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State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections

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ABSTRACT

By most accounts, the Supreme Court's ruling in Dobbs v. Jackson Women's Health Organization *signaled a broader stagnation (and perhaps retrenchment) of federal substantive due process protections. As a result, there is now great interest in the role that state constitutions and courts might play in protecting and expanding reproductive and privacy rights. This Article aims to place this moment in state constitutional development in broader context. It makes two core claims in this regard. First, although state courts are free to interpret state constitutions as providing broader individual rights protections than those contained in the Federal Constitution, state constitutions have not materialized as a robust source of counter-majoritarian rights during earlier periods of federal rights stagnation. To the contrary, state constitutional rights tend to conform with popular sentiment regarding rights because they are heavily mediated by various processes of popular constitutionalism (such as popular election, recall, and retention of state judges, and the initiative and referendum). From this point of view, state constitutional rights have limited potential in protecting political minorities from abusive popular majorities. However, this Article's second claim is that state constitutional rights are well-situated to address many contemporary rights battles precisely because of their majoritarian nature. Many extant rights conflicts are between statewide popular majorities that support rights expansion and misaligned state governments looking to disregard or evade popular preferences. State constitutional rights are better situated to address this problem than the problem of abusive popular majorities. The challenge for contemporary state courts in this moment is to articulate an independent rights jurisprudence that accounts for the popular nature of state constitutional rights rather than parrot the counter-majoritarian jurisprudence of the United States Supreme Court, which is largely inapposite when adjudicating state constitutional rights. The Article concludes by offering some preliminary thoughts on how state courts might approach today's rights disputes under state constitutions.*

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I. INTRODUCTION

FEDERAL substantive due process has long been a controversial doctrine,[1] but *Dobbs v. Jackson Women's Health Organization*[2] has ignited new uncertainty about its future.[3] Although the *Dobbs* majority was careful to limit its ruling to abortion,[4] its methodology suggests that the Court has adopted a backward-looking approach that effectively forecloses the recognition of new and evolving substantive due process rights.[5] Moreover, Justice Thomas's concurrence outlined (again) his position against substantive due process *in toto*, and he specifically called for reconsideration of *Griswold*, *Lawrence*, and *Obergefell*.[6] No other justice

1. *See* Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. Rev. 1501, 1501 (1999) ("There is no concept in American law that is more elusive or more controversial than substantive due process.").

2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

3. *See, e.g.*, Mark Walsh, *Abortion Ruling by Supreme Court Sparks Closer Scrutiny of Substantive Due Process*, ABA J. (June 30, 2022), https://www.abajournal.com/web/article/supreme-courts-abortion-ruling-sparks-closer-scrutiny-of-substantive-due-process [https://perma.cc/ZU2R-TRHW]; Richard Johnson, Dobbs v. Jackson *and the Revival of the States' Rights Constitution*, 93 Pol. Q. 612, 612 (2022) ("In addition to the impact on American women, the *Dobbs* case raises even bigger questions about the status of many other national rights in the U.S.").

4. *See Dobbs*, 142 S. Ct. at 2277–78 ("And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."); *id.* at 2280–81 (responding to the dissent's argument that the majority opinion calls into question other substantive due process holdings).

5. *See id.* at 2325–26 (Breyer, Sotomayor & Kagan, JJ., dissenting) (noting that the majority adopted a "pinched view of how to read our Constitution" that limits rights to whatever was "the sentiment in 1868"); *see also* Darren Lenard Hutchinson, *Thinly Rooted*, 65 Ariz. L. Rev. (forthcoming 2023) (exploring how the majority opinion in *Dobbs* has anchored federal substantive due process to a backward-looking analysis).

6. *See Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring) ("As I have previously explained, 'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution.'" (quoting Johnson v. United States, 576 U.S. 591, 607–08 (2015) (Thomas, J.,

joined Justice Thomas, and there is spirited debate among Supreme Court diviners about whether other precedents are truly vulnerable.[7] Nevertheless, when considering the future of federal substantive due process, *Dobbs* and Justice Thomas's concurrence raise the possibility that the Supreme Court rolls back other protections or, at the very least, stagnates federal substantive due process.[8]

Within this context, there is now great expectation that state constitutions will fill gaps created by the Supreme Court.[9] As a matter of black letter law, it is axiomatic that state constitutions can provide broader individual rights protections than those guaranteed by the Supreme Court under the Federal Constitution.[10] And, since at least the 1970s when Justice Brennan spearheaded the "new judicial federalism," a tome of literature has developed offering theories, arguments, and evidence for why state courts should develop their own independent rights jurisprudence under state constitutions.[11] Moreover, several recent state court rulings have refused to lockstep with *Dobbs* and have upheld an independent state constitutional right to abortion.[12]

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concurring))); *see generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015).

7. For a perspective suggesting that these precedents are vulnerable, see Sheryl Gay Stolberg, *Thomas's Concurring Opinion Raises Questions About What Rights Might Be Next*, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/24/us/clarence-thomas-roe-griswold-lawrence-obergefell.html [https://perma.cc/ZEP8-W4EN]. For a perspective suggesting that they are not, see Dale Carpenter, *Why Other Fundamental Rights Are Safe (At Least for Now)*, Volokh Conspiracy (June 24, 2022, 3:56 PM), https://reason.com/volokh/2022/06/24/why-other-fundamental-rights-are-safe-at-least-for-now [https://perma.cc/C9MW-VZW4].

8. It should be noted that while Justice Thomas has derided substantive due process doctrine, he has also suggested that the Privileges or Immunities Clause protects substantive rights. *See Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring) ("[W]e could consider whether any of the rights announced in this Court's substantive due process cases are 'privileges or immunities of citizens of the United States' protected by the Fourteenth Amendment." (citing U.S. Const. amend. XIV, § 1)). But, even then, he has suggested that the analysis should be backward-looking. *See id.* ("That said, even if the Clause does protect unenumerated rights, the Court conclusively demonstrates that abortion is not one of them under any plausible interpretive approach.").

9. *See* Becky Sullivan, *With* Roe *Overturned, State Constitutions Are Now at the Center of the Abortion Fight*, NPR (June 29, 2022, 5:00 AM), https://www.npr.org/2022/06/29/1108251712/roe-v-wade-abortion-ruling-state-constitutions [https://perma.cc/T5Q2-AVVX]; Jess Krochtengel, *State Constitutions Take Spotlight Post*-Dobbs, Law360 (Jan. 10, 2023), https://www.law360.com/articles/1564233/state-constitutions-take-spotlight-post-dobbs [https://perma.cc/59T9-NL4V].

10. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980); Oregon v. Hass, 420 U.S. 714, 719 (1975); *see also* Robert F. Williams, The Law of American State Constitutions 113–14 (2009).

11. For a survey of this movement as well as the literature and caselaw that it generated, see Williams, *supra* note 10, at 113–232.

12. The Brennan Center for Justice maintains a wonderful State Court Abortion Litigation Tracker. *See State Court Abortion Litigation Tracker*, Brennan Ctr. for Just. (Aug. 4, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker [https://perma.cc/XE6S-QU3E]. As of March 20, 2023, the South Carolina Supreme Court has held that the state constitution protects the right to abortion. *See* Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 774 (S.C. 2023). The Idaho Supreme Court declined to find a right to abortion in the state constitution. *See* Planned Parenthood Great Nw. v. State 522 P.3d 1132, 1148 (Idaho 2023). On March 16, 2023, the North Dakota

This Article aims to place this moment in state constitutional development in broader context. My goal is to show that although state courts have generally been ineffective at broadening individual rights during periods of federal rights stagnation, they are uniquely suited to the present moment. I advance two core claims in this regard.

First, since the 1970s, state courts and constitutions have a disappointing track record in providing broader individual rights protections.[13] Indeed, state courts have been notoriously reluctant to chart their own paths in the face of conflicting federal rights precedent.[14] This is true even when state constitutional history, text, and structure support an independent basis for divergent outcomes.[15] To be sure, there are notable outliers, but state courts have not built a robust body of independent rights jurisprudence.[16] To the contrary, they seem to helplessly gravitate towards federal rights trends.[17] Moreover, even when state courts have broadened individual rights protections, state majorities frequently erode unpopular rulings with responsive constitutional amendments, judicial recalls, or reactionary judicial elections.[18] In all, state constitutions have not lived up to Justice Brennan's lofty expectations as a double source of protection from "the passions or fears of political majorities."[19]

However, my second claim is that despite their spotty track record, there is good reason to believe that this moment in state constitutional development is different, and that state constitutional rights will be more robust. As I have argued elsewhere, state constitutional rights are deeply

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Supreme Court upheld a preliminary injunction by a lower court blocking an abortion ban based on a state constitutional right to an abortion. *See* Wrigley v. Romanick, 988 N.W.2d 231, 234 (N.D. 2023).

13. *See* Justin Long, *Intermittent State Constitutionalism*, 34 Pepp. L. Rev. 41, 42 (2006) (arguing that states exercise independent judgment only intermittently and even erratically); Williams, *supra* note 10, at 130–31; G. Alan Tarr, Understanding State Constitutions 168 (1998) ("[S]tate judges, instead of independently developing state civil liberties law, tended to construe state and federal guarantees identically."); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 763 (1992) ("[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.").

14. *See* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 Dick. L. Rev. 783, 783 (2011).

15. *See id.* at 789, 796–97.

16. *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Penn. L. Rev. 703, 725 n.119 (2016); *cf.* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018) (telling four stories where state government advanced rights in areas where federal government did not).

17. *See* Dodson, *supra* note 16, at 725.

18. *See* John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 Rutgers L.J. 983, 983–84 (2007); John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 Alb. L. Rev. 2105, 2107–10 (2012); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 Miss. L.J. 223, 223–35 (1984); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 Publius 153, 153 (1987); Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 Alb. L. Rev. 2061, 2064 (2012); Kenneth P. Miller, Direct Democracy and the Courts 154–55 (2009).

19. *See* William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 Valparaiso U. L. Rev. 1, 12 (1991).

misunderstood.[20] Although the Federal Bill of Rights may function as an important constraint on popular majorities (especially intrastate majorities), state bills of rights serve a different purpose. They were built primarily as a device for democratic majorities to control wayward government officials. They were never designed to function as deeply entrenched counter-majoritarian constraints administered by an insulated judiciary. To the contrary, they were built to function as higher law beyond the reach of government, but always within the immediate reach of the people. That is why state bills of rights almost universally begin with the right of the people to alter or reform government.[21] It is also why state bills of rights have ballooned in scope and detail as majorities have used them to respond to specific government failures.[22] The key to understanding and harnessing state constitutional rights is to recognize that this can be a feature and not (only) a bug.

This perspective on state constitutional rights is important for understanding the present moment. Many of the battles over constitutional rights currently playing out in the states involve conflicts between statewide popular majorities and misaligned state legislatures.[23] Indeed, in the wake of *Dobbs*, polling data suggests that many states with Republican legislatures have popular majorities that favor legalized abortion (e.g., Florida, Nebraska, Iowa, Montana, Oklahoma, Pennsylvania, New Hampshire, Wisconsin).[24] Similar trends exist to an even greater degree regarding marriage equality, criminalization of consensual gay and lesbian relations, and contraception.[25] In other words, in many states the dynamics do not

20. *See* Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Penn. L. Rev. 853, 857–59 (2022).

21. *See id.* at 860 n.29 (collecting examples); *see also* Steven G. Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 Notre Dame L. Rev. 49, 133 (2018) (noting that, as of 2018, forty-nine states have such provisions).

22. *See* Marshfield, *supra* note 20, at 868–69 (conducting an original analysis of the texts of state bills of rights over time and finding a 220% increase in the number of words since 1776, an average increase of 43% in the number of topics covered, and an average increase of 116% in the level of detail per topic).

23. *See, e.g.*, Arielle A.J. Scoglio & Sameera S. Nayak, *Alignment of State-Level Policies and Public Attitudes Towards Abortion Legality and Government Restrictions on Abortion in the United States*, 320 Soc. Sci. & Med. 1, 1–6 (2023); Mikaela H. Smith, Abigail Norris Turner, Payal Chakraborty, Robert B. Hood, Danielle Besset, Maria F. Gallo & Alison H. Norris, *Opinions About Abortion Among Reproductive-Age Woman in Ohio*, 19 Sexuality Rsch. & Soc. Pol'y 909, 909 (2021).

24. *Dobbs* spawned a furry of polling regarding opinions on abortion with some studies more robust than others. Here, I reference data compiled by the Pew Research Center that tracks public opinion by state on whether abortion should be: (1) "legal in all/most cases," (2) "illegal in all/most cases," or (3) "don't know." *See Views About Abortion by State*, Pew Rsch. Ctr., https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state [https://perma.cc/JE3L-3UHE].

25. *See Views About Same-Sex Marriage by State*, Pew Rsch. Ctr., https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-same-sex-marriage/by/state [https://perma.cc/YBV4-DKAF]. Gallup gathers and maintains longitudinal opinion data regarding a variety of issues related to sexuality and reproductive choice. *See generally LGBTQ+ Rights*, Gallup, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/M266-ASMN].

involve abusive majorities looking to deprive political minorities of rights. Instead, they involve misaligned state governments potentially seeking to disregard popular preferences.

State constitutional rights are much better suited to this problem than the problem of abusive majorities. Indeed, contemporary state constitutional rights are forged at the intersection of various structures, processes, and institutions that work in favor of popular majorities and against misaligned state governments.[26] For example, many state high court justices are subject to statewide popular election or retention referendum.[27] Some state high court justices are also subject to popular recall.[28] Moreover, at least sixteen states have the constitutional initiative process and a longstanding tradition of using constitutional amendments to "overrule" unpopular court decisions and legislation.[29] These features suggest that state constitutional rights are likely to trend towards popular preferences, notwithstanding misaligned state government, either because courts are more attentive to their statewide constituencies or because amendment actors respond to wayward legislation and judicial rulings.

Thus, to the extent that state constitutions will be effective in advancing substantive due process protections, they will likely do so *because* of their responsiveness to popular preferences. Of course, this suggests some meaningful limitations on state constitutions. There are states where popular majorities will work to diminish rights. But it also has important implications for how judges and advocates frame and pursue rights advancement in the states.

This Article proceeds in four parts. Part II briefly recounts the Supreme Court's reasoning in *Dobbs* to show that federal substantive due process is unlikely to progress under the current Court and that this creates open space for state courts and constitutions moving forward. Part III places this moment in state constitutional development in context by examining how state constitutions performed on salient rights issues during the Burger and Rehnquist Courts, with the goal of showing that the track record of rights expansion is spotty at best. Part IV argues that the key to better understanding and utilizing state constitutional rights is to recognize their populist origins and institutional environment. Finally, Part V explores how this perspective on state constitutional rights suggests that they are well-situated to address federal rights stagnation in our current moment. I conclude by exploring how, in the context of substantive due process, courts

26. *See generally* Marshfield, *supra* note 20; *see also* Miller, *supra* note 18, at 2063 (recounting the processes by which voters can respond to unpopular court rulings).

27. *See* The Council of State Gov'ts, The Book of the States 193–95 tbl.5.1, 203–05 tbl.5.6 (2021) (listing selection method for all state high courts as of 2021); Miller, *supra* note 18, at 2063 ("One democratic check on state courts is judicial election, available in some form in most states.").

28. *See* G. Alan Tarr, Without Fear or Favor: Judicial Independence and Judicial Accountability in the States 58–62 (2012).

29. *See* The Council of State Gov'ts, *supra* note 27, at 10 tbl.1.5 (2021) (listing initiative procedures in states); Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 984 (discussing the culture of overruling courts by amendment in the states); Miller, *supra* note 18, at 2063–64 (same).

and advocates might approach state constitutional rights as accountability tools rather than constraints on democratic outputs.

II. *DOBBS* AND STATE CONSTITUTIONAL RIGHTS

This section provides a brief overview of the Supreme Court's reasoning in *Dobbs* to support the claim that federal substantive due process is now unlikely to yield new constitutional protections (at least under the current Court). The more likely scenarios are stagnation or regression in federal constitutional rights protections. I then survey post-*Dobbs* state constitutional developments to illustrate the political energy and resources now being poured into state constitutions regarding abortion rights (and substantive due process protections more generally). Importantly, my survey shows there has been considerable investment by pro-choice advocates in both litigation and formal constitutional amendments, but far less investment by pro-life advocates (even in deeply Republican states). As I argue in subsequent sections, this imbalance is telling because it may reflect misaligned public opinion (even in deeply Republican states) on abortion, and, consequently, a more specific role for state constitutional rights during this particular period of federal rights stagnation.

A. The Stagnation of Federal Substantive Due Process

Dobbs held that the Fourteenth Amendment to the United States Constitution does not protect a woman's right to abortion.[30] The specific issue under review was whether Mississippi's Gestational Age Act, which banned most abortions after fifteen weeks of pregnancy, violated the constitutional right to abortion recognized in *Roe v. Wade* and *Planned Parenthood v. Casey*.[31] The majority explicitly overruled *Roe* and *Casey* and fundamentally restructured regulatory power regarding abortion by sending it to the states and/or (presumably) to Congress.[32]

At the core of the Court's ruling is its conclusion that the right to abortion is not a fundamental right protected under the Due Process Clause.[33] To reach that conclusion, the Court made two critical findings. First, it concluded that the right to abortion was not deeply rooted in English common law, early American common law, or state positive law.[34] Second, it concluded that the right to abortion was not implicit in the concept of ordered

30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

31. *See Dobbs*, 142 S. Ct. at 2241–44; *see generally* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

32. *Dobbs*, 142 S. Ct. at 2259 ("Both sides make important policy arguments, but supporters of *Roe* and *Casey* must show that this Court has the authority to weigh those arguments and decide how abortion may be regulated in the States. They have failed to make that showing, and we thus return the power to weigh those arguments to the people and their elected representatives."); *id.* at 2305 ("The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress . . . ." (Kavanaugh, J., concurring)).

33. *See id.* at 2253–54.

34. *Id.* at 2253 ("The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions.").

liberty because it did not have historic roots[35] and because a more dynamic understanding of constitutional tradition would not adequately constrain courts.[36]

The majority was explicit that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[37] According to the majority, cases such as *Griswold*, *Eisenstadt*, *Lawrence*, and *Obergefell* are "sharply" distinguishable from *Dobbs* because abortion uniquely implicates "potential life."[38] And, according to the majority, the government's interest in regulating "potential life" raises a "critical moral question" that is unique to abortion.[39]

Despite the majority's exhortations about the limited nature of its holding, there is good reason to believe that *Dobbs* was a watershed moment in the Court's broader rights jurisprudence.[40] Prior to *Dobbs*, the Court frequently used a more dynamic standard for identifying which liberties were fundamental under the Fourteenth Amendment.[41] To be sure, even before *Dobbs*, the Court had not established a definitive approach to identifying new fundamental rights,[42] but the Court had frequently invoked the idea espoused by Justice Harlan in *Poe* that the analysis should account for tradition as a "living thing."[43]

Justice Harlan's approach emphasized that "tradition" is not a series of isolated points that capture the full scope of liberties protected under due process.[44] Rather, tradition is a "rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[45] Justice Harlan's understanding of due process suggests that the Court should look to history to identify the "reasons certain liberties received protection," and then "determine[] if a newly asserted

35. *See id.* at 2257–60.
36. *See id.* at 2260–62.
37. *Id.* at 2277–78 ("[O]ur decision concerns the constitutional right to abortion and no other right.").
38. *See id.* at 2257–58, 2277–78; *see generally* Griswold v. Connecticut, 381 U.S. 479 (1965); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 576 U.S. 644 (2015); Eisenstadt v. Baird, 405 U.S. 438 (1972).
39. *See Dobbs*, 142 S. Ct. at 2258, 2277–78.
40. *See generally* Hutchinson, *supra* note 5. Justice Thomas took a more direct shot at prior substantive due process holdings and his opinion has been the cause for concern regarding the future of substantive due process. In his concurrence, he outlined his position against substantive due process and his belief that the Privileges or Immunities Clause is a better fit for claims based on unenumerated rights. *See id.* at 11 n.78; *Dobbs*, 142 S. Ct. at 2302 (Thomas, J., concurring). Ultimately, however, Justice Thomas and the majority seem to agree that either provision is subject to the same backward-looking analysis, which they both concluded cannot support a federal right to abortion. *See Dobbs*, 142 S. Ct. at 2257–61; *id.* at 2302–04 (Thomas, J., concurring).
41. *See* Hutchinson, *supra* note 5, at 6–7 (referencing *Lawrence* and *Obergefell* as examples of more dynamic analysis that drew on an understanding of constitutional tradition outlined by Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).
42. *See* Washington v. Glucksberg, 521 U.S. 702, 721 n.17 (1997).
43. *See Poe*, 367 U.S. at 542 (Harlan, J., dissenting).
44. *Id.* at 542–43.
45. *Id.* at 543.

interest fits within this broadened framing of tradition."[46] This approach is consistent with the Court's holdings in *Lawrence* and *Obergefell*, where the Court moved from well-established traditional protections for sexual privacy and marriage equality to more specific and modern protections for consensual, same-sex sexual activities and same-sex marriage.[47]

In contrast, *Dobbs* provides every reason to believe that the Court now uses a "backwards-looking tradition analysis" as the exclusive method for identifying rights under substantive due process.[48] The *Dobbs* majority emphasized that the general framework for evaluating new substantive due process claims is essentially historical.[49] Moreover, the majority explicitly rejected the argument that a right to abortion could be connected to well-established rights of a more general nature.[50] Instead, the majority emphasized that the right to abortion required specific historical validation before the Court would recognize it as a constitutional protection.[51]

By its very nature, this approach to federal substantive due process suggests that the Court is unlikely to recognize many new rights. Indeed, it appears that the Court would recognize a new right only upon the discovery of new historical evidence sufficient to demonstrate a deep historical commitment to the right at issue. Moreover, the majority opinion in *Dobbs* seemed to foreclose Justice Harlan's approach from *Poe*, suggesting that the absence of historical validation for a specific right would override any analytical connections that might be drawn between historical rights and contemporary practices and conventions.

From this vantage point, *Dobbs* indicates a likely stagnation in the expansion of federal rights under substantive due process and perhaps even equal protection analysis.[52] The future is, of course, unwritten and uncertain, but the current Court does not seem receptive to the type of analysis that would expand federal protections through a "living" approach to substantive due process or equal protection. It is understandable, therefore, why advocates have looked to state constitutions to protect rights left unguarded or insecure by the Supreme Court's reasoning and holding in *Dobbs*.

B. Subsequent State Constitutional Developments

It is, of course, black letter law that state constitutions can provide broader individual rights protections than those provided under the

46. Hutchinson, *supra* note 5, at 7 (describing Justice Harlan's approach); *see also Poe*, 367 U.S. at 543–44.
47. *See* Hutchinson, *supra* note 5, at 7 n.53 (making this connection).
48. *See id.* at 5.
49. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2260–61 (2022).
50. *See id.* 2258–59.
51. *See id.* at 2558. The Court accepted for the sake of argument that the "'specific practices of States at the time of the adoption of the Fourteenth Amendment' do not 'mar[k] the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.'" *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 848 (1992)).
52. *See* Hutchinson, *supra* note 5 (making this connection to equal protection).

United States Constitution.[53] Even before *Dobbs* was (officially) decided, advocacy groups began to focus on state constitutions to protect abortion rights.[54] In short, pro-choice advocates have pursued both formal amendments to state constitutions as well as constitutional litigation in state courts,[55] while pro-life advocates have focused almost exclusively on state legislation rather than state constitutions.[56]

Pro-choice advocates have pursued aggressive litigation strategies under state constitutions in state courts. Currently, there are forty-one cases pending and there have already been four state high court decisions since *Dobbs*.[57] Pro-choice litigants in these cases have developed a variety of arguments in support of a state constitutional right to abortion.[58] Some cases involve privacy or autonomy arguments attached to state due process clauses.[59] These arguments are akin to the original framing in *Roe*.[60] Other cases have relied on modern equal protection rationales similar to those argued in *Dobbs* (but summarily rejected by the majority).[61] These two arguments are largely replications of the arguments raised before the Supreme Court in *Dobbs*, *Roe*, and *Casey*.

But litigants have also made arguments based on provisions in state constitutions with no direct analogs in the Federal Constitution.[62] State constitutions, for example, contain rights provisions that explicitly protect the right to privacy.[63] Advocates have emphasized that these provisions are a stronger basis for a right to abortion because of their unique histories (which sometimes reveal that they were intended to apply to abortion) or because they reduce the number of analytical steps necessary to

53. *See* Jonathan L. Marshfield, *"Amendomania" and Individual Rights*, 40 A.B.A. Hum. Rts. Mag., Apr. 1, 2014.

54. *Cf.* Elizabeth Nash & Megan K. Donovan, *Ensuring Access to Abortion at the State Level: Selected Examples and Lessons*, Guttmacher Inst. (Jan. 9, 2019), https://www.guttmacher.org/gpr/2019/01/ensuring-access-abortion-state-level-selected-examples-and-lessons [https://perma.cc/5DRR-SAX4].

55. Several states have also enacted pro-choice laws through legislation and by gubernatorial executive orders. *See* Nicole Dube, James Orlando & Jessica Schaeffer-Helmecki, Conn. Off. of Legis. Rsch., 2022-R-0227, State Abortion Laws Enacted Post-*Dobbs* Decision (2022).

56. For a helpful summary of legislative and executive efforts by pro-life advocates after and in anticipation of *Dobbs*, see *id.* Before *Dobbs*, four states adopted state constitutional amendments declaring that the state constitution did not include a right to abortion (Arkansas, 1988; Tennessee, 2014; West Virginia, 2018; Louisiana, 2020). *See generally* John Dinan, State Constitutional Politics 133–37 (2018); Mabel Felix, Laurie Sobel & Alina Salganicoff, *Legal Challenges to State Abortion Bans Since the* Dobbs *Decision*, KFF (Jan. 20, 2023), https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision [https://perma.cc/D59J-GJE5]. Since *Dobbs*, two states have placed similar amendments before voters (Kansas and Kentucky), but both failed. *See generally* Dinan, *supra*.

57. The Brennan Center along with the Center for Reproductive Rights tracks ongoing abortion litigation under state constitutions. *See State Court Abortion Litigation Tracker*, *supra* note 12. These results were current as of August 4, 2023.

58. *See generally* Felix et al., *supra* note 56.

59. *See id.*

60. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973).

61. *See* Felix et al., *supra* note 56.

62. *See id.*

63. *See id.*

get from the constitutional text to abortion rights.[64] Similarly, various state constitutions have equal rights amendments that explicitly require gender equality.[65] Those provisions have likewise been used to strengthen equal-protection-type arguments under state constitutions in support of a right to abortion.[66] Finally, in an especially ironic and cheeky twist, several states adopted healthcare freedom provisions during the Obama administration as a form of protest against the Affordable Care Act.[67] Some of those provisions boldly declare that all persons "shall have the right to make his or her own health care decisions."[68] Pro-choice advocates have enlisted these provisions to support a right to abortion in Wyoming and Ohio.[69]

Finally, pro-choice advocates have raised new religious freedom challenges to state abortion bans.[70] In Florida, for example, plaintiffs have argued that the Reducing Fetal and Infant Mortality Act violates the Florida constitution's free exercise and establishment clauses.[71] Similar arguments have been made in cases pending in Indiana (state RFRA claim only), Kentucky, Missouri, Utah, and Wyoming.[72] In making these arguments under state constitutions, pro-choice advocates emphasize that their respective state constitutions provide "religious rights" that are "more potent than those in the Federal Constitution."[73]

So far, only four state high courts have finally ruled on these challenges.[74] On January 5, 2023, the Supreme Court of South Carolina found that the state constitution's privacy provision protected the right to an abortion.[75] On the same day, the Idaho Supreme Court, in an opinion that mirrored the majority opinion in *Dobbs*, held that the state constitution did not include a right to abortion.[76]

Regarding formal amendments to state constitutions, pro-choice advocates have secured amendments recognizing a right to abortion in

64. *Cf. id.*

65. *Cf.* Diana Kasdan & Alexander Wilson, *Gender Equality Under State Constitutions*, Brennan Ctr. for Just. (June 13, 2023), https://www.brennancenter.org/our-work/analysis-opinion/gender-equality-under-state-constitutions [https://perma.cc/2EAF-NKX4].

66. *See id.*

67. *See* Felix et al., *supra* note 56.

68. *See, e.g.*, Wyo. Const. art I, § 38.

69. *See* Felix et al., *supra* note 56.

70. *See id.*

71. *See* Vin Gurrieri, *Religious Liberty May Emerge as Tool for Abortion Advocates*, Law360 (July 1, 2022), https://www.law360.com/employment-authority/articles/1508090/religious-liberty-may-emerge-as-tool-for-abortion-advocates [https://perma.cc/95C4-9QPA].

72. *See* Felix et al., *supra* note 56.

73. *See* Second Amended Complaint at 3, Generation to Generation, Inc. v. State, No. 2022-CA-000980 (Fla. Cir. Ct. 2022).

74. *See State Court Abortion Litigation Tracker*, *supra* note 12 (for full update on current litigation outcomes).

75. *See* Planned Parenthood S. Atl. v. State, 882 S.E.2d 770, 774 (S.C. 2023); *but see* Planned Parenthood S. Atl. v. State, No. 28174 (S.C. Aug. 23, 2023) (upholding new abortion ban).

76. The Idaho Supreme Court declined to find a right to abortion in the state constitution. *See* Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1148 (Idaho 2023). On March 16, 2023, the North Dakota Supreme Court upheld a preliminary injunction by a lower court blocking an abortion ban based on a state constitutional right to an abortion. *See* Wrigley v. Romanick, 988 N.W.2d 231, 234 (N.D. 2023).

California, Michigan, and Vermont.[77] These campaigns have been costly and challenged in court. Michigan's pro-choice campaign, for example, was a $40 million effort that involved a protracted court challenge.[78]

Pro-life advocates in Kansas and Kentucky successfully qualified initiatives for the ballots in those states in 2022, but voters rejected both proposals.[79] Pro-life advocates have begun initiative campaigns in a few states, but they have so far failed to garner enough signatures to qualify for the ballot and have not attracted significant financial contributions. In Florida, for example, an initiative titled "Florida Abortion Ban After Detectable Heartbeat" was effectively abandoned by its sponsors in 2022.[80] A new initiative has been submitted to the Florida Department of State, but it has not yet received the signatures required and the group sponsoring the initiative (The Protect Human Life Florida Committee) has received only $125,757 in total contributions through June 30, 2023.[81] The campaigns in Kansas and Kentucky received larger contributions,[82] but the current trend for pro-life advocates appears to be away from formal constitutional amendment and towards legislation. Indeed, I was unable to locate a single legislative-referred, pro-life amendment post-*Dobbs*. Pro-choice advocates have likewise failed to pursue litigation to recognize fetal personhood under state

77. *See* CAL. CONST. art. I, § 1.1 (adopted 2022) ("The state shall not deny or interfere with an individual's reproductive freedom in their most intimate decisions, which includes their fundamental right to choose to have an abortion and their fundamental right to choose or refuse contraceptives."); MICH. CONST. art. I, § 28 (adopted 2023) ("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 . . . ."); VERMONT CONST. art. XXII (adopted 2022) ("[A]n individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.").

78. *See* Laura Benshoff, *This Group Gets Left-Leaning Policies Passed in Red States. How? Ballot Measures.*, NPR (Feb. 24, 2023, 5:00 AM), https://www.npr.org/2023/02/24/1158797456/fairness-project-abortion-ballot-measures-gop-democrats-medicaid-minimum-wage [https://perma.cc/SQ9T-AU5V]. Democratic governors have also issued a variety of executive orders designed to protect against out-of-state prosecution for in-state abortion care.

79. *See* Felix et al., *supra* note 56.

80. *See Florida Abortion Ban After Detectable Heartbeat Initiative (2022)*, BALLOTPEDIA (2020), https://ballotpedia.org/Florida_Abortion_Ban_After_Detectable_Heartbeat_Initiative_(2022) [https://perma.cc/L728-VPTA].

81. *See Florida Department of State Campaign Finance Database: Contributions Records*, FLORIDA DIVISION OF ELECTIONS, https://dos.elections.myflorida.com/committees/ComDetail.asp?account=74660 (select "Campaign Finance Activity"); *see generally* HUM. LIFE PROT. AMEND., https://humanlifefl.com [https://perma.cc/RDG4-MPG9].

82. In Kansas, pro-life advocates spent $4.5 million. *See* Miranda Moore, *Follow the Money: Who is Funding Kansas Abortion Amendment Ads?*, FLATLAND (Aug. 1, 2022, 11:25 AM), https://flatlandkc.org/news-issues/follow-the-money-who-is-funding-kansas-abortion-amendment-ads [https://perma.cc/7HKC-D8Z7]. This is not an insignificant sum, but it pales in comparison to the amounts spent by pro-choice advocates in support of amendments in Michigan, California, and even Vermont. *See, e.g.*, Alice Miranda Ollstein, *Michigan Abortion-Rights Battle Rakes in Cash Ahead of Referendum*, POLITICO (Oct. 31, 2022, 1:25 PM), https://www.politico.com/news/2022/10/31/michigan-abortion-cash-referendum-00064253 [https://perma.cc/56LE-CNN5]; Nicole Nixon, *California's Pro-Abortion Ballot Measure is Poised to Pass. So Why are Democrats Spending so Much Time and Money on It?*, CAPRADIO (Oct. 17, 2022), https://www.capradio.org/articles/2022/10/17/californias-pro-abortion-ballot-measure-is-poised-to-pass-so-why-are-democrats-spending-so-much-time-and-money-on-it [https://perma.cc/WZC7-C7DV].

constitutions or otherwise mount state constitutional challenges to legislation allowing abortions post-*Dobbs*. For pro-life groups, state legislatures adopting statutes appear to be the preferred forums.[83]

One final post-*Dobbs* development is worth nothing. In *Kligler v. Attorney General*, the Massachusetts Supreme Judicial Court decided whether the Massachusetts constitution contained a right to physician-assisted suicide.[84] In evaluating that question under the due process clause of the Massachusetts constitution, the court went to great lengths to disavow the backward-looking "narrow" approach adopted by the majority in *Dobbs*.[85] The court reasoned that the *Dobbs* approach was improper because it would "freeze for all time the original view of what [constitutional] rights guarantee" and would perpetuate discrimination and subordination of the past.[86] Thus, the court "part[ed] ways with the recent Federal analysis of substantive due process" in favor of an approach that would "ensure that the rights protected by the Massachusetts Declaration of Rights are not inappropriately limited by an unduly restrictive reading of history or tradition."[87]

Kligler is important because it illustrates *Dobbs's* potential impact beyond the abortion context, and, at the same time, it shows how state courts might take a different approach to substantive due process under state constitutions going forward. The full extent of this divergence in the abortion context and beyond is yet to be seen, which leads me to a short history of how state constitutional rights have performed in the past.

III. REACTIONARY STATE CONSTITUTIONALISM IN CONTEXT

To fully appreciate the current moment in state constitutional development, it is helpful to place it in historical context. This is not the first time that the stagnation of federal rights has instigated state constitutional advocacy.[88] Indeed, the field of state constitutional rights jurisprudence as we currently know it came of age during the 1970s in response to the transition from the more progressive Warren Court to the more conservative Burger Court.[89] This section briefly sketches the history of that movement, which became known as the "new judicial federalism" but has broadened to include more holistic accounts of state constitutions within the federal system.[90]

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83. *See* Felix et al., *supra* note 56.
84. *See* Kligler v. Att'y Gen., 198 N.E.3d 1229, 1236 (Mass. 2022).
85. *Id.* at 1251 (noting that the majority in *Dobbs* "appears to have abandoned the comprehensive approach and to have settled on the narrow approach as the definitive test for identifying fundamental rights protected by the Fourteenth Amendment").
86. *Id.* at 1251 (alteration in original) (quoting Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2326 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting)).
87. *Id.* at 1252–53.
88. *See* Tarr, *supra* note 13, at 160–62; Williams, *supra* note 10, at 113–14.
89. *See* Tarr, *supra* note 13, at 160–62; Williams, *supra* note 10, at 113–15.
90. *See* Williams, *supra* note 10, at 113.

I have two core purposes in providing this account. First, I aim to show that the idea that state courts should independently develop broader state constitutional protections is mostly a reaction to stagnation in federal rights by the United States Supreme Court and not an independent, ground-up state constitutional phenomenon.[91] Second, because of this reactionary (even top-down) orientation, state constitutional rights jurisprudence has generally failed to reckon with the realities of state constitutional politics and the institutional environments within which state constitutional rights exist.[92] When state court opinions engage with state constitutional rights, they often read like mini-Supreme Court opinions construing the Federal Bill of Rights.[93] They frequently recite tropes of questionable applicability given the realities of state constitutional structure and politics.[94] And they rarely (if ever) address how those factors might support a more authentic state approach to constitutional rights. The result is that state constitutional rights jurisprudence is, at best, "intermittent" and tends to reflect trends in federal constitutional rights jurisprudence more than anything. Moreover, state constitutional rights rarely tend to settle around these federally inspired state court rulings.[95] Instead, they are often recast, redirected, or even eliminated by processes of popular constitutionalism in the states (especially formal amendment of state constitutional text).[96]

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91. It is important to distinguish between constitutional rights development by other actors and by courts. My point here is not that the states have neglected constitutional rights. Far from it. They have been more active than the Supreme Court and perhaps even the federal government in germinating, debating, and implementing new constitutional rights. However, state constitutional rights tend to be developed through institutions and processes besides state courts. Even a cursory review of contemporary state constitutions and state constitutional history reveals that state constitutional rights are not the exclusive domain of courts in the way that the Supreme Court has occupied federal constitutional rights since incorporation. *See* Marshfield, *supra* note 20 at 865–66.

92. *See generally id*. at 872–77.

93. *See* Tarr, *supra* note 13, at 165–66 (noting that state courts engaging with new judicial federalism in the 1970s and '80s were following a model of constitutional rights constructed and illustrated by the Warren Court).

94. *See generally* Marshfield, *supra* note 20, at 930 (collecting cases). For a recent example, see Kligler v. Attorney General, 198 N.E.3d 1229 (Mass. 2022). In *Kligler*, the Supreme Judicial Court went to great lengths to justify a dynamic jurisprudential approach to substantive due process to "ensure that the rights protected by the Massachusetts Declaration of Rights are not inappropriately limited by an unduly restrictive reading of history or tradition." *Id.* at 1253. The court further reasoned that their approach to substantive due process was important because, "[i]n this way, we allow our State Constitution to respond effectively to our changing world, and to 'define liberty that remains urgent in our own era.'" *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 672 (2015)). Nowhere in the court's recitation of these ideas regarding dynamic substantive due process did the court address the fact that the Massachusetts Constitution can (and is) frequently updated through formal amendment. Rather, the gist of the court's position was that the court needed to assume an active and dynamic role or the constitution would become obsolete. *See id.* While this might be true under the Federal Constitution, it is surely not equally true for the Massachusetts constitution.

95. *See generally* Marshfield, *supra* note 20, at 930–31.

96. *See generally id.*

A. Justice Brennan and the New Judicial Federalism

From the 1930s to the 1970s, the Federal Constitution and federal courts dominated the field of civil rights jurisprudence.[97] During this period, the Supreme Court incorporated the Federal Bill of Rights against the states, broadened the scope of federal protections (especially in the areas of substantive due process, equal protection, and criminal procedure), and generously construed Reconstruction-era statutes to make federal courts more hospitable to civil rights claims.[98] The Warren Court (1953–1969) was the apex of this movement with decisions like *Brown v. Board of Education*, *Miranda v. Arizona*, *Griswold v. Connecticut*, and *Monroe v. Pape*.[99]

However, with President Nixon's appointment of Chief Justice Burger in 1969, there was a conservative shift on the Court that signaled a change in momentum for federal constitutional rights.[100] Scholars have debated the extent to which this shift was real or perceived, but there were genuine fears of federal rights "retrenchment."[101] Those fears were especially acute regarding criminal procedure where the Burger Court appeared to quickly backtrack on progressive gains made by the Warren Court.[102]

In response, Justice Brennan (a cornerstone of the Warren Court), issued a series of dissents and law review articles that not only criticized the merits of the Court's new rulings, but drew attention to the fact that state courts remained free to interpret their own constitutions as providing greater rights protections.[103] Indeed, Justice Brennan argued that state courts had an obligation to counteract the Supreme Court's misguided rulings by ensuring that civil liberties would be appropriately protected under

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97. *See* Tarr, *supra* note 13, at 162–63 n.117; John J. Dinan, Keeping the People's Liberties 138 (1998).

98. *See* Tarr, *supra* note 13, at 162–63 n.117; Dinan, *supra* note 97, at 138.

99. *See generally Developments in the Law: The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982); Brown v. Bd. of Educ., 348 U.S. 886 (1954); Miranda v. Arizona, 384 U.S. 436 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965); Monroe v. Pape, 365 U.S. 167 (1961).

100. *See* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 Rutgers L.J. 913, 914–15 (1995).

101. *See* Tarr, *supra* note 13, at 178.

102. *See id.* at 178–79; *see also* Barry Latzer, State Constitutions and Criminal Justice 90–95 (1991).

103. Justice Brennan's dissent in *Michigan v. Mosley*, is a particularly well-known example of his encouragement of state court activism:

> In light of today's erosion of Miranda standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.

Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting). Justice Brennan authored two influential law review articles encouraging independent state rights jurisprudence. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 490–504 (1977); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 539–53 (1986); *see generally* Ann Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 Ohio St. L.J. 387 (2016).

state constitutions.[104] According to Justice Brennan, "one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens."[105] State courts, according to Justice Brennan, must invoke state constitutional rights to fill any gaps created by "crippled" federal protections.[106] For Justice Brennan, state and federal constitutional rights were of the same basic kind and were interchangeable.[107] They were intended to operate as reciprocal fail-safes.[108]

Justice Brennan's "call to arms" worked (at least initially). His exhortations led to a "rediscovery" of state bills of rights in state courts.[109] Litigants began to rely on state constitutions as an alternative means of advocating for greater rights protections, and state judges embraced this strategy and handed down "a sudden burst of independent, rights-protective rulings."[110] Indeed, during the two decades before Justice Brennan's exhortations (1950–1969), there were only ten state cases that found broader individual rights protections under state constitutions.[111] But from 1970–1986, there were more than 300.[112]

This momentum in favor of broader state constitutional protection continued into the early 1980s with state courts across the country expanding protections on a variety of issues.[113] The movement was fueled by a variety of factors including the Supreme Court's implicit acceptance of state court activism on rights issues (alongside the Burger Court's conservative approach to federal rights),[114] and by an explosion of academic literature providing state courts with principled grounds for diverging from federal precedent.[115] These factors encouraged state courts to disentangle federal

104. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, *supra* note 103, at 502–03.
105. *Id.* at 503.
106. *Id.*
107. *Id.*
108. *See id.*
109. *See* Kincaid, *supra* note 100, at 920, 936–38.
110. James A. Gardner, Interpreting State Constitutions 40 (2005). Justice Brennan later applauded the "marvelous enthusiasm" with which state judges responded to his prompting. *Id.* at 40 n.44.
111. Tarr, *supra* note 13, at 165–66.
112. *Id.* at 166.
113. *See* Williams, *supra* note 10, at 119–27 (describing this as the first stage of the new judicial federalism); *see generally* Ronald K. L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 Publius 141 (1986).
114. *See* Williams, *supra* note 10, at 120–24 (noting that *Michigan v. Long*, 463 U.S. 1032 (1983), emboldened state courts, and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), "placed its imprimatur on the NJF [new judicial federalism]").
115. *See id.* at 125–26 (describing how influential publications moved the new judicial federalism forward). This literature took various forms, but two broad camps are discernable. Some literature focused on excavating unique state sources of constitutional meaning. This literature emphasized textual, historical, and structural differences between state constitutions and the Federal Constitution that would support divergence. Another group of scholars focused on constructing general theories of divergence to help increase predictability and alleviate concerns that state courts were unmoored in their application of independent state constitutionalism. *See also* Tarr, *supra* note 13, at 165–66 (providing an account of why the new judicial federalism took off during the 1970s and '80s).

and state constitutional rights and propelled the new judicial federalism forward with remarkable early success.

Cases decided during this era addressed various topics, but the vast majority of them were criminal procedure cases reacting to rulings by the Burger Court, especially in the area of Fourth Amendment search and seizure law.[116] Other rights issues addressed during this era included equal protection, education, free exercise and free speech, abortion, and other unique state constitutional rights.[117] Cases during this period also addressed various issues that fall under the rubric of federal substantive due process. Long after *Lochner v. New York*[118] was discredited and limited at the federal level, state courts continued to more closely review economic regulation under state due process guarantees.[119] State courts also ruled on privacy issues based on due process as well as explicit privacy provisions in state bills of rights.[120] This era of state constitutionalism truly represented a period of rigorous state constitutional rights jurisprudence across many issues. This was, however, only the beginning of a much more complicated story.

B. The Impact of State Amendment Actors

As state courts took up Justice Brennan's call and advanced state constitutional rights beyond federal protections, a groundswell of political backlash brewed.[121] This was especially true during the early stages of the new judicial federalism where the vast majority of state cases involved more expansive criminal procedure protections.[122] These defendant-oriented rulings were increasingly unpopular as tough-on-crime sentiments took hold during the 1980s.[123]

Popular disapproval of state court rulings found several outlets under state law.[124] Judicial elections, for example, focused on the degree to which state judges were "soft on criminals" by extending state criminal procedure

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116. *See* Ronald K. L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. Cin. L. Rev. 317, 319 (1986):

> The lion's share of state constitutional law in this area continues to be largely reactive. That is, much of what still prompts reliance on state law in the criminal justice field are federal precedents that run contrary to the thinking of the state bench. In this respect, the primary purpose of state constitutional law is to supplement federal constitutional protections by holding out the possibility of relief where it cannot be obtained under the Fourteenth Amendment.

See also Tarr, *supra* note 13, at 178; Latzer, *supra* note 102, at 90.

117. *See* Ronald K. L. Collins & Peter J. Galie, *State Constitutional Cases & Commentaries*, Nat'l L.J., Sept. 29, 1986, at 14, col. 3.

118. Lochner v. New York, 198 U.S. 45 (1905).

119. *See* Williams, *supra* note 10, at 190–92; Jeffrey M. Shaman, Equality and Liberty in the Golden Age of State Constitutional Law 86–107 (2008).

120. *See* Shaman, *supra* note 119, at 121–58.

121. *See* Wilkes, *supra* note 18, at 232–34.

122. *Id.*

123. *Id.*

124. *See id.*; *see also* Miller, *supra* note 18, at 2063–64.

protections.[125] Judges were also threatened with recall initiatives if they expanded constitutional protections.[126] Even gubernatorial elections were influenced by whether candidates supported judges in favor of the new judicial federalism.[127]

However, the most significant response to the new judicial federalism was the swift use of constitutional amendments to undo or modify state court rulings broadening constitutional rights.[128] By 1984, states had liberalized amendment procedures such that forty-eight states allowed for amendments to be ratified based on a simple majority at a statewide popular referendum.[129] At least fifteen states allowed for constitutional amendment by the initiative process.[130] Because of these liberal amendment procedures, popular dissatisfaction with state court rulings quickly manifested in the form of reactive constitutional amendments.[131]

California provides an especially stark illustration of this point. In 1972, in *People v. Anderson*, civil rights advocates and death penalty opponents won a huge victory before the California Supreme Court.[132] The court ruled that capital punishment violated the state's bill of rights.[133] The ruling ended the death penalty in California and extended criminal protections far beyond the Federal Bill of Rights.[134] It was a significant decision. But it was quickly undone. Nine months later, in a statewide referendum, California voters amended their bill of rights to reinstate the death penalty and prohibit future court rulings from questioning its constitutionality.[135] This process reoccurred in California at least two other times in less than nine years.[136] In 1979, California voters approved an amendment that prohibited state courts from imposing any duty to remedy de facto segregation in public schools.[137] That amendment was in direct response to *Crawford v. Board of Education*, which imposed a duty for remedying de facto segregation.[138] Then, in 1982, California voters approved the California Victims' Bill of

125. *See* Wilkes, *supra* note 18, at 232–33.

126. *See* BETTY MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS 3–9 (1983).

127. *See* Wilkes, *supra* note 18, at 232 n.38 (citing the 1982 California gubernatorial campaign).

128. *See id.* at 233.

129. *See* THE COUNCIL OF STATE GOV'TS, *supra* note 27, at 8 tbl.1.4.

130. *See id.* at 10 tbl.1.5 (noting Illinois and Massachusetts with significant limitations).

131. *See* Wilkes, *supra* note 18, at 233; May, *supra* note 18, at 175–76.

132. Marshfield, *supra* note 20, at 855; People v. Anderson, 493 P.2d 880, 899 (Cal. 1972) (decided February 1972); *see* Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213 (2003) (discussing *Anderson's* significance).

133. Marshfield, *supra* note 20, 855–56; *Anderson*, 493 P.2d at 899.

134. Marshfield, *supra* note 20, at 856; *Anderson*, 493 P.2d at 899.

135. Marshfield, *supra* note 20, at 856; *see* CAL. CONST. art. I, § 27 (adopted November 1972).

136. *See generally History of Capital Punishment in California*, CAL DEP'T OF CORRS. & REHAB., https://www.cdcr.ca.gov/capital-punishment/history [https://perma.cc/2NNQ-G9CD].

137. *See* CAL. CONST. art. I, § 7 (amended 1979); Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 1006 n.91.

138. Crawford v. Bd. of Educ., 551 P.2d 28, 30–31 (Cal. 1976); *see also* Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 1006 n.91.

Rights, which made various criminal procedure reforms but specifically overruled the California Supreme Court's decision in *People v. Beagle*,[139] which had adopted the exclusionary rule.[140]

To be sure, California's amendment procedures and constitutional culture fall on the far side of the amendment spectrum. But similar processes played out in states across the county.[141] Even in Massachusetts, which might be on the opposite end of the amendment spectrum from California, voters swiftly responded to a Supreme Judicial Court ruling striking the death penalty with a constitutional amendment reinstating the death penalty.[142] Indeed, Donald E. Wilkes and Janice May have collected responsive amendments from the 1970s and 1980s and found a broad trend across various states, including several non-initiative states.[143]

John Dinan has provided the most robust and systematic study of this trend in state constitutionalism.[144] Dinan provides a survey of "court-constraining amendments regarding civil rights and liberties in the late-twentieth and early-twenty-first centuries."[145] Dinan's survey builds on the earlier work by Wilkes and May, and his conclusions are consistent with theirs.[146] He finds that across a variety of issues, state amendments actors actively respond to unpopular state court rulings with constitutional amendments.[147] Dinan finds examples of this across areas as diverse as freedom of religion, segregation, death penalty, criminal procedure, gun rights, and marriage equality.[148] In many of these areas, amendment actors targeted particular state court rulings, but in some instances they proactively foreclosed anticipated state court rulings.[149]

In any event, Dinan shows that responsive amendments are an entrenched aspect of state constitutional rights.[150] He emphasizes that this is not a new phenomenon and that it was not until the new judicial federalism and the Civil Rights Era jurisprudence of the Warren Court that scholars were hostile and critical of the practice.[151] Indeed, Dinan shows that prior to the 1960s, the dominant perspective was that responsive amendments were a virtue because they enhanced the democratic legitimacy of constitutional

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139. *See* People v. Beagle, 492 P.2d 1, 7–8 (Cal. 1972); *see also* J. Clark Kelso & Brigitte A. Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 Pac. L.J. 843, 844, 857–59 (1992).

140. *See* May, *supra* note 18, at 175–76.

141. *See* Wilkes, *supra* note 18, at 233.

142. *See* Mass. Const. pt. 1, art. CXVI (amending pt. 1, art. XXVI) (adopted 1982 in response to a series of high court rulings in the 1970s); *see also* Wilkes, *supra* note 18, at 238–40 (discussing this history in Massachusetts).

143. *See* Wilkes, *supra* note 18, at 234.

144. *See* Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 1000–19.

145. *Id.* at 1001.

146. *See id.*

147. *See id.*

148. *See id.* at 1000–19.

149. *Id.* at 1001.

150. *See Id.* at 1028–29; *see also* Miller, *supra* note 18, at 3–13.

151. *See generally* Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 1028–32.

law and sprung from a deep commitment to popular sovereignty.[152] Dinan's work is important because it shows that state courts are far from the final word on constitutional rights. In fact, state courts rulings are often only the beginning of a long process that frequently culminates with a statewide popular referendum on a contested right.[153]

C. The Underperformance of State Courts

The new judicial federalism was remarkable. It impacted thousands of cases in a remarkably short period of time, and its influence is still alive today. By drawing attention to state constitutions as an independent basis for protecting rights and providing state courts with theories, arguments, and evidence for diverging from federal precedent, the new judicial federalism reshaped American public law. Nevertheless, it is a mistake to conclude that the fury of independent state court jurisprudence that erupted during the 1970s and '80s accurately reflects the totality of state constitutional rights jurisprudence. Several important points suggest that this period is more aberrational than normal.

First, early proponents of the new judicial federalism frequently argued that before the Supreme Court's incorporation of the Bill of Rights through the Fourteenth Amendment, constitutional rights were protected primarily by state courts enforcing state constitutional rights.[154] On this view, state courts had actively enforced and developed constitutional rights until they were displaced by incorporation. On this view, the new judicial federalism was actually a "rediscovery" of a longstanding tradition. However, these accounts have been almost universally discredited. Alan Tarr, for example, has shown that prior to the 1930s, state constitutional litigation of any kind was rare and seldom involved civil liberties.[155]

Moreover, John Dinan has provided a compelling theoretical and empirical explanation for this phenomenon. In *Keeping the People's Liberties*, Dinan explains that prior to the mid-twentieth century, democratic institutions were presumed to be the primary defenders of constitutional rights.[156] According to Dinan, it was not until the mid-twentieth century that the judiciary took a central role in rights through constitutional litigation in federal court.[157] In other words, it was not until the new judicial federalism that state courts took an active and dominant role in enforcing constitutional rights against the political branches. Indeed, the opposite was true, the political branches (supplemented by a growing list of populist institutions and processes) were the active guardians of rights under state

152. *See id.* at 1020–24. Contemporary critiques, on the other hand, claim that the Federal Constitution is more effective at protecting rights because it (ostensibly) entrusts their enforcement and development to an apolitical and insulated judiciary. *See id.* at 1020.

153. *See, e.g.*, Cal. Const. art. I, § 27.

154. *See* Tarr, *supra* note 13, at 163.

155. *See id.*; G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 Publius 63, 66 (1994).

156. *See* Dinan, *supra* note 97, at 116–17.

157. *See id.*

constitutions.[158] Case surveys have confirmed this.[159] Almost all state high court cases before 1935 involved "ordinary commercial disputes."[160]

What is more, state courts have largely failed to deliver on the promise of the new judicial federalism in the decades since it first flourished.[161] Despite the tome of academic literature justifying and enabling independent state constitutional rights jurisprudence, state courts and litigants tend to decide rights issues based on prevailing Supreme Court precedent.[162] Indeed, even when state courts diverge in their outcomes, they often adopt the reasoning laid out in Supreme Court dissents rather than develop any independent state constitutional analysis.[163] Thus, Lawrence Friedman concluded in 2012 that "the promise of 'the New Judicial Federalism' . . . has gone largely unfilled."[164] And Justin Long observed in 2006 that state courts adopt the precepts of the new judicial federalism "only inconsistently, if not downright erratically."[165]

Explanations for this abound. Some scholars note that the typical law school curriculum biases judges and lawyers in favor of federal authorities and does not train them to develop independent state arguments.[166] Others have argued that reliance on independent state sources is theoretically flawed.[167] It may be that external constraints and limited resources impact how state judges decide cases. For my part, I have argued that state judges likely react to appreciable override threats, including responsive amendments, which can chill their desire to step out beyond the cover of federal precedent.[168]

In any event, it is now well-accepted that state courts are more often than not reluctant to engage in independent state constitutional reasoning and prefer instead to lockstep their analysis to federal rights jurisprudence. To be sure, there are exceptions, which I discuss below, but on the whole state courts have not built a steady and robust body of independent rights jurisprudence that expands rights beyond federal protections.

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158. *See id.*

159. The authoritative study of state supreme court caseloads from 1870 to 1970 found that almost all cases before 1935 involved "ordinary commercial disputes." *See* Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 Stan. L. Rev. 121, 132–33, 150 (1977).

160. *Id.* at 132–33.

161. *See generally* Long, *supra* note 13 (arguing that states exercise independent judgment only intermittently); Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 Penn St. L. Rev. 783 (2011); Williams, *supra* note 10, at 130–31.

162. *See* Tarr, *supra* note 13, at 179.

163. *See id.*

164. *See* Friedman, *supra* note 161, at 783.

165. *See* Long, *supra* note 13, at 42. Indeed, the underperformance of state courts since the new judicial federalism is illustrated by the fact that in 2018, forty-one years after Justice Brennan published his Harvard Law Review article calling for state courts to enhance liberty within our federal system by independently applying their state constitutions, Chief Judge of the Sixth Circuit Jeffrey Sutton published a book arguing "that an underappreciation of state constitutional law has hurt state and federal law and has undermined the appropriate balance between state and federal courts in protecting individual liberty." *See* Sutton, *supra* note 16, at 6.

166. *See* Sutton, *supra* note 16, at 194.

167. *See* Gardner, *supra* note 13, at 763.

168. *See* Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. Rev. 55, 61–65 (2018).

D. Successful State Constitutional Rights Expansion

Despite the limited success of the new judicial federalism, it is a mistake to conclude that state constitutions have not advanced greater individual rights protections. There are at least two scenarios where this has occurred. First, some state court rulings expanding rights have gone unaltered by amendment or other political response. Second, states have adopted various amendments that affirmatively enlarge rights beyond those in the Federal Constitution.

Education rights under state constitutions are a good example of the first category. Following the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*, which rejected a federal constitutional right to education,[169] state courts began to recognize a justiciable right to a quality public education under state constitutions.[170] These cases generally took the form of challenges to inadequate education fundings schemes.[171] Beginning with the California Supreme Court in 1976,[172] various state high courts from Texas to New Jersey invalidated legislative funding schemes as violating the state's education obligations to children under the state constitution.[173] These rulings have often resulted in judicial oversight of education fundings that spans decades and is unusually intrusive on legislative budgeting.

These decisions have by no means cured education funding or quality problems. Nevertheless, what is most remarkable about these rulings is that they have imposed significant new obligations on local communities and state legislatures, but they have not (generally) been the subject of direct amendment overrides or even modifications.[174] To be sure, groups have sought to evade higher tax burdens created by these rulings, mostly by adopting constitutional amendments that cap property taxes.[175] But there has not been the same wave of reactionary amendments, recalls, and judicial appointments that followed other areas of expansion in state constitutional rights. Indeed, I'm unaware of any formal amendments that explicitly targeted these funding rulings.[176] In contrast, there have been several amendments that advance funding for public education.[177]

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169. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56–59 (1973).

170. *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 948–49 (Cal. 1976).

171. *See generally* Jonathan Banks, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 Vand. L. Rev. 129, 131 (1991).

172. *See Serrano*, 557 P.2d at 948–49.

173. *See* Sutton, *supra* note 16, at 22–41.

174. *Cf.* Paul L. Tractenberg, *Education*, *in* State Constitutions for the Twenty-First Century 241, 248 (G. Alan Tarr & Robert F. Williams eds., 2006).

175. *See id.* (an example of this is the infamous California Proposition 13, which capped property taxes and had the effect of limiting education spending).

176. There were reactionary amendments regarding school desegregation; especially rulings that required states to address de facto desegregation by funding transportation. *See* Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 1006. Amendments have also played a central role in establishment issues under state constitutions related to parochial schools. *See id.* at 1003.

177. *See* Dinan, *supra* note 56, at 180–81.

Placing these rulings in full context allows for a more accurate assessment of their significance. In light of the many rulings that are undone by amendment, and the relatively low barriers to amendment, it is plausible that these rulings reflect a degree of popular acquiescence or, at the very least, popular disinterest. Unlike rulings by the United States Supreme Court, which are effectively insulated from override absent the Court's own reversal, state court rulings are always adopted against the backdrop of a responsive amendment.[178] Thus, when these rulings stand, it is not because the rulings are against popular preferences but because the public concedes or does not care enough to act.

Regarding the second category, the states have expanded rights protections beyond federal limits in a variety of areas by explicitly amending their constitutions to include broader protections.[179] This has occurred across a broad spectrum of issues—from education funding (mentioned above), to abortion, guns rights, fishing and hunting rights, property rights, free exercise rights, rights of public access to government information, gender equality, and crime victim rights, among others.[180]

These rights-expanding amendments are important because they have no analog under the Federal Constitution and because they provide a much broader institutional and theoretical context for state constitutional rights. These amendments have all passed through popular referenda (with the exception of two or three adopted in Delaware where no referendum is required).[181] While the referenda is surely imperfect, it offers a window into popular preferences regarding rights issues and provides an opportunity for citizens to contribute to the discussion and direction of state constitutional rights. There is no comparable opportunity in federal constitutional rights discourse. Of course, for this same reason, these rights tend to reflect majoritarian preferences rather than minority-oriented protections. This too suggests that state constitutional rights operate in a unique environment.

IV. A MISSING PERSPECTIVE ON STATE CONSTITUTIONAL RIGHTS

Despite the widespread academic enthusiasm for the new judicial federalism, a more sober perspective on state constitutional rights has taken hold among some contemporary constitutional theorists.[182] To these scholars, state constitutional rights are of limited value because they are too

178. *See generally id.*

179. *See* Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, *supra* note 18, at 985–1019.

180. *See id.*

181. *See* Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, *supra* note 18, at 2126–27 (noting a 2003 Delaware amendment regarding free speech); *id.* at 2127 (noting a 1987 Delaware amendment regarding guns).

182. *See* Miller, *Defining Rights in the States*, *supra* note 18, at 2064 (defending state constitutional rights but noting that "voting on rights has become a regular feature of" state constitutionalism).

tightly connected to popular preferences.[183] No matter how well-reasoned and rights-protective a state court ruling may be, it will always be subject to popular and political override, which robs a constitutional right of its core purpose.[184]

For example, Chief Judge Sutton has asked: "What good is a liberty guarantee or a measure designed to protect discrete groups of citizens if both are one statewide initiative away from being changed by a majority vote?"[185] In a similar vein, Erwin Chemerinsky has concluded "that state constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution" precisely because voters in many states have amended their constitutions to foreclose state courts from expanding rights in certain areas.[186]

From this point of view, the new judicial federalism is an inherently flawed enterprise. The new judicial federalism is grounded in the idea that state and federal constitutional rights are of the same kind, and their common purpose is to provide courts with a legal basis for protecting liberties from encroachment by overbearing popular majorities. On this view, rights are guardrails on democratic decision making that are monitored and enforced by courts as the branch most insulated from popular accountability. Justice Brennan made this very clear: he wrote that the "salient purpose" of any constitutional right is to "protect minorities . . . from the passions or fears of political majorities."[187] It was against this theoretical backdrop that Justice Brennan exhorted state courts to construe state rights provisions more broadly.[188] The new judicial federalism was "born from the hope that state constitutions might provide an alternative corpus of counter-majoritarian protections," just as the Warren Court had during the Civil Rights Era.[189]

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183. *See id.* 2061–64.

184. *See id.*

185. Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 KAN. L. REV. 687, 690–91 (2011).

186. *See* Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010) (focusing on the history of marriage equality under state constitutions).

187. *See* William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VAL. U. L. REV. 1, 12 (1991). This perspective on constitutional rights did not originate with Justice Brennan. Justice Jackson declared in 1943 that the "purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). Indeed, this perspective on rights seems to have become an American obsession. Jeremy Waldron has observed that the American fear of overbearing majorities is so endemic that "judicially patrolled constraints on legislative decisions has become more or less axiomatic." Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1395 (2006). And Maggie Blackhawk has argued that *Brown* is viewed by most scholars as the "crown jewel of constitutional theory" because it represents a constitutional system of entrenched rights enforced against abusive majorities. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1846 (2019).

188. Indeed, Robert Williams has explained that the new judicial federalism was inextricably linked with the notion that rights should fundamentally protect unpopular minorities from abusive majorities through enforcement (and development) by independent judges. *See* WILLIAMS, *supra* note 10, at 133.

189. *See* Marshfield, *supra* note 20, at 874.

Not surprisingly, early state court rulings often framed rights issues in terms that emphasized judicial enforcement of rights as crucial to protecting individuals and political minorities from abusive majorities.[190] For example, in *People v. Anderson*, which was one of the most high profile early state cases, the Supreme Court of California dedicated an entire portion of its opinion to "The Judicial Function" in the context of constitutional rights.[191] The court wrote: "The cruel or unusual punishment clause of the California Constitution, like other provisions of the Declaration of Rights, operates to restrain legislative and executive action and to protect fundamental individual and minority rights against encroachment by the majority."[192] The court continued that it was "at the very core of [its] judicial responsibility" to enforce those rights against the political branches and popular majorities.[193]

Measured against this standard, it is understandable why scholars have cooled in their enthusiasm for state constitutional rights enforced by state courts. State constitutional rights are forged at the intersection of a variety of processes that favor popular majorities. State judges are often subject to popular recall or election, and unpopular rulings are quickly undone by referenda.[194] The result is a body of law that, on net, tends to track popular priorities and preferences regarding rights and not a set of countermajoritarian constraints on democratic decision-making.[195]

The first wave of popular backlash to the new judicial federalism illustrates this dramatically. As lawyers and judges endorsed Justice Brennan's vision for state courts and state constitutional rights, they quickly saw opportunities to expand criminal procedure protections as the Burger Court declined to advance the gains of the Warren Court.[196] Thus, in *Harris v. New York*, when the Supreme Court decided that illegally obtained confessions could be introduced as impeachment evidence without violating the Fourth Amendment,[197] the California and Pennsylvania Supreme Courts rejected *Harris* and found a state constitutional right against introduction of the illegal confessions, even for impeachment.[198] However, these decisions were wildly unpopular in both states and were quickly undone by amendments to both state constitutions.[199] Donald Wilkes has documented this trend extensively during the early stages of the new judicial federalism.[200]

190. *See, e.g.*, People v. Anderson, 493 P.2d 880, 888 (Cal. 1972).
191. *Id.* at 887–88.
192. *See id.* at 888.
193. *See id.* at 887.
194. *Cf.* The Council of State Gov'ts, *supra* note 27, at 193–95 tbl.5.1, 203–05 tbl.5.6.
195. *See Marshfield*, *supra* note 20, at 862.
196. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971).
197. *Id.* at 224–26.
198. *See* Tarr, *supra* note 13, at 178–79.
199. *See id.* at 179 n.21.
200. *See generally* Wilkes, *supra* note 18.

All of this suggests that state constitutional rights are not well suited to functioning as like-kind substitutes for federal constitutional rights.[201] Indeed, as I have argued elsewhere, this perspective on state constitutional rights is more reflective of the historical origins of the new judicial federalism than the origins and institutional context of state bills of rights.[202] If we examine state constitutional rights on their own terms, it is clear that they were not built to operate as counter-majoritarian constraints. The opposite is true. State constitutional rights were built to operate as instruments of popular control over government.[203] They were deeply connected to processes of popular constitutional reform. Indeed, most state bills of rights begin with the people's right to alter, reform, or abolish government in whatever manner they see fit.[204]

Here it is helpful to recognize that state constitutions are generally structured around a different set of concerns about democracy than the Federal Constitution.[205] The Federal Constitution has various features designed to address concerns about abusive popular majorities; such as its failure to include any forms of direct democracy, the malapportioned Senate, the electoral college, Article III life tenure for judges, and arduous formal amendment procedures.[206] All of these "undemocratic" features are designed to ensure that the federal government is not easily captured by hasty and self-interested popular majorities who might use government for their own purposes at the expense of political minorities and the common weal.[207] State constitutions, however, are generally concerned about the undue influence of an elite minority to the detriment of popular majorities.[208] This concern has a long history dating back to abuses by colonial governors, capture by wealthy railroads, and control by political bosses.[209]

From this point of view, state constitutional rights are part of a broader project to ensure that state government policies and practices align with democratic preferences. Their core purpose is to help reduce agency costs and enable a more efficient and responsive democratic order. This is why state bills of rights traditionally appear before the organization of

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201. This point has been largely missed or ignored for scholars of state constitutionalism. *See* Marshfield, *supra* note 20, at 872–77. However, an insightful passage from a 1982 article by the editors of the Harvard Law Review identified this point squarely. *See Developments in the Law*, *supra* note 99, at 1498. That article suggested that state courts work to develop a theory of "majoritarian judicial review" that would distinguish state constitutional rights from federal constitutional rights. *See id.* The article does not flesh out the full history of state bills of rights in this regard, nor does it fully account for the many contemporary institutions and processes that continue to breathe life into this theory of state constitutional rights, but it is an important data point in the history of state constitutional thought even if only because it has been largely ignored and overlooked.

202. *See* Marshfield, *supra* note 20, at 872–77.

203. *Id*. at 862.

204. *Id*. at 885.

205. *Id*. at 857.

206. *See generally* Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) (2006).

207. *Cf.* Marshfield, *supra* note 20, at 857–58.

208. *See id.* at 858.

209. *Cf.* Marc W. Kruman, Between Authority & Liberty (1997).

government and include strong declarations of popular sovereignty.[210] They operate as an affirmative articulation of the powers retained by the people and not ceded to government agents who are prone to recalcitrance.

This perspective helps us better understand the limits and the potential of state constitutional rights in the current moment. As the new judicial federalism illustrates, state constitutional rights are not likely to be effective at buoying counter-majoritarian rulings by state courts. Unlike federal rights, state constitutional rights are forged at the intersection of several popular political processes, which generally means that they will converge around popular preferences, especially on highly salient issues.

But what does this mean for how state litigants and courts should approach state constitutional rights going forward? A nihilistic approach might be to simply devalue state constitutional rights because they are unable to operate as meaningful counter-majoritarian constraints. Another view is to consider state constitutional rights as useful instruments of popular control over government.[211] In the final section of this Article, I offer a few preliminary thoughts on what this reorientation might mean for state constitutional rights jurisprudence and litigation.

V. MAKING THE MOST OF STATE CONSTITUTIONAL RIGHTS POST-*DOBBS*

As noted above, during the heart of the new judicial federalism, state courts often justified their expansive rights rulings by appealing to the idea of constitutional rights as counter-majoritarian and courts as the guardians of rights. This institutional framing reflected Justice Brennan's vision for the new judicial federalism, but it did not account for the institutional realities of state constitutional rights nor the unique history and theory underlying state constitutional rights. As a result, these opinions were easy targets for motivated popular majorities with access to processes of constitutional change. This history suggests that current state courts and advocates might benefit from reframing state constitutional rights. Indeed, there is good reason to believe that current political dynamics are better suited to the structure of state constitutional rights.

Unlike criminal procedure rulings during the 1970s and 1980s, privacy issues such as abortion, consensual sexual activity, and contraception now have broad public support even in many conservative states.[212] There is also growing evidence to suggest that restrictive state legislation on these issues reflects partisan platforms more than democratic preferences within particular states.[213] In other words, on privacy rights, there is evidence to suggest that many states are facing a misalignment between popular

210. *See id.* at 37–40; Tarr, *supra* note 13, at 83. Indeed, it was common practice during the Revolutionary period for states to first debate and adopt a declaration of rights as a guide for the constitutional drafting process.

211. *See* Marshfield, *supra* note 20, at 853–60.

212. *See, e.g.*, *Views About Abortion by State*, *supra* note 24.

213. *See, e.g.*, Smith et al., *supra* note 23, at 910–11.

political preferences and legislative outputs.[214] This is a problem better suited to state constitutional rights precisely because they are tightly connected to statewide democratic preferences.

Indeed, a 2019 Pew Research Center study found that 56% of Floridians said that abortion should be legal in all or most cases; yet, in 2022, Florida enacted a 15-week abortion ban.[215] Similarly, a more robust study of public opinion in Ohio before *Dobbs* found that there was likely misalignment between legislative priorities regarding abortion and public opinion.[216] More recently, in the most robust state-level investigation post-*Dobbs*, Arielle Scoglio and Sameera Nayak studied public opinion and legislative policy across the United States and found strong evidence of misalignment in several states.[217] Indeed, they found that support for legal abortion (in at least some cases such as rape or incest) ranged from 77% (South Dakota) to 98% (Washington).[218] They concluded that popular preferences regarding abortion are not reflected in "the polarized state legislative climate, where lawmakers are attempting to effectively outlaw abortion."[219]

If we assume that this dynamic is present in at least some states where substantive due process rights are now being contested under state constitutions, then it is worth considering how to reframe these rights disputes for courts and litigants. On the one hand, state courts cannot (and should not) decide cases based on popular opinion polls. On the other hand, state constitutional rights were built to protect democratic majorities from recalcitrant government officials. What is needed, then, is a more robust and useable "theory of majoritarian, rather than antimajoritarian, review."[220] There are surely great difficulties in developing such a theory,[221] but an authentic application of state constitutional rights requires a reckoning with their majoritarian nature.

To some extent, however, a theory may be a purely academic exercise. If we take seriously the idea that state judges appreciate override threats and political consequences for unpopular decisions, many state judges are already well-situated to take public opinion into account when deciding cases even if their stated reasons do not acknowledge this. And, if we understand state constitutional rights to be about correcting misalignment between popular preferences and state policy, this is a feature and not a bug of state constitutional design.

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214. *See id.*

215. *See Views About Abortion by State*, *supra* note 24; Wynne Davis, *Florida Governor Ron DeSantis Signs a Bill Banning Abortions After 15 Weeks*, NPR (Apr. 14, 2022, 12:25 PM), https://www.npr.org/2022/04/14/1084485963/florida-abortion-law-15-weeks [https://perma.cc/TQT5-GV9H]. The law includes exceptions to save the pregnant woman's life, prevent serious injury or if the fetus has a fatal abnormality. Davis, *supra*. It does not allow exemptions in cases where pregnancies were caused by rape, incest or human trafficking. *Id.*

216. *See* Smith et al., *supra* note 23, at 910.

217. *See* Scoglio & Nayak, *supra* note 23, at 2.

218. *See id.* at 3.

219. *Id.* at 6.

220. *See Developments in the Law*, *supra* note 99, at 1499.

221. *See id.* at 1499–51.

Consider, for example, an elected state high court judge in a state with the constitutional initiative and recall.[222] If a state constitutional rights issue were to arise, the judge is likely to consider (to some degree) the extent to which a particular outcome might create re-election or recall vulnerabilities, or instigate a responsive constitutional amendment. These pressures create incentives for a judge to stray from binding federal rights precedent only in instances where the judge feels comfortable that she can survive these processes of popular accountability.[223] This scenario is the core argument against taking state constitutional rights seriously as counter-majoritarian constraints.

But there is at least one other scenario under these conditions that might suggest a contrary result. A judge might also conclude that her best chance at navigating the processes of popular accountability is to expand state constitutional protections because of strong popular support against a contested state law. And, with increasing concerns about partisan gerrymandering in state legislatures, it is quite possible that a judge elected at a statewide election is more attentive to statewide popular preferences than a partisan legislator sitting within a manufactured legislative majority. Under these circumstances, the judge has an incentive to invalidate misaligned state legislation to appease her statewide constituency, and, at the very least, place the issue on the agenda for a popular referendum. In this way, the incentives for popular accountability might also encourage judicial expansion of state constitutional rights.

There is another important perspective on this scenario. Constitutional litigation is often described as promoting justice and fairness for political minorities and individuals because it provides an accessible forum for a single aggrieved individual to enforce the law against the rest of society. But the same incentives are at play when state government policy is misaligned with democratic majorities. That is, constitutional litigation is often a better choice for aggrieved democratic majorities than the political process. Voters could undertake to track legislator votes, recruit other voters, and vote out misaligned representatives. In initiative states, they could also sponsor corrective initiatives. But these are costly and drawn-out processes that invariably implicate logrolling and legislative priority setting, and might run headlong into partisan gerrymandering barricades. Constitutional litigation, on the other hand, provides an accessible forum for democratic majorities to pick misaligned issues and force courts to surgically evaluate state policy on those issues in isolation. In other words, it is a cheap and efficient forum for aggrieved majorities to make isolated corrections to state policy. Thus, if we assume that state policy and popular preferences are misaligned, there are strong incentives for groups with broad majoritarian support to nevertheless pursue constitutional litigation under state constitutions.

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222. Oregon is one such state. *See* Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 Cal. L. Rev. 1191, 1192–93 (2005).

223. Of course, a principled judge might appreciate but accept these threats.

Of course, none of these arguments address the need for a formal theory of majoritarian judicial review. Instead, they assume that judges and litigants are responding to incentives that generally push state constitutional rights towards majoritarian preferences. Here, I believe, is where state constitutional rights jurisprudence still has unrealized potential. The institutional environment within which they sit is configured to drive state constitutional rights towards popular preferences, but courts continue to speak in terms that do not match the real incentives driving outcomes. This is especially unfortunate because those incentives map on to a coherent constitutional theory that views rights as legal instruments designed to enable popular control over government.

At this point, my thoughts are especially preliminary and are part of a broader, separate project theorizing state constitutional rights. With that qualification, I offer the following closing thoughts. First, much could be accomplished by simply reframing state constitutional rights as protections that exist on behalf of the people rather than as constraints on the people themselves. To the extent that the usual modalities of constitutional construction support a rights-expanding outcome, litigants should invite state courts to enforce state constitutional rights in ways that hold government officials accountable to the public. This framing is not without precedent.[224] It is essentially a structural argument that might take the following (oversimplified) form: (1) the people adopted the rights provision at issue to ensure that they did not cede this freedom to government regulation; (2) the people have the ability to change the content and language of that provision through a variety of accessible amendment procedures but they have not done so; and (3) the court should therefore enforce the right to ensure that government officials are not able to circumvent the people's limitations on their authority.[225] This line of reasoning sits within the bounds of existing constitutional argumentation, but it carefully reframes the nature of the rights dispute.

Second, state courts might consider abandoning the tiers of scrutiny in favor of a more holistic proportionality test applied by other western democracies in rights disputes.[226] A full explanation of this idea is beyond the scope of this Article, but proportionality analysis generally allows courts to more directly evaluate legislative actions by comparing the social benefit from the rights-restricting law to the social benefit gained by preventing

224. *See generally* Jonathan L. Marshfield, *Amendment Creep*, 115 MICH. L. REV. 215 (2016).

225. For other examples of this sort of structural reasoning from amendment procedures, see *id.*

226. *See* Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 384–85 (2018); *see also* Marshfield, *supra* note 20, at 931 (forecasting this move away from tiers of scrutiny in state rights jurisprudence). Jessica Bulman-Pozen and Miriam Seifter have written a forthcoming article that pursues this precise possibility. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. (forthcoming Nov. 2023). They tackle this possibility with great nuance and a deep understanding of how state courts function within the structure of state government structure. *See id.* Their article is a momentous achievement and welcome move in the discussion of state constitutional rights.

the harm to the right.[227] This analysis has the potential to incorporate concerns about misalignment because the court would directly evaluate the social benefits on either side of the equation. Of course, this test risks turning courts into de facto legislatures and creating further indeterminacy in the law.

Finally, state courts might develop a series of factors that could support a presumption of misalignment that the government could rebut. For example, laws that provide an immediate and specific benefit to particular private groups might be eligible to trigger the presumption on the theory that they reflect mostly private rather than public purposes.[228]

There is much more work to be done to make the most of state constitutional rights. But the present moment seems ripe for these efforts as courts, litigants, and the public are focused on how state courts and constitutions can occupy critical space vacated by the Supreme Court.

227. *See* Beschle, *supra* note 226, at 411.

228. There is some precedent for this type of reasoning in state cases addressing economic regulation and substantive due process. *See* Sun Ray Drive-In Dairy, Inc. v. Trenhaile, 486 P.2d 1021, 1022–24 (Idaho 1971); Lincoln Dairy Co. v. Finigan, 104 N.W.2d 227, 230–34 (Neb. 1960).