 CV 4669, 2012 WL 763586, at \*4 (Wis. Cir. Ct. Mar. 12, 2012) (“The people’s fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature’s so-called ‘plenary authority’), not the other way around.”).

As state courts are called on to evaluate laws regulating voting, litigants are pushing them to adopt the federal *Anderson–Burdick* test.<sup>359</sup> But adopting this test, which has come to function as a sort of rational basis review,<sup>360</sup> is inappropriate. Democratic proportionality requires state courts to take voting rights more seriously, to evaluate government regulation more meaningfully, and to weigh interests in the context of the concrete dispute. For example, while a federal court might accept the government’s recitation of an abstract interest like combating voter fraud,<sup>361</sup> a court engaged in democratic proportionality review would require the government to establish concretely and specifically how that interest would be furthered by its regulation.<sup>362</sup> If the government successfully made such a showing, the court would ask whether there was a less rights-impairing way to achieve this result. And, if the law survived this stage of review, the court would proceed to engage in actual balancing, asking whether the established public benefits outweighed the intrusion on voting rights. At all stages of such an inquiry, state courts should be mindful of their ability to conduct context-specific analysis and to furnish tailored remedies.

As they review regulations of the franchise, moreover, courts applying democratic proportionality review should attend to government inaction as well as action. As election law scholars have observed, the distinction between negative and positive rights is flimsy when it comes to voting: Voting “is, inescapably, a positive right”<sup>363</sup> because it is only by creating a system of election administration that it can occur at all.<sup>364</sup> Balancing voting rights and the collective interest in well-run elections may require courts not only to invalidate problematic state regulation but also to demand an appropriate “infrastructure of provision.”<sup>365</sup>

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359. The *Anderson–Burdick* test requires courts to weigh burdens a law imposes on electoral participation against the law’s asserted benefits. See *Burdick*, 504 U.S. at 428, 441; *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983). For an example of litigants pushing the standard in state court, see *Mont. Democratic Party*, 518 P.3d at 74 (Rice, J., dissenting) (“[T]he Secretary [of State of Montana] and Amicus have asked the Court to adopt the balancing approach provided by the United States Supreme Court[’s] . . . ‘*Anderson–Burdick* standard’ . . .”).

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

361. See Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 Wm. & Mary Bill Rts. J. 59, 62–63 (2021) (discussing recent federal cases involving a deferential form of *Anderson–Burdick*).

362. See, e.g., *State v. Green Party of Alaska*, 118 P.3d 1054, 1070 (Alaska 2005).

363. Joseph Fishkin, *Voting as a Positive Right: A Reply to Flanders*, 28 Alaska L. Rev. 29, 33 (2011).

364. See Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. Rev. 1127, 1130 (2021).

365. Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 Yale L.J. Forum 332, 338 (2015), [https://www.yalelawjournal.org/pdf/FranklinPDF\\_xotfi3j7.pdf](https://www.yalelawjournal.org/pdf/FranklinPDF_xotfi3j7.pdf) [<https://perma.cc/D2K7-U9QS>].

During the COVID-19 pandemic, some state court decisions laid analytic groundwork for this approach. For example, the Alaska Supreme Court concluded that witness requirements deprived housebound voters of meaningful access to the ballot.<sup>366</sup> The court approved an injunction that not only eliminated the requirement but also required affirmative steps by the state to modify relevant election materials and to “educate the public about the change,”<sup>367</sup> including by amending its website, using social media, creating a public service announcement, and notifying “community get-out-vote organizations, tribal organization[s], Native corporations, and political parties.”<sup>368</sup> Decisions from other states including New Mexico and Tennessee during this period similarly required states to affirmatively facilitate voting, including by mailing unsolicited absentee ballot applications to voters<sup>369</sup> and conducting public outreach regarding the availability of voting by mail.<sup>370</sup>

A commitment to democratic proportionality review suggests that this approach should be more routine in voting litigation—not simply a response to a once-in-a-century pandemic. As Professors Joshua Sellers and Justin Weinstein-Tull have proposed, for instance, state courts could review for electoral adequacy much as they already review for educational adequacy.<sup>371</sup> State constitutions both suggest that an infrastructure for elections is constitutionally required and provide resources to flesh out what it must entail in any given state.

2. *Occupational Licensing.* — Democratic proportionality review also offers a better approach to the economic rights claims that have burgeoned in recent years. In the past decade, in particular, litigants have brought numerous challenges to state occupational licensing schemes on grounds of economic freedom. From lactation consultants in Georgia to vacation property managers in Pennsylvania to eyebrow threaders in Texas, individuals have challenged laws demanding that they satisfy educational, testing, or financial requirements and obtain a state license before working.<sup>372</sup>

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366. *State v. Arctic Vill. Council*, 495 P.3d 313, 322 (Alaska 2021).

367. *Id.* at 317.

368. [Proposed] Preliminary Injunction Order paras. 5–7, 9(i)–(vii), 11, 12, *Arctic Vill. Council v. Meyer*, No. 3AN-20-07858 CI (Alaska Super. Ct. filed Oct. 13, 2020), [https://www.acluak.org/sites/default/files/field\\_documents/3an-20-07858ci\\_003.pdf](https://www.acluak.org/sites/default/files/field_documents/3an-20-07858ci_003.pdf) [<https://perma.cc/ERQ8-7NH4>].

369. See *State ex rel. Riddle v. Oliver*, 487 P.3d 815, 830 (N.M. 2021).

370. See *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020) (modifying broader injunction but accepting state’s concession that it would facilitate mail voting for medically sensitive populations).

371. See Sellers & Weinstein-Tull, *supra* note 364, at 1163–64.

372. See *Raffensperger v. Jackson*, 888 S.E.2d 483, 486 (Ga. 2023); *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1101 (Pa. 2020); *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 91 (Tex. 2015). These challenges have often been spearheaded by the Institute for Justice. See *Occupational Licensing*, Inst. for Just., <https://ij.org/issues/economic->

The shadow of *Lochner* looms large over these cases. As some litigants and judges have insisted on strict scrutiny for economic rights,<sup>373</sup> many others have worried that this approach would invite a new era of “judicial overreach.”<sup>374</sup> Democratic proportionality review offers a better approach, a principled way to invalidate arbitrary and unreasonable licensing schemes without casting economic rights as fundamental and “unleashing ‘the *Lochner* monster.’”<sup>375</sup>

Begin, again, with the nature of the rights at stake. Litigants who argue that economic rights are at issue in occupational licensing cases find textual support in many state constitutions. For example, many of these constitutions expressly protect property rights or “the enjoyment of the gains of [one’s] own industry” within their inalienable rights clauses.<sup>376</sup> State constitutions may also furnish support for such rights through due process and equal protection provisions.<sup>377</sup> But as is generally true of state constitutional rights, these individual-protecting provisions sit alongside community-regarding obligations. Even clauses recognizing economic rights as inalienable immediately temper such rights with the rights of other individuals to their own life, liberty, and happiness, consistent with relational understandings of property.<sup>378</sup> And state constitutions contain many potentially conflicting rights, including guarantees of equality, a clean environment, worker protections, and more.<sup>379</sup>

Consistent with—though not apparently motivated by—this range of relevant constitutional provisions, state courts rightly have been hesitant to describe the economic rights involved in occupational licensing cases as fundamental rights.<sup>380</sup> This poses a problem for judges tracking the federal

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liberty/occupational-licensing/ [https://perma.cc/4RRZ-7B69] (last visited Aug. 20, 2023).

373. See, e.g., *Porter v. State*, 913 N.W.2d 842, 853, 859 (Wis. 2018) (Bradley, J., dissenting) (“Article I, Section 1 of the Wisconsin Constitution includes economic liberty within its general guarantee of liberty as an inherent and fundamental right, [and] . . . [w]hen fundamental constitutional rights are implicated, we generally apply strict scrutiny review.” (emphasis omitted)).

374. See *Ladd*, 230 A.3d at 1117 (Wecht, J., dissenting); see also *Pizza di Joey, LLC v. Mayor of Balt.*, 235 A.3d 873, 896–97 & n.13 (Md. 2020) (reaffirming the state court’s position that judicial restraint is required when reviewing most economic regulations).

375. *Patel*, 469 S.W.3d at 91.

376. E.g., Mo. Const. art. I, § 2; Okla. Const. art. II, § 2; see also N.C. Const. art. I, § 1 (guaranteeing individuals “the enjoyment of the fruits of their own labor”).

377. See, e.g., Tex. Const. art. I, §§ 3–3a, 19.

378. See, e.g., Mo. Const. art. I, § 2 (guaranteeing “that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry”).

379. See, e.g., Mont. Const. art. II, § 3 (“All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life’s basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property . . .”).

380. See, e.g., *Ladd v. Real Est. Comm’n*, 230 A.3d 1096, 1108 (Pa. 2020) (“[U]nlike the rights to privacy, marry, or procreate, the right to choose a particular occupation,

tiers of scrutiny, however: If economic rights are not fundamental rights warranting strict scrutiny, they are mere interests that receive rational basis review, giving a free pass to state legislation no matter how arbitrary or unreasonable it may be.

Democratic proportionality review moves beyond this rigid binary. Even as it demands a careful inquiry into the rights at issue, it does not make the ultimate resolution of a dispute turn on whether a right is classified as fundamental. Rejecting tiers of scrutiny, it calls on courts to evaluate—for any rights infringement—whether the government has a legitimate objective, whether it is pursuing that objective through appropriate means, and whether it could have adopted a less rights-impairing approach.<sup>381</sup> A critical piece of this analysis in the states, where the people themselves are always distinguished constitutionally from their political representatives, is to ask whether the government has acted arbitrarily.<sup>382</sup>

When it comes to occupational licensing schemes, this means that courts should not settle for the government's empty recitation of a legitimate objective, such as protecting the people's health and welfare, but rather ask whether the licensing scheme actually serves that objective. This step is where several recently challenged occupational licensing schemes would fail. For instance, Texas required eyebrow threaders to undergo 750 hours of expensive training before being permitted to work.<sup>383</sup> Given that roughly half of those hours did not even ostensibly pertain to the health-and-safety justification the state provided, the regulation revealed itself to be irrational.<sup>384</sup> The problem was not that a fundamental right was infringed but rather that the state was acting in an arbitrary manner.

So too, the Georgia Lactation Consultant Practice Act required lactation care providers who wished to support mothers in breastfeeding

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although 'undeniably important,' is not fundamental. The right is not absolute and its exercise remains subject to the General Assembly's police powers, which it may exercise to preserve the public health, safety, and welfare." (citation omitted) (quoting *Nixon v. Commonwealth*, 839 A.2d 277, 287 (Pa. 2003))).

381. See *supra* note 212. Although state courts have not applied democratic proportionality as such, several have applied similarly intermediate standards of review. See, e.g., *Raffensperger v. Jackson*, 888 S.E.2d 483, 493 (Ga. 2023) (applying a "reasonable necessity" test to an occupational licensing law); *Ladd*, 230 A.3d at 1102 (requiring exercises of the police power to be not "unreasonable, unduly oppressive or patently beyond the necessities of the case" and to employ means that have "a real and substantial relation to the objects sought to be attained" (internal quotation marks omitted) (quoting *Gambone v. Commonwealth*, 101 A.2d 634, 637 (Pa. 1954))). Democratic proportionality review helps to make sense of this more intermediate approach and also suggests why the court's evaluation of government action, rather than the delineating of a right as fundamental or not, is the critical consideration in such cases.

382. See *supra* section III.B.1.

383. See *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 90 (Tex. 2015).

384. See *id.*

to complete fourteen courses in health sciences, including eight college-level courses; complete ninety-five hours of lactation-specific education; complete at least 300 supervised clinical hours; and take an exam costing more than \$500.<sup>385</sup> Other education and accreditation options, including a popular free course, did not suffice for licensure.<sup>386</sup> Although the Act's stated purpose "to protect the health, safety, and welfare of the public" was sound on its face, there was no evidence that lactation consultants would cause harm without the required training (or any evidence that such harm had ever occurred).<sup>387</sup> To the contrary, there was significant evidence of safe and beneficial services provided by non-licensed lactation consultants.<sup>388</sup> A court employing democratic proportionality review could readily conclude that the law was unreasonable and thus invalid, without recognizing the right to be a lactation consultant specifically, or to pursue a particular occupation more generally, as fundamental.

Although regulations like these would fail before a balancing stage of democratic proportionality review based on their arbitrary and excessive character, it is easy to imagine that many other state licensing schemes—such as those specifying educational and testing requirements for doctors and lawyers—would pass to the final stage of review if challenged. At the balancing stage, the vast majority of licensing schemes should survive, as a court would already have established that they serve legitimate public interests in a reasonable manner and do not infringe on individuals' rights to pursue their occupation more than necessary. In the rare case that a court finds such a scheme unduly burdensome in relation to its benefits, the court should engage in remedial tailoring in lieu of all-or-nothing dispositions.

3. *Abortion.* — We conclude where we began, with state constitutional adjudication of abortion. As with voting rights, a democratic proportionality frame helps to reveal reproductive rights as core self-determination rights that frequently emerge from layered provisions in state constitutions and may require the affirmative provision of government infrastructure. As with occupational licensing, a democratic proportionality frame suggests that a commitment to nonarbitrariness should doom many state statutes—in particular, those that operate as abortion bans—while leaving space for regulations that genuinely serve health, safety, and welfare. Finally, a democratic proportionality frame underscores that state citizens have the power and obligation to engage directly with constitutional rights, including by revisiting judicial decisions and revising state constitutions.

At the first stage of rights discernment, state courts should recognize reproductive rights as core self-determination rights that have been

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385. *Jackson*, 888 S.E.2d at 486–87.

386. *Id.* at 488.

387. *See id.* at 488, 496.

388. *See id.* at 496–97.

refined and enhanced over time.<sup>389</sup> The right to abortion is rooted, first, in state constitutions' "universal" recognition of bodily autonomy.<sup>390</sup> As the Mississippi Supreme Court has put it, "Each of us has a right to the inviolability and integrity of our persons, a freedom to choose or a right of bodily self-determination . . . ."<sup>391</sup> In a range of contexts, including refusing and obtaining medical treatment, state courts have recognized that bodily autonomy is "the free citizen's first and greatest right, which underlies all others"<sup>392</sup>—or in Professor Pamela Karlan's words, a "rights-protecting right."<sup>393</sup> Bodily autonomy is vital in its own right and a prerequisite for exercising other rights recognized by state constitutions.

The practice of reading constitutional provisions together further illuminates the nature and force of reproductive rights. In most states, abortion rights have been strengthened and given more substantive content through the addition of rights to equality, privacy, health care, and more. For example, in Montana, which includes express protections for dignity, privacy, sex equality, and seeking health and happiness, as well as liberty rights and inalienable rights, the state supreme court has recognized that personal "procreative autonomy" is rooted in complementary provisions of the document.<sup>394</sup> Even as it focused on privacy rights, the court noted that abortion rights were supported by the "overlapping" rights to individual dignity, which "demands that people have for themselves the moral right and moral responsibility to confront the most fundamental questions about the meaning and value of their own lives"; to equal protection, which confers "an equal right to form and to follow [one's] own values in profoundly spiritual matters"; to "seek safety, health[,] and happiness," including by obtaining medical care and making bodily decisions without interference; to accept or reject religious doctrines and to express one's opinion; and to due process of law.<sup>395</sup>

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389. Already, most, though not all, state courts to consider the question have recognized abortion rights under their constitutions. See *After Roe Fell: Abortion Laws by State*, Ctr. for Reprod. Rts., <https://reproductiverights.org/maps/abortion-laws-by-state/> [<https://perma.cc/54AN-ZUYD>] (last visited Aug. 20, 2023) (analyzing state laws, constitutions, and court decisions on abortion); Quinn Yeargain, *What All State Constitutions Say About Abortion, and Why It Matters*, Bolts (June 30, 2022), <https://boltsmag.org/state-constitutions-and-abortion/> [<https://perma.cc/B5D2-ZFZS>] (summarizing state court interpretations of abortion rights).

390. See, e.g., *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905) ("[U]nder a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence . . .").

391. *In re Brown*, 478 So. 2d 1033, 1039 (Miss. 1985); see also Hodes & Nauser, MDs, *P.A. v. Schmidt*, 440 P.3d 461, 482–83 (Kan. 2019) (collecting cases recognizing a constitutionally protected right to bodily autonomy).

392. *Pratt*, 118 Ill. App. at 166.

393. Karlan, *supra* note 360, at 142.

394. See *Armstrong v. State*, 989 P.2d 364, 377 (Mont. 1999).

395. See *id.* at 383–89.

Of course, reading provisions together will not look the same in all states. In part because of its relatively recent constitutional convention, Montana's layering of abortion-protecting rights is particularly substantial and various, but every state constitution includes multiple clauses that speak to the right. All states protect a right of bodily integrity and autonomy, and some states layer this with more libertarian privacy rights,<sup>396</sup> while others focus on equal protection, including through equal rights amendments expressly focused on sex equality.<sup>397</sup> This means that the abortion right does not look exactly the same in all states and, especially, that the justifications for regulation may be evaluated differently. Privacy-oriented states may be particularly concerned about government interference with personal decisions, for example, while equality-oriented states may be particularly concerned about the sex-stereotyping and misogyny that inform abortion regulation. The general point is that every state constitution contains not only a core right to bodily autonomy but also additional protections that bear on this right. Most recently, three state constitutions were amended in 2022 to secure and clarify existing reproductive rights by expressly protecting abortion as such for the first time.<sup>398</sup>

Even as it underscores the weight of the abortion right, democratic proportionality review allows for civil and serious dialogue regarding competing rights and interests, including religious beliefs. The especially weighty individual right requires especially weighty justifications for infringement, but the government has a chance to offer such justifications for its laws. As we have suggested with respect to understanding the right at issue, these government interests—and the constitutional recognition of them—will vary by case and by state.

In every state, however, constitutional insistence on nonarbitrariness may prove dispositive in some instances. After discerning the rights at stake, courts conducting democratic proportionality review ask whether the state has a legitimate purpose, is using appropriate means, and is minimally impairing rights. Abortion laws emerging around the country in the wake of *Dobbs* founder at these steps: State courts should readily

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396. See, e.g., *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 782 (S.C. 2023) (concluding that “few decisions in life are more private than the decision whether to terminate a pregnancy,” and noting that Alaska, Florida, Minnesota, Montana, and Tennessee have also recognized abortion rights based on express privacy clauses). Some state constitutions also include libertarian health care rights that emerged out of opposition to the Affordable Care Act but speak more generally about individuals’ rights with respect to health care decisions; these provisions are being invoked in support of abortion rights. See, e.g., *Preterm-Cleveland v. Yost*, No. A2203203, 2022 WL 16137799, at \*15 (Ohio C.P. Hamilton Cnty. Sept. 2, 2022) (order granting preliminary injunction); *Johnson v. Wyoming*, No. 18732 (Wyo. Dist. Ct. July 25, 2022) (order granting preliminary injunction).

397. See, e.g., *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851–52 (N.M. 1998) (holding that the New Mexico’s Equal Rights Amendment requires judges to subject abortion restrictions to heightened scrutiny).

398. See Cal. Const. art. I, § 1.1; Mich. Const. art. I, § 28; Vt. Const. ch. I, art. 22.

conclude that abortion bans that fail to include exceptions, or that apply so early that many women are not even aware of a pregnancy, are invalid for their sheer arbitrariness. For example, the Idaho abortion ban, which requires the imprisonment of physicians rendering lifesaving care, does not clear this arbitrariness bar, contrary to the Idaho Supreme Court's holding.<sup>399</sup>

Moreover, as we have suggested with respect to voting litigation, democratic proportionality review may reveal problems not only of government action but also of government inaction. Although abortion is not generally understood as a positive right, reproductive rights do not meaningfully exist without a system that provides access to them. As Professor Cary Franklin has explained, "autonomy often depends . . . on an infrastructure of provision."<sup>400</sup> Unlike the U.S. Supreme Court,<sup>401</sup> a number of state courts have already determined that personal autonomy requires at least some public funding of abortion.<sup>402</sup> These cases have tended to focus more on nondiscrimination than on an affirmative requirement of government provision,<sup>403</sup> but some opinions have gone further in recognizing that "the distinction between prohibitions and benefits arbitrarily separates the existence of a right from the realization and enjoyment of that right."<sup>404</sup> Consistent with this observation, democratic proportionality review provides resources for conceptualizing abortion as a right requiring government support, especially when the rights provisions canvassed above are conjoined with provisions that more expressly impose affirmative obligations on state governments. In addition to positive welfare rights, for example, positive health care guarantees may require the government to furnish infrastructure for reproductive rights.<sup>405</sup>

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399. See *supra* notes 167–170 and accompanying text. For a frequently updated compendium of state abortion laws, see *After Roe* Fell, *supra* note 389.

400. Franklin, *supra* note 365, at 338.

401. See *Harris v. McRae*, 448 U.S. 297, 316–17 (1980) ("[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of opportunities.").

402. See, e.g., *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 34 (Ariz. 2002); *Comm. to Def. Reprod. Rts. v. Myers*, 625 P.2d 779, 798–99 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 404 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 937 (N.J. 1982); *N.M. Right to Choose/NARAL*, 975 P.2d at 850, 856; *Women's Health Ctr. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993).

403. See, e.g., *Byrne*, 450 A.2d at 937 (holding that the state need not generally fund abortion but "may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent").

404. *Myers*, 625 P.2d at 805 (Bird, C.J., concurring).

405. See, e.g., Alaska Const. art. VII, § 4 ("The legislature shall provide for the promotion and protection of public health.").

Finally, the abortion context demonstrates particularly vividly how state constitutionalism is an ongoing, collective enterprise. Especially in states that provide for direct democracy, the people can decide, and have decided, to revisit judicial decisions concerning abortion rights. In Tennessee, for example, the people responded to a ruling protecting abortion rights with a constitutional amendment stating that the constitution does not secure a right to abortion and abortion may be regulated by statute.<sup>406</sup>

More recently, in the face of federal retrenchment, popular mobilization has strengthened state constitutional protection for abortion. In August 2022, Kansas voters rejected a proposed amendment that would have eliminated the state constitutional right to abortion, effectively ratifying the state supreme court's rights-protecting decision.<sup>407</sup> A few months later, Michigan voters got out in front of judicial decisionmaking by adding an express right to "reproductive freedom" to the state constitution.<sup>408</sup> Voters in California and Vermont similarly added express protections for abortion rights in November 2022, even without a threat of imminent rescission of existing constitutional protections.<sup>409</sup>

Such mobilization is not limited to reproductive rights. In recent years, often in response to unfavorable judicial decisions, voters have amended state constitutions to provide for same-day voter registration and

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406. See *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000), superseded by constitutional amendment, Tenn. Const. art. I, § 36 (enacted 2014).

407. See Dylan Lysen, Laura Ziegler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022), <https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment> [<https://perma.cc/3AHX-QQ6D>] ("[S]upporters of the amendment argued that it was necessary to correct what they say was the Kansas Supreme Court's overreach in striking down some of the state's previous abortion restrictions in 2019.").

408. See Mich. Const. art. I, § 28 (enacted 2022) ("Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including . . . abortion care . . .").

409. See Cal. Const. art. I, § 1.1 (enacted 2022) ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions . . ."); Vt. Const. ch. I, art. 22 (enacted 2022) ("[A]n individual's right to personal reproductive autonomy . . . shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.").

no-excuse absentee voting,<sup>410</sup> to raise the minimum wage,<sup>411</sup> to legalize marijuana,<sup>412</sup> to guarantee a right to bear arms,<sup>413</sup> to recognize a right to collectively bargain,<sup>414</sup> and more. These recent initiatives underscore that, although individual rights are never secure without popular support, we should not assume popular majorities will infringe or limit rights; democratic majority rule may enhance individual as well as collective self-determination.<sup>415</sup>

### CONCLUSION

As state constitutional rights garner more attention, now is the time to focus on how state adjudication should proceed. This Article seeks to launch that conversation. We have argued that state constitutional adjudication must attend to the distinctive tradition of state constitutional rights. That is a tradition of rights abundance; of crosscutting obligations among the people; and of popular, majoritarian democracy. In full view, it is a rights tradition committed to both individual and collective self-determination.

Making sense of state constitutional rights claims requires an adjudicative framework focused on the states themselves. Methodological lockstepping with federal courts is understandable based on the limited study of and dialogue around state constitutions, but it leads state courts astray. A form of proportionality review tailored to the states better accounts for the state constitutional rights tradition. State courts should carefully discern the rights at issue, attending to the possibility of multiple relevant provisions. They should earnestly evaluate government

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410. See 2018 Mich. Legis. Serv. Ref. Meas. 18-3 (Ballot Proposal 18-3) (West) (adopted Nov. 2018) (amending Mich. Const. art. II, § 4). In 2022, at the same time that the people of Michigan made protections for abortion rights more explicit, they also expressly recognized the right to vote as “fundamental” and limited incidental as well as intentional restrictions of the right. See 2022 Mich. Legis. Serv. Ref. Meas. 22-2 (Ballot Proposal 22-2) (West) (adopted Nov. 2022) (amending Mich. Const. art. II, §§ 4, 7); Derek Clinger, *Democracy-Related Ballot Measures in 2022—and a Look Ahead*, State Democracy Rsch. Initiative (Jan. 6, 2023), <https://statedemocracy.law.wisc.edu/explainers/2023/democracy-related-ballot-measures-in-2022-and-a-look-ahead/> [<https://perma.cc/CCR3-YUWV>] (discussing recent Michigan ballot proposals).

411. See Fla. Const. art. X, § 24 (amended by Ballot Initiative 18-01) (approved Nov. 2020), [https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext\\_1801\\_EN.pdf](https://initiativepetitions.elections.myflorida.com/InitiativeForms/Fulltext/Fulltext_1801_EN.pdf) [<https://perma.cc/B8VR-AEV9>] (raising the minimum wage each year until it reaches fifteen dollars per hour in 2026).

412. See Mo. Const. art. XIV, § 2 (enacted by Ballot Proposal 2022-059) (approved Nov. 2022), <https://www.sos.mo.gov/cmsimages/Elections/Petitions/2022-059.pdf> [<https://perma.cc/HH28-94A7>] (legalizing recreational marijuana).

413. See S.J. Res. 7, 89th Gen. Assemb. (Iowa 2021) (proposing ballot amendment to state constitution creating a “[r]ight to keep and bear arms”) (amendment approved Nov. 2022).

414. See Ill. Const. art. I, § 25 (enacted Nov. 2022 by ballot initiative) (“Employees shall have the fundamental right to organize and to bargain collectively . . .”).

415. See Bulman-Pozen & Seifter, *Right to Amend*, *supra* note 22 (manuscript at 14).

justifications and invalidate arbitrary decisions, without assuming that state legislatures represent the popular will and mindful that the people of a state remain sovereign. They should embrace their own participation in state democracy, without the pretense of a countermajoritarian difficulty, and offer public-facing explanations of the balances they strike. None of this requires wholesale departures from existing state case law; the seeds of democratic proportionality review are already planted. The new state constitutional adjudication that develops will have important consequences for contemporary debates on abortion, voting, and more.

