

## DEFINING RIGHTS IN THE STATES: JUDICIAL ACTIVISM AND POPULAR RESPONSE

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### ABSTRACT

This article examines state-level contests over the definition of rights. While the U.S. Supreme Court has established a floor of rights that all states must observe, states can expand rights beyond federal minimums. During the past four decades, courts in several states have developed expansive definitions of rights in hotly contested areas including capital punishment, criminal procedure, racial desegregation, abortion, free speech, education equalization, non-establishment of religion, non-discrimination on the basis of sexual orientation, and marriage for same-sex couples. Many of these decisions have endured and substantially reshaped the law. Others, however, have been reversed through state constitutional amendments. This article documents these patterns of conflict and concludes that the controversial state-level practice of popular referendums on contested rights provides important benefits, including increasing the legitimacy of new rights and reducing popular pressure for removal of judges.

### I. INTRODUCTION

The short span between the 1960s and early 1970s was a time of transition in American constitutional law. As Chief Justice Earl Warren and other champions of liberal judicial activism left the U.S. Supreme Court, they were replaced by nominees of a President

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committed to “strict construction” of the Constitution and its rights guarantees.<sup>1</sup> Many liberals feared that the reconstituted Supreme Court would abandon its commitment to the expansion of individual and minority rights.<sup>2</sup> Seeking to sustain the Warren-era rights revolution, they turned in an unlikely direction—the states.<sup>3</sup> For years, many liberals had viewed the states as constitutional backwaters,<sup>4</sup> but some state judges were in fact eager to carry on the Warren Court’s rights-expanding legacy. Starting in the 1970s—with great intentionality—several state courts began invoking formerly dormant state constitutional rights provisions in ways that broadened rights beyond federal constitutional minimums.<sup>5</sup> For the past four decades, this movement, known as the “new judicial federalism,”<sup>6</sup> has transformed constitutional law as state judges have established new state constitutional rights in areas such as capital punishment, criminal procedure, equalization of public school funding, racial desegregation, abortion, free speech, non-establishment of religion, non-discrimination on the basis of gender or sexual orientation, and legal recognition of same-sex unions.

The rights revolution in state constitutional law has generated both praise and criticism. Many lawyers, judges, and legal academics, fully immersed in a rights-honoring legal culture, have celebrated the expansion of rights at the state level. They contend that the movement has bestowed a double benefit: while achieving the good of expanding individual rights, it also has promoted the separate, independent good of revitalizing federalism.<sup>7</sup> According to this view, the movement’s focus on state constitutional texts has breathed life into these documents and established a dialogue

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<sup>1</sup> The Nixon appointees were Warren E. Burger (1969), Harry A. Blackmun (1970), Lewis F. Powell, Jr. (1971), and William H. Rehnquist (1971). LAWRENCE BAUM, *THE SUPREME COURT* 28 (10th ed. 2010).

<sup>2</sup> See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (arguing that state courts should expand their role in protecting individual rights).

<sup>3</sup> See G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 *PUBLIUS* 63, 63 (1994).

<sup>4</sup> See *id.* at 66 (“[U]ntil the advent of the new judicial federalism, state courts’ contributions to developing constitutional protections for civil liberties were minimal.”).

<sup>5</sup> *Id.* at 63–79 (discussing the relationship between the Warren Court legacy and the new judicial federalism).

<sup>6</sup> *Id.* at 63.

<sup>7</sup> See, e.g., Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 *TEX. L. REV.* 1081, 1081 (1985) [hereinafter Mosk, *Liberal and Conservative*]; Tarr, *supra* note 3, at 73.

between the U.S. Supreme Court and the states regarding the proper understanding of individual rights and liberties.<sup>8</sup> Critics, however, have argued that the new judicial federalism is less concerned with creating a distinctive state constitutional jurisprudence than in achieving a liberal agenda of expanding certain preferred rights claims by any available means.<sup>9</sup> The emergence of an independent state constitutionalism, in this view, has merely provided activists a vehicle for “constitution shopping” and re-litigating rights cases whenever they lose in the federal courts.<sup>10</sup>

As state courts have recognized new and controversial rights claims, citizens have sometimes pushed back. One democratic check on state courts is judicial election, available in some form in most states.<sup>11</sup> Voters have occasionally used judicial elections to reconstitute state courts they consider activist—most notably in California in the mid-1980s and Iowa in this decade.<sup>12</sup> However, more frequently, voters have directly preempted or overturned

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<sup>8</sup> See, e.g., Mosk, *Liberal and Conservative*, *supra* note 7, at 1081.

<sup>9</sup> E.g., Earl M. Maltz, *The Political Dynamic of the “New Judicial Federalism”*, 2 EMERGING ISSUES ST. CONST. L. 233, 233 (1989) (discussing how increased judicial federalism and expansive interpretations of states’ rights furthers the liberal agenda); Ronald K.L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX. L. REV. 1095, 1136 (1985) (discussing how states other than Montana used federalism to enlarge “the rights domain”); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L. Q. 975, 975–76 (1979) (describing state constitutional interpretation and the possible reworking of analysis, diverging from federal caselaw); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1023 (1985) (discussing the pros and cons of expanding judicial review for state courts).

<sup>10</sup> See Deukmejian & Thompson, Jr., *supra* note 9, at 989. Other critics are more charitable, but still complain that state supreme courts have failed to develop coherent, independent interpretations of their state constitutions that justify diverging from federal constitutional standards on fundamental questions of rights. See, e.g., James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 774, 778 (1992).

<sup>11</sup> See Wendy R. Weiser, *Regulating Judges’ Political Activity After White*, 68 ALB. L. REV. 651, 675–76 (2005).

<sup>12</sup> In 1986, California voters removed three members of their California Supreme Court, Chief Justice Rose Bird, Associate Justice Joseph Grodin, and Associate Justice Cruz Reynoso, in their respective retention elections. B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1431–32 (2001). In 2010, Iowa voters similarly removed three members of their state supreme court: Chief Justice Marsha K. Ternus and Associate Justices Michael J. Streit and David L. Baker. A. G. Sulzberger, *In Iowa, Voters Oust Judges Over Marriage Issue*, N.Y. TIMES (Nov. 3, 2010) <http://www.nytimes.com/2010/11/03/us/politics/03judges.html>. See also Andrea McArdle, *The Increasingly Fractious Politics of Nonpartisan Judicial Selection: Accountability Challenges to Merit-Based Reform*, 74 ALB. L. REV. 1799, 1806–07 (2011) (discussing the ouster of the three justices).

judicial expansion of rights by adopting “court constraining” state constitutional amendments.<sup>13</sup> The stakes in these conflicts are high. While many consider the expansion of rights to be a requirement of justice,<sup>14</sup> others contend that recognizing an interest as a right trumps other competing interests that are of great importance but lack the status that a “right” confers.<sup>15</sup> State-level struggles over the definition of rights are thus hard-fought.

Overall, how have judicial decisions expanding state constitutional rights fared in the court of public opinion? To address this question, this article surveys the range of such decisions as well as popular efforts to limit this exercise of judicial power.<sup>16</sup> The article focuses on the period beginning in the early 1970s when supreme courts in several states launched the movement to interpret state constitutional rights more expansively than the U.S. Constitution requires, which, in turn, prompted popular movements to constrain state courts.<sup>17</sup> The record from the past four decades shows that while most judicial expansion of state constitutional rights have gone unchallenged, mobilized voters have overturned numerous such decisions and have preempted others, and that voting on rights has become a regular feature of the state model of constitutional interpretation.<sup>18</sup> After reviewing this history, the article concludes that the people’s ability to vote on state constitutional rights is a beneficial feature of the nation’s dual system of constitutional law.<sup>19</sup>

## II. JUDICIAL EXPANSION OF RIGHTS

The most influential advocate of the state-level strategy for the expansion of rights was a frustrated member of the post-Warren

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<sup>13</sup> John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 984 (2007).

<sup>14</sup> See, e.g., REPORT OF THE NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 18–28, 50–53 (2009) (discussing the importance of expanding the right to counsel beyond the federal standards, making ineffective assistance of counsel challenges easier, and restructuring how assigned counsel are paid).

<sup>15</sup> See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 16 (1991); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 892 (1999).

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Part V.

U.S. Supreme Court, Associate Justice William J. Brennan, Jr. In a 1976 speech delivered to the New Jersey Bar Association, later published in the *Harvard Law Review* under the title *State Constitutions and the Protection of Individual Rights*, the former pillar of the Warren Court lamented the “trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being” proper enforcement of the Bill of Rights and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>20</sup> Justice Brennan noted with approval that some state courts disagreed with these decisions and were “now beginning to emphasize the protections of their states’ own bills of rights.”<sup>21</sup> Brennan concluded:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.<sup>22</sup>

The movement that Brennan celebrated and sought to nurture was advancing in several states. By almost any measure, however, the California Supreme Court was setting the pace. Already considered one of the most activist and influential state courts in the nation due to its innovations in tort law,<sup>23</sup> California’s high court now sought to lead a similar revolution in state constitutional rights. During this period, the court was controlled by a solid majority of liberal justices, one of whom, Stanley Mosk, became a leading theoretician of the new judicial federalism.<sup>24</sup> Throughout

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<sup>20</sup> Brennan, *supra* note 2, at 495.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 491. Justice Brennan’s article has been called “the Magna Carta of state constitutional law” and is one of the most highly cited law review articles of the past half-century. See Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 716 (1983).

<sup>23</sup> *E.g.*, Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1518 (1985) (citing Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963, 965–77 (1981)).

<sup>24</sup> See Stanley Mosk, *State Constitutionalism after Warren: Avoiding the Potomac’s Ebb and Flow*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 201 (Bradley D. McGraw ed., 1985); Mosk, *Liberal and Conservative*, *supra* note 7. Former Oregon Supreme Court Justice Hans A. Linde is generally recognized as the most important theorist of the new judicial

the 1970s and into the 1980s, the court issued a long series of landmark decisions expanding state constitutional rights.<sup>25</sup> While the California Supreme Court took the lead in expanding rights beyond federal constitutional minimums,<sup>26</sup> enthusiasm for the movement has varied from state to state. Over time, the supreme courts of New Jersey<sup>27</sup> and Massachusetts<sup>28</sup> have competed with California<sup>29</sup> for leadership of the new judicial federalism, and courts in Oregon,<sup>30</sup> Washington,<sup>31</sup> Montana,<sup>32</sup> New Hampshire,<sup>33</sup> Maine,<sup>34</sup> Vermont,<sup>35</sup> Connecticut,<sup>36</sup> and several other states<sup>37</sup>—largely in the

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federalism. See INTELLECT AND CRAFT: THE CONTRIBUTIONS OF JUSTICE HANS LINDE TO AMERICAN CONSTITUTIONALISM 3–4 (Robert F. Nagel ed., 1995). Other state court justices who helped promote the movement include: Shirley S. Abrahamson of Wisconsin, Edward F. Hennessey of Massachusetts, William C. Hill of Vermont, Stewart G. Pollock of New Jersey, Samuel J. Roberts of Pennsylvania, and Robert F. Utter of Washington. See, e.g., Ronald K.L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 619 & n.46 (1986).

<sup>25</sup> See, e.g., *People v. Smith*, 667 P.2d 149, 159 (Cal. 1983) (en banc) (expanding privilege against self-incrimination); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798–99 (Cal. 1981) (invalidating restrictions on abortion funding as infringement of women's right to reproductive choice); *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979) (expanding the freedom of speech beyond the First Amendment and protecting reasonably exercised speech, even at privately owned shopping centers), *aff'd*, 447 U.S. 74 (1980).

<sup>26</sup> See Collins, Galie & Kincaid, *supra* note 24, at 603.

<sup>27</sup> See, e.g., *Right to Choose v. Byrne*, 450 A.2d 925, 933 (N.J. 1982) (holding that the right to public funding for abortion is more expansive under the New Jersey Constitution than under the federal Constitution).

<sup>28</sup> See, e.g., *Commonwealth v. Mavredakis*, 725 N.E.2d 169, 178 (Mass. 2000) (interpreting the right against self-incrimination more broadly than the Fifth Amendment under the state constitution).

<sup>29</sup> See, e.g., *Robins*, 592 P.2d at 347 (interpreting the California Constitution more broadly than the First Amendment).

<sup>30</sup> See, e.g., *State v. Quinn*, 623 P.2d 630, 644 (Or. 1981) (en banc) (invalidating in part the state's death penalty statute on the grounds that its provision for sentencing by the trial judge denied defendants their right to trial by jury), *overruled in part on other grounds by State v. Hall*, 115 P.3d 908, 921 (Or. 2005).

<sup>31</sup> See, e.g., *State v. Gunwall*, 720 P.2d 808, 814–15 (Wash. 1986) (en banc) (interpreting the state constitutional right against unreasonable searches and seizures more broadly than the Fourth Amendment).

<sup>32</sup> See, e.g., *State v. Covington*, 272 P.3d 43, 47 (Mont. 2012) (noting that Montana affords greater protection of the right to a jury trial than the Sixth Amendment).

<sup>33</sup> See, e.g., *State v. Aubuchont*, 784 A.2d 1170, 1175 (N.H. 2001) (holding that as to the voluntariness of confessions, New Hampshire Constitution provides more protection than the Fifth Amendment).

<sup>34</sup> See, e.g., *State v. Cadman*, 476 A.2d 1148, 1152 n.6 (Me. 1984) (other citations omitted) (citing *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973) (affording the right to counsel to parents in neglect proceedings more broadly than the federal Constitution)).

<sup>35</sup> See, e.g., *In re E.T.C.*, 449 A.2d 937, 939 (Vt. 1982) (interpreting the right to due process to include summoning a representative for a juvenile during custodial interrogation even though the Supreme Court refused to recognize such a right).

West and the Northeast—have also been enthusiastic participants.<sup>38</sup> Some state supreme courts, especially in the South and parts of the Midwest, have been more reluctant, generally preferring to follow the U.S. Supreme Court's interpretation of rights.<sup>39</sup>

In places where the new judicial federalism has taken hold, a pattern has emerged: state supreme courts have repeatedly invoked state constitutions to broaden rights beyond where the U.S. Supreme Court is willing to go.<sup>40</sup> The catalogue of these expanded state constitutional rights is impressive in both scope and degree of controversy. It includes broad rights to equality on the basis of gender<sup>41</sup> and sexual orientation;<sup>42</sup> the right to sexual privacy;<sup>43</sup> the

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<sup>36</sup> See, e.g., *State v. Oquendo*, 613 A.2d 1300, 1309 (Conn. 1992) (concluding that the Connecticut Constitution affords more protections than the Fourth Amendment regarding *Terry* stops).

<sup>37</sup> See, e.g., *People v. Scott*, 593 N.E.2d 1328, 1331–33 (N.Y. 1992) (interpreting the right against unreasonable searches and seizures more broadly than the federal “open fields” doctrine).

<sup>38</sup> See generally G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988) (discussing contemporary state supreme courts and the growth of the new judicial federalism).

<sup>39</sup> See, e.g., Cathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals*, 68 TEX. L. REV. 1481, 1489–90 & nn. 36–40 (1990) (providing examples where Texas, Illinois, Kentucky, Maryland, Tennessee, and Wyoming do not exceed federal requirements with regard to certain rights of criminal defendants).

<sup>40</sup> The U.S. Supreme Court has given formal approval to the practice of expanding state constitutional rights beyond federal minimums, so long as (1) the state constitutional right does not violate federal law and (2) the state court clearly specifies that it is basing its ruling on state rather than federal constitutional grounds. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (holding that a state court, in order to avoid federal review, must specify that its decision is based on the state constitution); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (holding that state constitutional rights may exceed federal minimums so long as they do not violate other federal constitutional rights); *Oregon v. Haas*, 420 U.S. 714, 719 (1975) (noting that a state, through its own laws, may impose restrictions on police operations that are greater than restrictions imposed by the federal Constitution (citations omitted)).

<sup>41</sup> See *Sail'er Inn, Inc. v. Kirby*, 485 P.2d 529, 543 (Cal. 1971) (holding a statute that prohibited women from tending bar unconstitutional under the California and federal Constitutions).

<sup>42</sup> See *In re Marriage Cases*, 183 P.3d 384, 446, 452 (Cal. 2008), where the California Supreme Court established a strict scrutiny standard for state constitutional equal protection analysis of statutes that make distinctions on the basis of sexual orientation. *Marriage Cases*, 183 P.3d at 446.

<sup>43</sup> After the U.S. Supreme Court's decision in *Bowers v. Hardwick*, upholding a Georgia statute that criminalized homosexual sodomy, state supreme courts in several states struck down similar statutes on state constitutional grounds. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003); *Jegley v. Picado*, 80 S.W.3d 332, 353–54 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998); *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992); *Gryczan v. State*, 942 P.2d 112, 125–26 (Mont.

right to refuse life-sustaining medical treatment;<sup>44</sup> the right to use marijuana;<sup>45</sup> the right to equally funded schools;<sup>46</sup> the right against exclusionary zoning;<sup>47</sup> the right against taking of private property;<sup>48</sup>

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1997). In 2003, the U.S. Supreme Court overturned *Bowers*. *Lawrence*, 539 U.S. at 578.

<sup>44</sup> The U.S. Supreme Court has recognized a federal constitutional right for persons to refuse life-sustaining treatment, but held that states can require “clear and convincing evidence” of patient’s intent before treatment is withheld. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 280, 284 (1990). Some state courts have expanded the right. *See In re Drabick, III*, 245 Cal. Rptr. 840, 852, 853 (Ct. App. 1988) (holding that there is a right of family members to discontinue the provision of food and water to a patient in a persistent vegetative state). *See also Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 300–01, 306–07 (Ct. App. 1986) (upholding a right of a healthy, but disabled woman, to disconnect feeding tube); *Bartling v. Superior Court*, 209 Cal. Rptr. 220, 225–26 (Ct. App. 1984) (finding that a man with a serious but non-terminal illness has the right to disconnect ventilator).

<sup>45</sup> *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975) (declaring that the Alaska Constitution’s right to privacy protects the right of an adult to possess and ingest marijuana for personal use at home).

<sup>46</sup> In *Serrano v. Priest*, the California Supreme Court held that the state’s public school financing system violated constitutional principles of equal protection because it invidiously discriminated against the poor in the provision of education—which the court labeled as a “right” and “fundamental interest.” *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (“Serrano I”). The court ordered the state to remedy this violation by redistributing school finances. *See id.* at 1265–66. Soon thereafter, however, the U.S. Supreme Court rejected this approach. In *San Antonio Independent School District v. Rodriguez*, the Court denied that education is a fundamental right under the federal Constitution, or that the Fourteenth Amendment’s Equal Protection Clause requires states to equalize funding for public schools. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 35 (1973). Undeterred, the California Supreme Court turned again to the state constitution. In subsequent *Serrano* litigation, the court again found the state’s public school financing system unconstitutional, but this time on state constitutional grounds. *Serrano v. Priest*, 557 P.2d 929, 951 (Cal. 1976) (“Serrano II”). State supreme courts in New Jersey (1973), Washington (1974), Montana (1974), and Connecticut (1977) joined California in invoking their state constitutions to reach opposite results. *See Horton v. Meskill*, 376 A.2d 359, 373–74 (Conn. 1977); *State ex rel. Woodahl v. Straub*, 520 P.2d 776, 783 (Mont. 1974); *Robinson v. Cahill*, 303 A.2d 273, 282–84 (N.J. 1973); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178, 198, 200 (Wash. 1974) (en banc). In time, supreme courts in twelve states declared a state constitutional right to equalization of public school finance. *See DOUGLAS S. REED, NAT’L CTR. FOR EDUC. STATS., COURT-ORDERED SCHOOL FINANCE EQUALIZATION: JUDICIAL ACTIVISM AND DEMOCRATIC OPPOSITION* 93 (1996), available at <http://nces.ed.gov/pubs97/97535g.pdf>; G. Alan Hickford et al., *Status of School Finance Constitutional Litigation—The Boxscore* (1997) (unpublished) (on file with the Illinois State University College of Education); RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* 567–621 (2010).

<sup>47</sup> *S. Burlington N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 724–25 (N.J. 1975) (declaring that municipal zoning laws that exclude low and moderate income residents violate the New Jersey Constitution’s equal protection and substantive due process guarantees).

<sup>48</sup> After the U.S. Supreme Court’s decision in *Kelo v. City of New London*, allowing the government taking of private property for private use, many states responded by creating state-level protections against such takings. *See Kelo v. City of New London*, 545 U.S. 469, 477–80, 489 (2005). Two examples of state supreme courts expanding state constitutional rights above federal minimums in this area are *City of Norwood v. Horney* and *Board of County Commissioners of Muskogee County v. Lowery*. *City of Norwood v. Horney*, 853 N.E.2d 1115, 1140–42 (Ohio 2006); *Bd. of Cnty. Comm’rs of Muskogee Cnty. v. Lowery*, 136 P.3d 639, 646–47 (Okla. 2006).

certain economic rights;<sup>49</sup> the right of free speech on private property;<sup>50</sup> the right to free exercise of religion;<sup>51</sup> and the right against establishment of religion.<sup>52</sup> Five prominent areas where state supreme courts have broadened rights beyond federal minimums and then the people have pushed back are: capital punishment, criminal procedure, racial desegregation, abortion, and the legal status of same-sex unions.<sup>53</sup> The balance of this section will summarize how state courts have expanded state constitutional rights in these five areas. The succeeding section will examine democratic responses to these decisions.

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<sup>49</sup> As noted above, in the years after 1937, the federal courts have exercised great deference to lawmakers on questions of economic regulation, while state courts have been less deferential to these regulations and more protective of economic liberties. See *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963) (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 395, 398–99 (1937)). State courts have most frequently invalidated regulations that fix prices for goods or services, restrict modes of operation a business or profession, or create barriers for entry to a business or profession. For specific examples, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1473–74 & 1474 nn.67–72 (1982).

<sup>50</sup> See *Robins v. PruneYard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979) (“[T]he California Constitution protect[s] speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned.”).

<sup>51</sup> Some states have expanded free exercise protections beyond those recognized by the U.S. Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*. Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990). See, e.g., *State v. Hershberger*, 462 N.W.2d 393, 396–97 (Minn. 1990); *Humphrey v. Lane*, 728 N.E.2d 1039, 1044–45 (Ohio 2000); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 177, 186 (Wash. 1992) (en banc).

<sup>52</sup> While the U.S. Supreme Court has permitted some government accommodation and support for religion, including providing textbooks or transportation for students in religious schools, *Agostini v. Felton*, 521 U.S. 203, 208, 239–40 (1997); *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968), or displaying religious objects on public property, *Lynch v. Donnelly*, 465 U.S. 668, 671, 684–85 (1984), many state supreme courts have interpreted their constitutions to require a stricter separation of church and state, thus expanding what some consider a right against religious establishments. See, e.g., *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 810, 836 (Cal. 1991) (prohibiting religious invocations and benedictions at public high school graduation ceremonies); *Cal. Teachers Ass’n v. Riles*, 632 P.2d 953, 963–64 (Cal. 1981) (invalidating statute authorizing public school districts to lend secular textbooks to parochial school students); *Fox v. City of L.A.*, 587 P.2d 663, 666 (Cal. 1978) (prohibiting the display of a cross on City Hall); *Feminist Women’s Health Ctr., Inc. v. Philibosian*, 203 Cal. Rptr. 918, 926 (Dist. Ct. App. 1984) (finding a district attorney’s plan to bury aborted fetuses at a memorial park that had agreed to permit a religious organization to hold a memorial ceremony violated the California Constitution’s Establishment Clause); *Elbe v. Yankton Ind. Sch. Dist. No. 63-3*, 372 N.W.2d 113, 116–18 (S.D. 1985) (invalidating the state’s school textbook loan statute on certified question of law from U.S. District Court of South Dakota); see also G. Alan Tarr, *Religion Under State Constitutions*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 65, 66–69 (1988) (discussing the struggle between state and federal law when states devise solutions to the separation of church and state).

<sup>53</sup> See *infra* Part II.A–E.

*A. Right Against Execution*

In 1972, the California Supreme Court effectively launched the rights revolution in state constitutional law through its decision in *People v. Anderson*.<sup>54</sup> In *Anderson*, the court declared that capital punishment violated the state constitution's prohibition on cruel or unusual punishments.<sup>55</sup> The court had scheduled argument in *Anderson* in late 1971,<sup>56</sup> at the same time that the U.S. Supreme Court was considering a federal constitutional challenge to the death penalty in *Furman v. Georgia*.<sup>57</sup> Many observers correctly predicted that the recently reconstituted U.S. Supreme Court would be unwilling to declare capital punishment unconstitutional *per se*.<sup>58</sup> Before the U.S. Supreme Court could issue its *Furman* ruling, the California Supreme Court announced its decision in *Anderson*.<sup>59</sup> Notably, the California court avoided reliance on the U.S. Constitution's Eighth Amendment prohibition on cruel and unusual punishments, instead ruling that the death penalty violated the California Constitution's analogous prohibition on cruel or unusual punishments.<sup>60</sup> In other words, the court had reached its decision on "adequate [and independent] state ground[s]."<sup>61</sup> State constitutional law scholar Robert F. Williams has pointed to *Anderson* as "[p]robably the most important early case" in the development of the new judicial federalism.<sup>62</sup> The decision "stimulated a substantial academic response," he noted, "as well as the initial recognition that state courts could evade decisions of the United States Supreme Court by relying on their own state

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<sup>54</sup> *People v. Anderson*, 493 P.2d 880 (Cal. 1972) (en banc), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27.

<sup>55</sup> *Id.* at 899.

<sup>56</sup> KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 201 (2009).

<sup>57</sup> *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

<sup>58</sup> *Id.* at 310–11 (White, J., concurring) (noting that the Court's holding does not declare capital punishment unconstitutional *per se*); Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 41–42 (2007) (noting that many Supreme Court observers predicted that the Court would not abolish the death penalty in *Furman*).

<sup>59</sup> *Anderson* was decided in February 1972, and the motion to reargue was denied in March 1972. *Anderson*, 493 P.2d at 880. *Furman* was argued in January 1972 but was not decided until June 1972. *Furman*, 408 U.S. at 238.

<sup>60</sup> *Anderson*, 493 P.2d at 891–92.

<sup>61</sup> Scott H. Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 758 (1972).

<sup>62</sup> Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213 (2003).

constitutions.”<sup>63</sup> After *Anderson*, courts in Massachusetts (1980 and 1984),<sup>64</sup> Oregon (1981),<sup>65</sup> and New York (2004)<sup>66</sup> also struck down capital punishment on state constitutional grounds, and in New Jersey (1988)<sup>67</sup> and Nebraska (2008),<sup>68</sup> courts declared that certain aspects of the death penalty violated their state constitutions.

### B. Criminal Procedure Rights

Criminal appeals present many opportunities for courts to define the scope of constitutional rights and these cases have caused the most frequent divergences between state and federal interpretations of rights. While some state supreme courts have attempted to follow U.S. Supreme Court decisions closely, courts in almost every state have defined at least some state constitutional criminal procedure rights more broadly than the federal standard.<sup>69</sup> These decisions have expanded the protections of state constitutions beyond the analogous protections of the federal Bill of Rights in areas including: searches incident to arrest, searches of automobiles, searches of closed containers, searches of garbage, surreptitious surveillance, repeat interrogations, access to counsel, confessions, line-ups, preliminary hearings, trial by jury, jury selection, confrontation of accusers, impeachment, and speedy trial.<sup>70</sup> In all of these areas, state supreme courts have been more

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<sup>63</sup> *Id.* (footnotes omitted).

<sup>64</sup> *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124 (Mass. 1984); *Dist. Att’y Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1287 (Mass. 1980), *superseded by constitutional amendment*, MASS. CONST. pt. I, art. XXVI.

<sup>65</sup> *State v. Quinn*, 623 P.2d 630, 644 (Or. 1981) (en banc), *overruled in part on other grounds* by *State v. Hall*, 115 P.3d 908, 921 (Or. 2005).

<sup>66</sup> *People v. LaValle*, 817 N.E.2d 341, 366–67 (N.Y. 2004).

<sup>67</sup> *State v. Gerald*, 549 A.2d 792, 815–16 (N.J. 1988), *superseded by constitutional amendment*, N.J. CONST. art. I, ¶ 12, *as recognized in State v. Cruz*, 749 A.2d 832, 836–37 (N.J. 2000).

<sup>68</sup> *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008), *abrogated in part on other grounds* by *State v. Rogers*, 760 N.W.2d 35, 47 (Neb. 2009).

<sup>69</sup> See BARRY LATZER, *STATE CONSTITUTIONS AND CRIMINAL JUSTICE* 1, 3–4, 157 (1991) (examining how court interpretations of the rights of the criminally accused in the fifty state constitutions have expanded the rights of criminal defendants to be more broad than those afforded by the U.S. Constitution).

<sup>70</sup> *Id.* at 3, 51–53, 63–64, 68–70, 90–93, 97–98, 111–15, 118–20, 131–33, 157–58 (discussing the split in states over whether to apply the federal Bill of Rights to defendants or expand the state rights beyond what the federal Constitution provides; the trend has moved toward states expanding individual liberties in areas of criminal law); 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 14, 16 (G. Alan Tarr & Robert F. Williams eds., 2006).

willing than the U.S. Supreme Court to exclude incriminating evidence, overturn convictions, and allow criminals to go free, in order to protect individual rights and liberties.<sup>71</sup>

### C. Right to Desegregated Schools

During the 1970s, the scope of the right to desegregated schools was one of the most controversial areas of constitutional law, as civil rights groups sought to achieve the elusive vision of *Brown v. Board of Education*<sup>72</sup> by expanding court-ordered busing. In a series of cases including *Swann v. Board of Education*,<sup>73</sup> *Keyes v. School District No. 1*,<sup>74</sup> and *Milliken v. Bradley*,<sup>75</sup> the U.S. Supreme Court placed limits on these remedies.<sup>76</sup> The Court concluded that in situations where schools districts had not intentionally segregated students on the basis of race—in legal terms, where the segregation was *de facto* rather than *de jure*—the Constitution generally did not require remedial measures.<sup>77</sup> This distinction made a great difference in the many school districts that were segregated due to residential patterns rather than as a result of discriminatory policies designed to separate children based on their race.<sup>78</sup> Most state courts accepted this standard, but the California Supreme Court did not.<sup>79</sup> California's high court was committed to the view that racial imbalances in public school districts were unconstitutional no matter the cause.<sup>80</sup>

California was home to many districts where it was difficult to establish that officials were intentionally segregating students on the basis of race.<sup>81</sup> The massive Los Angeles Unified School District was one of those districts, and litigants had long sought court orders forcing the district to desegregate its schools through racial

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<sup>71</sup> See LATZER, *supra* note 69, at 3–4, 157–58.

<sup>72</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that racial segregation by means of “separate but equal” schools is a violation of equal protection and therefore unconstitutional).

<sup>73</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30–31 (1971).

<sup>74</sup> *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 203–04 (1973).

<sup>75</sup> *Milliken v. Bradley*, 418 U.S. 717, 725–26 (1974).

<sup>76</sup> *Id.* at 743–44; *Keyes*, 413 U.S. at 193, 200–02; *Swann*, 402 U.S. at 16–18, 32.

<sup>77</sup> See *Milliken*, 418 U.S. at 744–45; *Keyes*, 413 U.S. at 193; *Swann*, 402 U.S. at 17–19.

<sup>78</sup> See *Milliken*, 418 U.S. at 725–26, 744–45; *Keyes*, 413 U.S. at 201–03, 210–12; *Swann*, 402 U.S. at 7, 20–21.

<sup>79</sup> *Crawford v. Bd. of Educ. of the City of L.A.*, 551 P.2d 28, 36 (Cal. 1976) (en banc).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., *id.* at 36–39 (deemphasizing characterization of *de facto* and *de jure* segregation when the exact cause is unknown).

assignments and busing.<sup>82</sup> When the U.S. Supreme Court determined that the federal Constitution did not require remedial action for *de facto* segregation, the California Supreme Court—in *Crawford v. Board of Education of the City of Los Angeles*—turned to its state constitution’s equal protection provision to mandate the opposite result.<sup>83</sup>

#### D. Abortion Rights

The late 1960s and early 1970s also saw a movement emerge in the United States to liberalize abortion laws, with proponents increasingly framing their arguments in terms of the woman’s right to privacy and reproductive choice.<sup>84</sup> In California, the state supreme court issued decisions in 1969 and 1972 invalidating two iterations of the state’s abortion statutes.<sup>85</sup> These decisions recognized a fundamental constitutional right to an abortion, anticipating the U.S. Supreme Court’s decision in *Roe v. Wade*.<sup>86</sup> In *Roe*, the U.S. Supreme Court held that an implied constitutional “right of privacy”—which it had recognized in previous cases—was “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>87</sup> The Court denied that the right was absolute or that the woman “is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses.”<sup>88</sup> Instead, the Court held that under limited circumstances, states could regulate or even prohibit abortion for the purpose of preserving and protecting the pregnant woman’s health or protecting what it called “the potentiality of human life.”<sup>89</sup> Under *Roe*’s trimester framework, the state’s interests—and its ability to regulate or prohibit abortion—purportedly increased as

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<sup>82</sup> *Id.* at 46.

<sup>83</sup> *Id.* at 39.

<sup>84</sup> *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 120 (1973); *People v. Barksdale*, 503 P.2d 257, 261 (Cal. 1972) (en banc); *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969); *State v. Barquet*, 262 So. 2d 431, 434 (Fla. 1972).

<sup>85</sup> *Barksdale*, 503 P.2d at 270–71; *Belous*, 458 P.2d at 206. In 1972, the Florida Supreme Court invoked the due process clauses of both the U.S. Constitution and the Florida Constitution to strike down the state’s criminal abortion statutes as impermissibly vague. *Barquet*, 262 So. 2d at 438. The court did not reach the question of whether the statutes invaded a woman’s right to privacy. *Id.*

<sup>86</sup> *Roe*, 410 U.S. at 154.

<sup>87</sup> *Id.* at 153.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 162.

the pregnancy neared term.<sup>90</sup>

Prior to viability, the woman had a right to terminate her pregnancy without interference by the state.<sup>91</sup> But, in addition—at whatever stage of pregnancy—the right to abortion could not be impaired if the abortion “[was] necessary to preserve the life or health of the mother.”<sup>92</sup> In practice, the health exception was liberally construed and created a barrier for states seeking to proscribe abortion even at late stages of pregnancy.<sup>93</sup>

While the Court sought through *Roe* to settle abortion policy in the United States, the controversy has instead intensified over the past four decades. Despite persistent pressure from pro-life advocates, the Court has never abandoned *Roe*'s core holding that women have a federal constitutional right to choose abortion.<sup>94</sup> On the other hand, over the objections of advocates of abortion rights, the Court has permitted states to enact limited regulations on abortion, so long as the regulations do not place an “undue burden” on the abortion right.<sup>95</sup> For example, the Court has struck down regulations requiring a woman to notify her husband before she has an abortion,<sup>96</sup> but has upheld regulations requiring minors to obtain parental consent to an abortion,<sup>97</sup> as well as regulations requiring informed consent<sup>98</sup> and waiting periods before an abortion may be performed—in all cases, as long as various exceptions are allowed.<sup>99</sup> Moreover, in *Maher v. Roe*<sup>100</sup> and *Harris v. McRae*<sup>101</sup> the Court has allowed state and federal governments to restrict public funding for abortion.

When the U.S. Supreme Court determined that there is no federal constitutional right to public funding for abortion, abortion rights advocates turned to the states to achieve a different result. The

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<sup>90</sup> *Id.* at 162–63, 164–65.

<sup>91</sup> *See id.* at 163.

<sup>92</sup> *Id.* at 163–65.

<sup>93</sup> *See id.* at 164.

<sup>94</sup> *See* Lucy E. Hill, Note, *Seeking Liberty's Refuge: Analyzing Legislative Purpose Under Casey's Undue Burden Standard*, 81 *FORDHAM L. REV.* 365, 371 (2012) (citing *Roe*, 410 U.S. at 163).

<sup>95</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (citations omitted).

<sup>96</sup> *Id.* at 893–95.

<sup>97</sup> *Id.* at 899.

<sup>98</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976).

<sup>99</sup> *Casey*, 505 U.S. at 885–87 (citing *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 450 (1983)).

<sup>100</sup> *Maher v. Roe*, 432 U.S. 464, 470, 474 (1977).

<sup>101</sup> *Harris v. McRae*, 448 U.S. 297, 302, 311, 317–18, 326–27 (1980).

supreme courts of Massachusetts (1981),<sup>102</sup> California (1981),<sup>103</sup> and New Jersey (1982)<sup>104</sup> quickly responded, declaring that their respective state constitutions require the state to pay for an indigent woman's abortion if it provides funding for other health care services. In time, courts in ten other states—Oregon (1984),<sup>105</sup> Connecticut (1986),<sup>106</sup> Vermont (1986),<sup>107</sup> West Virginia (1993),<sup>108</sup> Illinois (1994),<sup>109</sup> Minnesota (1995),<sup>110</sup> Montana (1995),<sup>111</sup> New Mexico (1998),<sup>112</sup> Alaska (2001),<sup>113</sup> and Arizona (2002)<sup>114</sup>—reached similar conclusions.<sup>115</sup> In the same way, while the U.S. Supreme Court held in *Planned Parenthood v. Casey* that various regulations on abortion—such as parental consent, informed consent, and waiting periods—do not violate the federal Constitution,<sup>116</sup> state supreme courts in California,<sup>117</sup> Massachusetts,<sup>118</sup> New Jersey,<sup>119</sup> Minnesota,<sup>120</sup> Alaska,<sup>121</sup> Tennessee,<sup>122</sup> and Florida<sup>123</sup> have defined

<sup>102</sup> *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 405 (Mass. 1981).

<sup>103</sup> *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 806 (Cal. 1981).

<sup>104</sup> *Right to Choose v. Byrne*, 450 A.2d 925, 941 (N.J. 1982).

<sup>105</sup> *Planned Parenthood Ass'n, v. Dep't of Human Resources of Or.*, 663 P.2d 1247, 1261 (Or. Ct. App. 1983), *aff'd on statutory grounds en banc*, 687 P.2d 785 (Or. 1984).

<sup>106</sup> *Doe v. Maher*, 515 A.2d 134, 162 (Conn. Super. Ct. 1986).

<sup>107</sup> *See Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986).

<sup>108</sup> *Women's Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658, 667 (W. Va. 1993).

<sup>109</sup> *See Doe v. Wright*, No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994).

<sup>110</sup> *Women of Minn. v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995).

<sup>111</sup> *See Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995).

<sup>112</sup> *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 857 (N.M. 1998).

<sup>113</sup> *Alaska Dep't of Health & Human Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 915 (Alaska 2001).

<sup>114</sup> *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 37 (Ariz. 2002).

<sup>115</sup> *See* PAUL BENJAMIN LINTON, *ABORTION UNDER STATE CONSTITUTIONS: A STATE BY STATE ANALYSIS* 164, 322–25 (2d ed. 2012) (citations omitted) (discussing Illinois and Montana laws and court cases which struck them down); *Public Funding for Abortion*, AM. CIV. LIBERTIES UNION n.2 (July 21, 2004), <http://www.aclu.org/reproductive-freedom/public-funding-abortion>.

<sup>116</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 887, 899 (1992).

<sup>117</sup> *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 831 (Cal. 1997) (discussing parental notification requirement).

<sup>118</sup> *Planned Parenthood League of Mass., Inc. v. Att'y Gen.*, 677 N.E.2d 101, 109 (Mass. 1997) (eliminating statute requiring parental consent of more than one parent); *Framingham Clinic, Inc. v. Bd. of Selectmen of Southborough*, 367 N.E.2d 606, 610–11 (Mass. 1977) (discussing zoning restriction on abortion clinics); *Doe v. Doe*, 314 N.E.2d 128, 133 (Mass. 1974) (discussing spousal consent).

<sup>119</sup> *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 642–43 (N.J. 2000) (discussing parental notice).

<sup>120</sup> *Women of Minn. v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995).

<sup>121</sup> *State v. Planned Parenthood of Alaska*, 35 P.3d 30, 32 (Alaska 2001) (discussing parental consent).

<sup>122</sup> *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000) (striking down multiple regulations, including: requirement that abortions must be in

the abortion right more broadly and invalidated such regulations.<sup>124</sup>

### *E. Rights of Same-Sex Couples*

In 1972, the U.S. Supreme Court had its first occasion to rule on the issue of whether same-sex couples have a constitutional right to marry. In *Baker v. Nelson*,<sup>125</sup> the Court received a petition for review of a decision by the Minnesota Supreme Court that Minnesota's laws restricting marriage to a union between a man and a woman did not violate the Fourteenth Amendment's Equal Protection Clause.<sup>126</sup> In a summary decision, the U.S. Supreme Court dismissed the appeal for "want of substantial federal question."<sup>127</sup> Normally, appeals come to the U.S. Supreme Court through petitions for writ of certiorari and denials of petitions are not considered rulings on the merits.<sup>128</sup> But because *Baker* came through mandatory appellate review, the Court's decision constituted a substantive ruling. The constitutional question remained largely dormant for the next two decades. Beginning in the 1990s, however, gay rights activists began to pursue a more focused effort to win legal recognition of same-sex relationships, including the right to marry.<sup>129</sup> Significantly, the leaders of this effort were adamant about steering the litigation away from the U.S. Supreme Court, where their prospects were uncertain.<sup>130</sup>

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hospitals; informed consent; physician only counseling; two-day waiting period; medical emergency abortions being performed only to save the mother's life).

<sup>123</sup> N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 639–40 (Fla. 2003) (discussing parental notice); *In re T.W.*, 551 So. 2d 1186, 1196 (Fla. 1989) (discussing parental consent).

<sup>124</sup> See LINTON, *supra* note 115, at 51, 78, 125, 284, 300, 366, 502, 556 (analyzing the states' approaches to abortion regulations); see also *Armstrong v. State*, 989 P.2d 364, 390 (Mont. 1999) (holding that a statute prohibiting otherwise certified physician assistants from performing abortions was unconstitutional); LINTON, *supra* note 115, at 556 n.1 (noting that the Washington Supreme Court has not ruled on the issue, but the court previously struck down a consent requirement without a "judicial bypass mechanism" (citing *State v. Koome* 530 P.2d 260, 263 (Wash. 1975) (en banc))).

<sup>125</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

<sup>126</sup> *Id.* at 187.

<sup>127</sup> See *Baker*, 409 U.S. at 810. In its decision, the Minnesota Supreme Court held: "The equal protection clause of the Fourteenth Amendment . . . is not offended by the state's classification of persons authorized to marry." *Baker*, 191 N.W.2d at 187.

<sup>128</sup> Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1251 (1979) (footnotes omitted).

<sup>129</sup> See William N. Eskridge, Jr., *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 282–85 (2013).

<sup>130</sup> *Id.* at 289.

Instead, they capitalized on the opportunities presented by the new judicial federalism to win marriage rights through state supreme court interpretation of state constitutions.<sup>131</sup>

The first mover was the Hawaii Supreme Court. In *Baehr v. Lewin*,<sup>132</sup> (1993), the court held that the state's marriage statutes created a gender classification that was suspect under the Hawaii Constitution's equality protection guarantees—a decision that paved the way for the state's domestic partner law.<sup>133</sup> Next, in *Baker v. State* (1999),<sup>134</sup> the Vermont Supreme Court declared that under the Vermont Constitution, same sex couples “may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry”<sup>135</sup>—a mandate the legislature initially satisfied through establishment of civil unions.<sup>136</sup> In 2003, the movement achieved a breakthrough when the Massachusetts Supreme Judicial ruled in *Goodridge v. Department of Public Health*<sup>137</sup> that the Massachusetts Constitution guarantees same-sex couples an equal right to marry.<sup>138</sup> In 2006, the New Jersey Supreme Court ruled in *Lewis v. Harris*<sup>139</sup> that “unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution,”<sup>140</sup> but narrowly held that civil unions for same-sex partners could satisfy that requirement.<sup>141</sup> As noted above, in *In re Marriage Cases* (2008), the California Supreme Court found in its state constitution an unqualified right for same-sex couples to marry.<sup>142</sup> The supreme

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<sup>131</sup> *Id.*

<sup>132</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>133</sup> *Id.* at 67.

<sup>134</sup> *Baker v. State*, 744 A.2d 864 (Vt. 1999).

<sup>135</sup> *Id.* at 867.

<sup>136</sup> Act of Apr. 26, 2000, No. 91, § 1, 2000 Vt. Acts & Resolves 72–73.

<sup>137</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>138</sup> *Id.* at 969.

<sup>139</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>140</sup> *Id.* at 200.

<sup>141</sup> *Id.*

<sup>142</sup> *In re Marriage Cases*, 183 P.3d 384, 433–34, 444, 452–53 (Cal. 2008). According to the court, the state constitution's privacy and due process clauses protect a right to marry, and that those provisions “guarantee[] same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage.” *Id.* at 433–34 (footnote omitted). See CAL. CONST. art I, §§ 1, 7. In addition, the court held that the existing marriage laws violated California Constitution's equal protection provision. *Marriage Cases*, 183 P.3d at 452. For the first time, the court held that the state constitution provides the same level of protection against classifications based on sexual orientation as it does against classifications based on

courts of Connecticut (2008)<sup>143</sup> and Iowa (2009)<sup>144</sup> soon issued similar decisions.<sup>145</sup>

Thus, in these five areas of contested state constitutional law (as in others), rights advocates and state courts successfully used the tools of the new judicial federalism to expand the scope of rights at the state level.

### III. DEMOCRATIC RESPONSES TO THE JUDICIAL EXPANSION OF RIGHTS

Judicial definitions of state constitutional rights are not necessarily final because the people can preempt or override these rulings through state constitutional amendments.<sup>146</sup> This section briefly summarizes the methods for amending state constitutions, then looks to the five rights categories discussed above<sup>147</sup> to examine some specific instances where the people have used state constitutional amendments to limit judicial expansion of rights in the states.

The most widely available and frequently used form of state constitutional amendment is the legislative constitutional amendment, or “LCA.”<sup>148</sup> Under this process, a legislature proposes an amendment and refers it to the voters for their approval or rejection.<sup>149</sup> LCAs require the concurrence of both representatives and the people, giving them a high level of democratic legitimacy.<sup>150</sup> A second form of state constitutional amendment is the initiative constitutional amendment, or “ICA,” which is available in some

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race, gender, or religion. *Id.* at 444.

<sup>143</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008).

<sup>144</sup> *Varnum v. Brien*, 763 N.W.2d 862, 906–07 (Iowa 2009).

<sup>145</sup> Meanwhile, courts in several states declined to find a state constitutional right of same-sex couples to marry, or otherwise upheld the traditional definition of marriage. *See Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); *Frandsen v. County of Brevard*, 828 So. 2d 386, 386 (Fla. 2002); *Morrison v. Sadler*, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 990 (Wash. 2006) (en banc).

<sup>146</sup> *See, e.g.*, CAL. CONST. art. II, § 8.

<sup>147</sup> *See* discussion *supra* Part II.

<sup>148</sup> *See* MILLER, *supra* note 56, at 158 (citing 39 COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 11 (2007)).

<sup>149</sup> *See* MILLER, *supra* note 56, at 158 (citing COUNCIL OF STATE GOV’TS, *supra* note 149, at 11).

<sup>150</sup> *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1512 (1990).

form in eighteen states.<sup>151</sup> This process allows citizens to propose constitutional amendments and to gather sufficient petition signatures to place the amendment on the ballot for ratification by the people.<sup>152</sup> In most states, the initiative constitutional amendment process completely bypasses the legislature; in two states—Mississippi and Massachusetts—the process is “indirect.”<sup>153</sup> In those states, the people must submit initiative constitutional amendments to the legislature, and in Massachusetts, the legislature can block the proposal from reaching the voters.<sup>154</sup> But in states with no legislative check, the initiative constitutional amendment gives the people a powerful means to override both legislatures and courts when they contravene the people’s will.<sup>155</sup> Finally, state constitutions can be amended (or replaced) through constitutional conventions, a formerly popular system of state constitution making that has declined in recent decades.<sup>156</sup>

It is important to note that many rights-expanding judicial decisions have not generated widespread popular opposition or attempts at override through either legislative or initiative constitutional amendments. But as courts have promoted the rights revolution in state constitutional law, use of court-constraining state constitutional amendments has grown. Citizens have voted on numerous amendments to overturn or preempt rights-expanding decisions in a number of subjects, including the five areas discussed above—capital punishment, criminal procedure, racial desegregation, abortion, and same-sex marriage.<sup>157</sup> These amendments demonstrate that the people have, in fact, frequently voted to limit, or withdraw, state constitutional rights that exceed federal minimums.

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<sup>151</sup> See MILLER, *supra* note 56, at 158 n.9 (citing M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 12 (2003)).

<sup>152</sup> MILLER, *supra* note 56, at 158.

<sup>153</sup> *Id.* at 158 n.9 (citing WATERS, *supra* note 151, at 12).

<sup>154</sup> Eule, *supra* note 151, at 1511; MASS. CONST. art. XLVIII, pt. IV, §§ 1-4.

<sup>155</sup> In states with the initiative process, citizens can use state constitutional amendments to constrain legislatures as well as courts. See MILLER, *supra* note 56, at 158.

<sup>156</sup> G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century: The Agenda of State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1079 (2005)). All states allow for the calling of state constitutional conventions and fourteen states provide for mandatory referendums that allow for a popular vote on whether to call a convention. See John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395, 395 (2010) (citing Tarr & Williams, *supra*, at 1079).

<sup>157</sup> See discussion *infra* Part III.A–E.

*A. Capital Punishment*

If *Anderson* demonstrated the power of a state supreme court to expand rights beyond the mandates of the federal Constitution, it also highlighted a counter-power in state constitutional law—the power of the people to overturn court decisions that expand state constitutional rights. The *Anderson* decision set off what one court watcher called “a fire bell in the night.”<sup>158</sup> Citizen groups quickly mobilized to amend the state constitution and reinstate capital punishment in the state.<sup>159</sup> The ballot statement supporting the proposed amendment emphasized the priority of the people over the court in deciding this constitutional question:

This proposition qualified for a place on this ballot because over one million Californians signed petitions in one of the most successful initiative drives in the history of California. They did this so that the people of this state would have the opportunity to vote on this critical issue.

We are faced with a question of the utmost gravity. The people of this state, rather than the Court, now have the opportunity to decide whether or not they need the death penalty for the protection of innocent citizens. Accept that responsibility and vote YES on Proposition 17.<sup>160</sup>

In November 1972, nine months after the court’s decision in *Anderson*, Californians approved Proposition 17—now California Constitution article I, section 17—by a sixty-eight percent affirmative vote.<sup>161</sup> Voters thus overturned *Anderson* and eliminated what many considered a profound right—the right against execution by the state.<sup>162</sup>

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<sup>158</sup> Barry Latzer, *California’s Constitutional Counterrevolution*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 155, 156 (G. Alan Tarr, ed., 1996).

<sup>159</sup> Ed Meagher, *Reagan Says Court Puts Itself “Above the Will of the People,”* L.A. TIMES, Feb. 18, 1972, at 3. The amendment read, in part: “The death penalty . . . shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of article 1, section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.” CAL. CONST. art. I, § 27.

<sup>160</sup> GEORGE DEUKMEJIAN ET AL., PROPOSED AMENDMENTS TO CONSTITUTION: PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS 42, 43 (1972) (arguing in favor of the amendment, titled Proposition 17).

<sup>161</sup> BILL JONES, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 6 (1998).

<sup>162</sup> After the election, the California Supreme Court affirmed the validity of the people’s decision. *People v. Frierson*, 599 P.2d 587, 614 (Cal. 1979) (en banc). *But see* *People v. Bean*, 760 P.2d 996, 1021 (Cal. 1988) (en banc) (declaring that the judiciary retains authority to

Citizens in other states have also overturned or preempted judicial decisions expanding rights against execution. Voters in Massachusetts (1982)<sup>163</sup> and Oregon (1984)<sup>164</sup> adopted citizen initiated amendments to reinstate capital punishment after supreme courts in those states had voided executions on state constitutional grounds.<sup>165</sup> In 1992, the legislature and voters of New Jersey overturned a 1988 state Supreme Court decision declaring that capital punishment violates the New Jersey Constitution if the defendant did not knowingly or intentionally cause death.<sup>166</sup> In addition, in 1998 and 2002, the Florida legislature and electorate adopted state constitutional amendments designed to prevent their state supreme courts from declaring that the death penalty violates the state constitution.<sup>167</sup> The 2002 amendment included “lockstep” or “forced linkage” language that binds the state court to interpret state constitutional rights no more broadly than the U.S. Supreme Court interprets analogous federal constitutional rights.<sup>168</sup>

The lockstep provision of article I, section 17 of the Florida Constitution reads as follows:

The death penalty is an authorized punishment for capital

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prohibit the death penalty on state constitutional grounds so long as it did not rule that the death penalty is inherently cruel or unusual).

<sup>163</sup> Massachusetts Question 2 of 1982 became Massachusetts Constitution article 26, section 27. The amendment declared: “[n]o provision of the Constitution . . . shall be construed as prohibiting the imposition of the punishment of death.” MASS. CONST. art. XXVI, § 27. Two years later, however, the Massachusetts Supreme Judicial Court pushed back and held that the reinstated capital punishment law violated article 12 of the Massachusetts Constitution’s Declaration of Rights—defendant’s right against self-incrimination and right to trial by jury. *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 124 (Mass. 1984).

<sup>164</sup> Oregon Measure 7 was passed on November 6, 1984. See Or. Sec’y of State, *Initiative, Referendum and Recall: 1980–1987*, OR. BLUE BOOK, <http://bluebook.state.or.us/state/elections/elections20.htm> (last visited Aug. 4, 2013).

<sup>165</sup> See, e.g., *State v. Quinn*, 623 P.2d 630, 644 (Or. 1981) (en banc) *overruled in part on other grounds* by *State v. Hall*, 115 P.3d 908, 921 (Or. 2005).

<sup>166</sup> *State v. Gerald*, 549 A.2d 792, 818 (N.J. 1988), *superseded by constitutional amendment*, N.J. CONST. art. I, ¶ 12, *as recognized in State v. Cruz*, 749 A.2d 832, 836–37 (N.J. 2000). The constitutional amendment reads:

It shall not be cruel and unusual punishment to impose the death penalty on a person convicted of purposely or knowingly causing death or purposely or knowingly causing serious bodily injury resulting in death who committed the homicidal act by his own conduct or who as an accomplice procured the commission of the offense by payment or promise of payment or anything of pecuniary value.

N.J. CONST. art. I, ¶ 12.

<sup>167</sup> FLA. CONST. art. I, § 17.

<sup>168</sup> *Id.*

crimes designated by the legislature. The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution. Any method of execution shall be allowed, unless prohibited by the United States Constitution.<sup>169</sup>

### *B. Criminal Procedure*

Meanwhile, as the California Supreme Court handed down a series of decisions expanding rights of criminal defendants, many Californians became concerned that the state had become too tolerant of criminals and insufficiently concerned about their victims. In 1982, anti-crime activists qualified an initiative constitutional amendment they called the "Victims' Bill of Rights."<sup>170</sup> The initiative's provisions were designed to override state supreme court decisions that created an expansive state constitutional right to exclude certain evidence in criminal trials, and to limit these rights to the federal standard.<sup>171</sup> In June 1982, voters adopted the measure, which, in part, became California Constitution article I, section 28.<sup>172</sup> As legal scholars J. Clark Kelso and Brigitte A. Bass observed, the Victims' Bill of Rights initiative succeeded in abrogating no fewer than twenty-seven leading cases of the Supreme Court of California. Those leading cases were of course relied upon in subsequent decisions by

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<sup>169</sup> *Id.* See Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 664-66 (1987), for a discussion of forced linkage in Florida.

<sup>170</sup> CAL. CONST. art. I, § 28(d).

<sup>171</sup> *Id.* The amendment was presented to voters as Proposition 8 of 1982. JONES, *supra* note 162, at 6. The "truth in evidence" provision limiting the state's exclusionary rule is now California Constitution article I, section 28(f)(2). That provision reads as follows:

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court.

CAL. CONST. art. I, § 28(f)(2). The California Supreme Court has rejected multiple challenges to the amendment. See *In re Lance W.*, 694 P.2d 744, 769-70 (Cal. 1985) (en banc); *Brosnahan v. Brown*, 651 P.2d 274, 289 (Cal. 1982) (en banc).

<sup>172</sup> CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION 32-33 (June 8, 1982), available at [http://librarysource.uchastings.edu/ballot\\_pdf/1982p.pdf](http://librarysource.uchastings.edu/ballot_pdf/1982p.pdf).

the supreme court and by lower courts in California. In total, there are well over one thousand appellate cases that were affected by [the amendment] . . . . It is a rare piece of legislation or judicial decision that, in one stroke, accomplishes such a remarkable result.<sup>173</sup>

Also in 1982, an anti-crime movement in Florida proposed a state constitutional amendment to rein in the state supreme court's expansive protections in the area of search and seizure. Proponents drafted an amendment to add a new lockstep provision to article I, section 12 of the Florida Constitution, stating that "[t]his right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court."<sup>174</sup> Florida voters approved the amendment, thereby effectively overturning numerous state court decisions and eliminating their state's independent protections against government searches and seizures.<sup>175</sup>

In 1990, Californians again sought to scale back the state supreme court's expansive interpretations of the rights of criminal defendants by adopting Proposition 115, known as the "Crime Victims Justice Reform Act." This amendment and corresponding statutory provisions limited the state constitutional rights of criminal defendants in several areas, including the use of post-indictment preliminary hearings, *voir dire*, hearsay evidence, joinder and severance of cases, and discovery.<sup>176</sup> Moreover, the amendment included a lockstep provision that sought to restrict a

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<sup>173</sup> 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, 865–66 (1992) (footnotes omitted); Latzer, *supra* note 159, at 165–66 (footnote omitted).

<sup>174</sup> Florida Constitution article I, section 12 reads as follows:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.*

FLA. CONST. art. I, § 12 (emphasis added).

<sup>175</sup> See *State v. Lavazzoli*, 434 So. 2d 321, 323–24 (Fla. 1983) (interpreting the amendment and holding that it cannot be applied retroactively).

<sup>176</sup> 1990 Cal. Legis. Serv. 32–33 (West).

wide range of state constitutional criminal justice rights to the federal constitutional standard.<sup>177</sup> After the people adopted the amendment, the California Supreme Court invalidated its lockstep clause on state constitutional grounds, but upheld the measure's other rights-restricting provisions.<sup>178</sup>

### C. Racial Desegregation

During the 1970s, voters in California, Colorado, and Massachusetts adopted state constitutional amendments designed to restrict court-ordered remedies for racial segregation of public schools.<sup>179</sup> The California initiative constitutional amendment—known as Proposition 1 of 1979—was specifically designed to overturn the California Supreme Court's decision to expand state constitutional rights beyond federal constitutional minimums.<sup>180</sup> As noted above, the U.S. Supreme Court had held that the federal Constitution required remedial action only for intentional, *de jure* segregation,<sup>181</sup> but the California Supreme Court had held several times—most recently in *Crawford v. Board of Education* (1976)—that the California Constitution required that school districts remedy racial imbalances in the schools, whether *de jure* or *de facto*.<sup>182</sup> Proposition 1 sought to limit these remedies and thus narrow the scope of the state constitutional right to desegregated schools.<sup>183</sup> In a special election, California voters adopted this

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<sup>177</sup> *Id.* at 33. The preamble to the amendment stated:

We the people . . . find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have unnecessarily expanded the rights of accused criminals beyond that which is required by the United States Constitution.

*Id.*

<sup>178</sup> *Raven v. Deukmejian*, 801 P.2d 1077, 1085, 1088–90 (Cal. 1990) (en banc) (holding that the lockstep provision was invalid because it effected a constitutional “revision” rather than an “amendment” and thus exceeded the people’s power through the initiative process). The court did not disturb the measure’s other provisions. *Id.* at 1088–90. See discussion *infra* Part IV.

<sup>179</sup> The Colorado and Massachusetts state constitutional amendments were popular responses to federal court-ordered busing; these amendments had no ability to override federal constitutional law. See Dinan, *supra* note 13, 1005–06.

<sup>180</sup> See *Crawford v. Bd. of Educ. of the City of L.A.*, 458 U.S. 527, 530–32 (1982); see also Dinan, *supra* note 13, at 1006 (discussing the purpose of the 1979 California amendment).

<sup>181</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) (explaining that a remedy would only be appropriate in circumstances where discriminatory acts of schools or districts have been a substantial cause for inter-district segregation).

<sup>182</sup> *Crawford v. Bd. of Educ. of the City of L.A.*, 551 P.2d 28, 33–34 (Cal. 1976) (en banc).

<sup>183</sup> As amended, article 1, section 7(a) of the California Constitution now reads, in part:

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amendment, thus again overriding the state supreme court and eliminating a right formerly recognized under the state constitution.<sup>184</sup>

#### *D. Abortion*

In the years since the U.S. Supreme Court's 1973 decision in *Roe v. Wade*, pro-life state legislators and citizens have qualified twenty-one state constitutional amendments seeking to eliminate or limit state constitutional rights to abortion, including two amendments that have qualified for a vote in 2014.<sup>185</sup> To date, the amendments have appeared on ballots in Arizona, Arkansas, California, Colorado, Florida, Massachusetts, Mississippi, Ohio, Oregon, Rhode Island, and South Dakota, with additional amendments pending in North Dakota and Tennessee.

Most of these proposed amendments have sought to preempt or overturn state court decisions establishing state constitutional abortion rights above the federal minimum, including the right to government funding for abortions and the right of a minor to seek an abortion without first notifying her parents.<sup>186</sup> While voters have rejected most of these amendments, they have adopted

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A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

CAL. CONST. art. I, § 7(a).

<sup>184</sup> See generally *Crawford*, 458 U.S. at 531–32, 534–35 (discussing how the amendment to the state constitution would conform the powers of the state courts to those exercised by federal courts). For a summary of the voting percentages, see *id.* at 532 n.5.

<sup>185</sup> See John Dinan, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV. 1007, 1023–24 (2011); see, e.g., S.J. Res. 127, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (indicating Tennessee citizens will vote on an amendment relative to abortion in 2014).

<sup>186</sup> See, e.g., ARK. CONST. amend. 68, § 1 (restricting the use of public funds for abortions); FLA. CONST. art. 10, § 22 (requiring notification to a parent of a minor before an abortion, but providing for exceptions where a waiver could be obtained).

several. In 1984, voters in Colorado approved an amendment restricting public funding for abortions.<sup>187</sup> In 1988, voters in Arkansas approved an amendment that banned public funding for abortion and included a lockstep provision limiting abortion rights in Arkansas to those contained in the Federal Constitution.<sup>188</sup> And in 2004, voters in Florida approved a state constitutional amendment authorizing the adoption of a parental notice requirement.<sup>189</sup> In 2014, voters in Tennessee will have an opportunity to overturn their state Supreme Court's ruling in *Planned Parenthood of Middle Tennessee v. Sundquist* (2000),<sup>190</sup> which invoked the state constitution to expand abortion rights and

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<sup>187</sup> Colorado Amendment 3 of 1984 (codified as amended at COLO. CONST. art. V, § 50); *Urbish v. Lamm*, 71 P.2d 756, 759–60 (Col. 1988); *Statewide Initiative Usage, INITIATIVE & REFERENDUM INST. UNIV. S. CAL.*, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20at%20the%20Statewide%20Level/Usage%20history/Colorado.pdf>.

The text reads:

No public funds shall be used by the State of Colorado, its agencies or political subdivisions to pay or otherwise reimburse, either directly or indirectly, any person, agency or facility for the performance of any induced abortion, PROVIDED HOWEVER, that the General Assembly, by specific bill, may authorize and appropriate funds to be used for those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each.

COLO. CONST. art. V, § 50. This amendment's funding restrictions were invalidated in part on federal preemption grounds in *Hern v. Beye*. *Hern v. Beye*, 57 F.3d 906, 912–13 (10th Cir. 1995), *cert. denied sub nom. Weil v. Hern*, 516 U.S. 1011 (1995).

<sup>188</sup> ARK. CONST. amend. 83, § 1–2 (adopted by voters in 1988). The text reads: "No public funds will be used to pay for any abortion, except to save the mother's life. . . . The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution." *Id.* This amendment's funding restrictions were invalidated in part on federal preemption grounds in *Dalton v. Little Rock Family Planning Services*. *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 477–78 (1996).

<sup>189</sup> Article X, section 22 to the Florida Constitution, approved by voters in 2004, reads as follows:

The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

FLA. CONST. art. X, § 22. In addition, in 1986, voters in Rhode Island adopted a constitutional provision stipulating that "[n]othing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof." R.I. CONST. art. I, § 2. *See also Rhode Island Charter Change Would Bar Abortion Support*, N.Y. TIMES, July 13, 1986, at 33 (discussing the one-hundred-member constitutional convention that proposed the amendment for ballot).

<sup>190</sup> *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000).

strike down a number of abortion regulations.<sup>191</sup>

For more than three decades, citizens have been voting on abortion rights. Although U.S. Supreme Court decisions have constrained the people's ability to ban abortion or impose what the Court has called an "undue burden" on abortion rights, the scope of those rights is still repeatedly contested at the state level. Sometimes, state courts have expanded abortion rights beyond federal minimums;<sup>192</sup> other times, voters have acted to preempt or override courts by restricting these rights as far as the prevailing interpretation of the U.S. Constitution will allow.

### *E. Same-Sex Relationships*

Efforts by gay rights advocates to win legal recognition of same-sex relationships—including full marriage rights for same-sex couples—through state constitutional litigation have generated popular opposition and have prompted widespread use of state constitutional amendments to preempt or override judicial recognition of these asserted rights. For example, when the Hawaii Supreme Court declared that the state's marriage laws created classifications that were suspect under the state constitution, the Hawaii legislature and the people resisted the decision.<sup>193</sup> Lawmakers drafted an amendment to the state constitution to override the court by specifically authorizing the statutory limitation of marriage to a man and a woman, and Hawaii voters approved the amendment by a 69.2 to 28.6 percent margin.<sup>194</sup>

Over time, voters in thirty-one states have approved

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<sup>191</sup> *Id.* at 4. The text of the proposed Tennessee amendment provides that, "[n]othing in this Constitution secures or protects a right to abortion or requires the funding of an abortion." S. J. Res. 127, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

<sup>192</sup> See, e.g., *Sundquist*, 38 S.W.3d at 4.

<sup>193</sup> See generally Philip L. Bartlett II, *Recent Legislation: Same-Sex Marriage*, 36 HARV. J. ON LEGIS. 581, 581–82 (1999) (explaining how a history of tension between branches of the Hawaii government led to the passage of the amendment).

<sup>194</sup> See generally *1998 General Election Results*, ST. OF HAW. (Nov. 3, 1998), <http://hawaii.gov/elections/results/1998/general/98swgen.htm> (noting the amendment's passage with 69.2 percent approval, 28.6 percent opposition, and 2.2 percent blank or over votes). See also HAW. CONST. art. I, § 23 ("The Legislature shall have the power to reserve marriage to opposite-sex couples."). In addition, in 1998, a state trial court in Alaska demanded that the state show compelling reasons not to issue marriage licenses to same-sex couples. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743, at \*3 (Sup. Ct. Alaska Feb. 27, 1998), *aff'd*, 21 P.3d 357 (Alaska 2001). But before the issue could be reviewed on appeal, citizens of the state adopted an amendment restricting marriage to a union between a man and a woman. ALASKA CONST. Art. I, § 25.

constitutional amendments expressly limiting the definition of marriage to a union between a man and a woman or, in Hawaii's case, authorizing the legislature to do so. These states are: Alaska (1998),<sup>195</sup> Hawaii (1998),<sup>196</sup> Nebraska (2000),<sup>197</sup> Nevada (2000/2002),<sup>198</sup> Arkansas (2004),<sup>199</sup> Georgia (2004),<sup>200</sup> Kentucky (2004),<sup>201</sup> Louisiana (2004),<sup>202</sup> Michigan (2004),<sup>203</sup> Missouri (2004),<sup>204</sup> Mississippi (2004),<sup>205</sup> Montana (2004),<sup>206</sup> North Dakota (2004),<sup>207</sup> Ohio (2004),<sup>208</sup> Oklahoma (2004),<sup>209</sup> Oregon (2004),<sup>210</sup> Utah (2004),<sup>211</sup> Kansas (2005),<sup>212</sup> Texas (2005),<sup>213</sup> Alabama (2006),<sup>214</sup> Colorado (2006),<sup>215</sup> Idaho (2006),<sup>216</sup> South Carolina (2006),<sup>217</sup> South Dakota (2006),<sup>218</sup> Tennessee (2006),<sup>219</sup> Virginia (2006),<sup>220</sup> Wisconsin (2006),<sup>221</sup> Arizona (2008),<sup>222</sup> California (2008),<sup>223</sup> Florida (2008),<sup>224</sup> and North Carolina (2012).<sup>225</sup> Most of these amendments came in 2004–06, in the wake of the Massachusetts Supreme Judicial

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<sup>195</sup> ALASKA CONST. art. I, § 25.

<sup>196</sup> HAW. CONST. art. I, § 23.

<sup>197</sup> NEB. CONST. art. I, § 29.

<sup>198</sup> NEV. CONST. art. I, § 21.

<sup>199</sup> ARK. CONST. amend. 83, § 1.

<sup>200</sup> GA. CONST. art. I, § 4. ¶ 1.

<sup>201</sup> KY. CONST. § 233A.

<sup>202</sup> LA. CONST. art. XII, § 15.

<sup>203</sup> MICH. CONST. art. I, § 25.

<sup>204</sup> MO. CONST. art. I, § 33.

<sup>205</sup> MISS. CONST. art. 14, § 263A.

<sup>206</sup> MONT. CONST. art. XIII, § 7.

<sup>207</sup> N.D. CONST. art. XI, § 28.

<sup>208</sup> OHIO CONST. art. XV, § 11.

<sup>209</sup> OKLA. CONST. art. II, § 35.

<sup>210</sup> OR. CONST. art. XV, § 5a.

<sup>211</sup> UTAH. CONST. art. I, § 29.

<sup>212</sup> KAN. CONST. art. 15, § 16.

<sup>213</sup> TEX. CONST. art. I, § 32.

<sup>214</sup> ALA. CONST. art. I, § 36.03.

<sup>215</sup> COLO. CONST. art. II, § 31.

<sup>216</sup> IDAHO CONST. art. III, § 28.

<sup>217</sup> S.C. CONST. art. XVII, § 15.

<sup>218</sup> S.D. CONST. art. XXI, § 9.

<sup>219</sup> TENN. CONST. art. XI, § 18.

<sup>220</sup> VA. CONST. art. I, § 15-A.

<sup>221</sup> WIS. CONST. art. XIII, § 13.

<sup>222</sup> ARIZ. CONST. art. XXX, § 1.

<sup>223</sup> CAL. CONST. art. I, § 7.5.

<sup>224</sup> FLA. CONST. art. I, § 27.

<sup>225</sup> N.C. CONST. art. XIV, § 6. In November 2012, voters in Minnesota defeated a proposed state constitutional amendment defining marriage as a union between a man and a woman, breaking a long streak of victories for such amendments. Erik Eckholm, *As Victories Pile Up, Gay Rights Advocates Cheer 'Milestone Year'*, N.Y. TIMES, Nov. 8, 2012, at P7.

Court's 2003 decision mandating equal marriage rights for same-sex couples. Some of these amendments focused only on the definition of marriage; others also prohibited the establishment of other legal arrangements substantially similar to marriage, such as domestic partnerships or civil unions.<sup>226</sup>

While the *Goodridge* decision triggered preemptive constitutional amendments in many states, voters in Massachusetts were unable to vote on the issue.<sup>227</sup> After the Massachusetts Supreme Judicial Court handed down its ruling, proponents of traditional marriage attempted to override the decision by amending the Massachusetts Constitution through the initiative process.<sup>228</sup> The state legislature, however, prevented the amendment from reaching the ballot.<sup>229</sup> Because Massachusetts lacks a direct form of initiative constitutional amendment, its citizens do not have the same ability as citizens in some other states to bypass the legislature and submit an amendment directly to the people for the approval or rejection.<sup>230</sup> As a consequence, Massachusetts voters have never had a direct, up-or-down vote on extending marriage rights to same-sex couples.<sup>231</sup> The same is true for voters in Connecticut and Iowa, other states where courts have recognized a state constitutional right of same-sex couples to marry.<sup>232</sup>

The story was different in California, where citizens have access to a direct form of initiative constitutional amendment.<sup>233</sup> Under that system, proponents of an amendment can submit an

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<sup>226</sup> In one example, in 2004 the people of Louisiana adopted a legislative state constitutional amendment that read as follows:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

LA. CONST. art. XII, § 15.

<sup>227</sup> Stephen Smith, *Same-Sex Marriage Win in Boston*, CBS NEWS (July 8, 2010, 5:55 PM), <http://www.cbsnews.com/stories/2005/09/14/national/main846230.shtml>.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> WATERS, *supra* note 151, at 26.

<sup>231</sup> Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012, 2:24 PM), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage>.

<sup>232</sup> *Id.*

<sup>233</sup> WATERS, *supra* note 151, at 23.

amendment directly to voters.<sup>234</sup> In early 2008, before the California Supreme Court handed down its decision in *In re Marriage Cases*, proponents of traditional marriage were already engaged in the process of circulating petitions to qualify a constitutional amendment for the ballot.<sup>235</sup> When the court issued its decision, the proponents were ready to give voters an opportunity to overturn the ruling.<sup>236</sup> In November 2008, voters approved the amendment, known as Proposition 8, by a 52–48 percent margin.<sup>237</sup>

The differences described above demonstrate that the state model of constitutional rights interpretation varies from state to state, and that state-level rules for constitutional amendment can have substantive consequences. In states like California, with a direct form of the initiative constitutional amendment process, citizens have greater ability to override state courts and to shape state constitutional interpretation than do citizens in some other states.

#### IV. LIMITS ON REFERENDUMS ON RIGHTS

While a state constitutional amendment is a powerful check on judicial expansion of rights, both state and federal law limit the process.<sup>238</sup>

##### A. State Constraints

First, the power of state constitutional amendment is limited by state constitutions themselves in ways that vary from state to state. For example, some states permit the people to amend their state constitution through the initiative process, but prohibit initiative constitutional amendments on certain subjects.<sup>239</sup> For example, the

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<sup>234</sup> *Id.* at 22–23.

<sup>235</sup> Bill Ainsworth, *Groups Jousting over Gay Rights in California*, SAN DIEGO UNION-TRIB. (Nov. 12, 2007), <http://legacy.utsandiego.com/news/state/20071112-9999-1n12gayright.html>.

<sup>236</sup> *California's Proposition 8 (Same-Sex Marriage)*, N.Y. TIMES (Feb. 7, 2012), [http://topics.nytimes.com/top/reference/timestopics/subjects/c/californias\\_proposition\\_8\\_sames\\_ex\\_marriage/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/c/californias_proposition_8_sames_ex_marriage/index.html) (last visited Aug. 25, 2013).

<sup>237</sup> *Id.* Proposition 8 of 2008 was codified in the California Constitution. It reads: “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5. *declared unconstitutional in Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), *appeal vacated for lack of standing sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). *See infra* Part IV.B.

<sup>238</sup> *See infra* Part IV.A–B (discussing both state and federal constraints).

<sup>239</sup> *See, e.g.*, MISS. CONST. art. 15, § 273 (laying out several instances when the initiative

Massachusetts Constitution declares that “[n]o proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative”<sup>240</sup> and the Mississippi Constitution states that “[t]he initiative process shall not be used . . . [f]or the proposal, modification, or repeal of any portion of the Bill of Rights of this Constitution.”<sup>241</sup>

A more technical limitation requires that an amendment may contain only one subject. This rule, known as the “single subject rule,” is said to limit logrolling, prevent the drafting of unwieldy or deceptive measures, and protect voters from confusion.<sup>242</sup> In practice, however, the malleability of the term “subject” can make the rule a large hurdle to the amendment power. Supreme courts in some states, including Florida and Colorado, have aggressively enforced single subject rules to block or invalidate many proposed constitutional amendments.<sup>243</sup> Another limitation on the amendment power is the no-revision rule, which states that a citizen-initiated amendment may only *amend*, but not *revise* the state constitution.<sup>244</sup> The California Supreme Court invoked this rule to invalidate in part a 1990 citizen-initiated constitutional amendment, Proposition 115.<sup>245</sup> As noted above, that amendment contained limitations on specific rights of criminal procedure, as

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process cannot be utilized).

<sup>240</sup> MASS. CONST. art. 48, init., pt. 2, § 2. Some have contended that the Massachusetts restrictions on initiatives ban measures designed to overturn judicial decisions establishing state constitutional rights. *Schulman v. Attorney Gen.*, 850 N.E.2d 505, 508–09 (Mass. 2006). But in *Schulman*, the Massachusetts Supreme Judicial Court upheld the people’s ability to use the initiative process to attempt to override the court’s decision establishing a state constitutional right of same-sex couples to marry by citing *Albano v. Attorney General*. *Id.* at 510 n.12. “[T]he initiative process permits the people to petition for a constitutional amendment that overrules a court decision when the court has declared a statute to be in violation of our Constitution.” *Id.* (quoting *Albano v. Attorney Gen.*, 769 N.E.2d 1242, 1246 (Mass. 2002)). See also *Mazzone v. Attorney Gen.*, 736 N.E.2d 358, 369 (Mass. 2000).

<sup>241</sup> MISS. CONST. art. XV, § 273(5)(a).

<sup>242</sup> Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 45 (2002).

<sup>243</sup> See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 145–47 (2002). In addition, since the late 1990s, the Oregon Supreme Court has aggressively enforced a related restriction, the state constitution’s “separate vote requirement,” or “one amendment rule” for state constitutional amendments. See *Armatta v. Kitzhaber*, 959 P.2d 49, 51, 58–60 (Or. 1998). For a critique of strict enforcement of single subject rules, see Lowenstein, *supra* note 243, at 44 (citing Daniel H. Lowenstein, *California Initiatives and the Single Subject Rule*, 30 UCLA L. REV. 936 (1983)).

<sup>244</sup> See, e.g., *Raven v. Deukmejian*, 801 P.2d 1077, 1085 (Cal. 1990) (citing CAL. CONST. art. XVIII, § 3).

<sup>245</sup> *Raven*, 801 P.2d at 1089.

well as lockstep language designed to limit the state courts from interpreting state constitutional rights beyond federal constitutional minimums.<sup>246</sup> After the voters of California adopted the amendment, the California Supreme Court upheld the amendment's specific limitations, but struck down its lockstep provision on the grounds that it violated the no revision rule.<sup>247</sup> Nearly two decades later, when opponents of California's Proposition 8 asserted that the amendment violated the same no revision rule, the California Supreme Court disagreed. In *Strauss v. Horton*,<sup>248</sup> the court held that Proposition 8 did not constitute the kind of fundamental alteration to the constitutional structure that requires a constitutional revision rather than amendment.<sup>249</sup>

### B. Federal Constraints

Second and more importantly, the power of voters to define rights at the state level is limited by federal supremacy over state law.<sup>250</sup> The U.S. Constitution creates a floor for the protection of

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<sup>246</sup> The proposed lockstep provision of California Proposition 115 stated:

In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

CAL. CONST. art. I, § 24.

<sup>247</sup> The court reasoned that "[i]n essence and practical effect, [the lockstep provision] would vest all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court." *Raven*, 801 P.2d at 1087. The provision "not only unduly restricts judicial power, but it does so in a way which severely limits the independent force and effect of the California Constitution," and thus effected "such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, an undertaking beyond the reach of the initiative process." *Id.* at 1080, 1088. *See also* *Bowens v. Superior Court*, 820 P.2d 600, 609 (Cal. 1991) (upholding a separate provision of Proposition 115). In *Bess v. Ulmer*, the Alaska Supreme Court invalidated a proposed lockstep amendment related to criminal procedure on the grounds that it would revise rather than amend the state constitution, but upheld a marriage amendment and a redistricting amendment against the assertion that they violated the state's no revision rule. *Bess v. Ulmer*, 985 P.2d 979, 987–89 (Alaska 1999).

<sup>248</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

<sup>249</sup> *Id.* at 98.

<sup>250</sup> U.S. CONST. art. VI, cl. 2.

fundamental rights and states may not violate this national standard.<sup>251</sup> In a formal sense, the people may choose to define their state constitutional rights below federal minimums, but, if so, the federal right retains its full force.<sup>252</sup> For example, when California voters adopted the “Victims’ Bill of Rights” initiative in 1982, they effectively eliminated the state constitutional right to exclusion of illegally obtained evidence.<sup>253</sup> At that point, the analogous, but narrower, federal constitutional right became the new standard for admission of evidence in California courts.<sup>254</sup>

At times, courts have voided amendments to state constitutions when they determine that the amendments violate federal constitutional norms. A notable example is Colorado’s Amendment 2 of 1992.<sup>255</sup> That amendment read as follows:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>256</sup>

Amendment 2 was exceptionally broad. It sought to overturn all existing laws in Colorado protecting persons against discrimination based on sexual orientation and to ban the future recognition of any

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<sup>251</sup> *See id.*

<sup>252</sup> *See id.*

<sup>253</sup> CAL. CONST. art. I, § 28(f)(2).

<sup>254</sup> *See* *People v. May*, 748 P.2d 307, 312 (Cal. 1988); Latzer, *supra* note 159, at 165. Moreover, the doctrine of federal supremacy requires that state constitutions comply with ordinary federal law when the two are in conflict. Latzer, *supra* note 159, at 165. A number of state constitutional amendments, including some designed to limit abortion rights, have been challenged and invalidated in part on the grounds that they are partially preempted by federal law. *See* *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476 (1996) (“In a pre-emption case such as this, state law is displaced only ‘to the extent that it actually conflicts with federal law.’” (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983))); *Hern v. Beye*, 57 F.3d 906, 910 (10th Cir. 1995), *cert. denied sub nom.* *Weil v. Hern*, 516 U.S. 1011 (1995) (finding that the state’s restriction on Medicaid funding for certain abortions violated federal law and was thus preempted).

<sup>255</sup> COLO. CONST. art. II, § 30b.

<sup>256</sup> *Id.*

such rights by any state government entity—including local governments, the legislature, the executive, or the courts.<sup>257</sup> With respect to courts, the amendment sought to preempt judicial decisions that would recognize *any* state constitutional rights on the basis of sexual orientation.<sup>258</sup> These restrictions were too much for the U.S. Supreme Court to accept.

In *Romer v. Evans*, the Court held that Colorado's Amendment 2 violated the Fourteenth Amendment's Equal Protection Clause because it could not satisfy the Court's doctrinal equal protection requirement that classifications in the law be rationally related to a legitimate end.<sup>259</sup> The Court emphasized that Amendment 2 effected a change in legal status that was "sweeping and comprehensive" in that it sought to prevent gays and lesbians from gaining any legal protection against any form of discrimination based on their sexual orientation.<sup>260</sup> The Court reasoned, "[Amendment 2] is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board."<sup>261</sup> According to the Court, the primary interests the state offered for the amendment—that is, the competing rights of "freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality"—could not support such a broad restriction of the rights of gays and lesbians.<sup>262</sup> The ruling thus established that a state's decision to restrict state-level rights could violate the federal Constitution if the restrictions are so broad that they cannot demonstrate a rational basis.<sup>263</sup>

Nearly two decades later, a Ninth Circuit panel invoked *Romer* in its decision declaring California's Proposition 8 of 2008 unconstitutional—a decision later vacated by the U.S. Supreme

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<sup>257</sup> As the U.S. Supreme Court put it, "Amendment 2, in explicit terms, does more than repeal or rescind these provisions. It prohibits all legislative, executive or judicial action at any level of state or local government designed to protect the named class." *Romer v. Evans*, 517 U.S. 620, 624 (1996).

<sup>258</sup> COLO. CONST. art. II, § 30b.

<sup>259</sup> *Romer*, 517 U.S. at 635. The Colorado Supreme Court had also declared the amendment in violation of the federal Constitution. See *Evans v. Romer*, 854 P.2d 1270, 1286 (Colo. 1993) (en banc); *Evans v. Romer*, 882 P.2d 1335, 1350 (Colo. 1994) (en banc), *aff'd*, 517 U.S. 620 (1996).

<sup>260</sup> *Romer*, 517 U.S. at 627.

<sup>261</sup> *Id.* at 633.

<sup>262</sup> *Id.* at 635.

<sup>263</sup> *Id.*

Court in *Hollingsworth v. Perry*.<sup>264</sup> Judge Stephen Reinhardt, writing for the Ninth Circuit panel, declined to reach the question of whether there is a federal constitutional right of same-sex couples to marry.<sup>265</sup> Instead, he reasoned that Proposition 8 was invalid because California's vote to withdraw the judicially recognized state constitutional right of same-sex couples to marry was analogous to Colorado's sweeping effort to eliminate all state-level protections of persons based on their sexual orientation.<sup>266</sup> In his view, Proposition 8's proponents could not demonstrate a rational basis for the marriage restriction—but, even more importantly for state constitutionalism, he opined that a vote to *withdraw* a state constitutional right was more suspect than a decision not to grant the asserted right in the first place.<sup>267</sup> “The context matters,” Judge Reinhardt wrote.<sup>268</sup> “Withdrawing from a disfavored group the right to obtain a designation with significant societal consequences is different from declining to extend that designation in the first place, regardless of whether the right was withdrawn after a week, a year, or a decade.”<sup>269</sup>

On appeal, U.S. Supreme Court vacated the Ninth Circuit's ruling on the grounds that Proposition 8's proponents lacked Article III standing to defend the initiative in federal court when state officials declined to do so.<sup>270</sup> As a consequence, the Court let stand a district court decision declaring Proposition 8 unconstitutional—without addressing the merits of the case, the constitutional validity of state-level marriage amendments, or the issue of whether voters have the power to withdraw rights, once granted, from certain groups.

Although Judge Reinhardt's theory of the Proposition 8 case was

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<sup>264</sup> *Perry v. Brown*, 671 F.3d 1052, 1080–85 (9th Cir. 2012), *vacated for lack of standing sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>265</sup> *Id.* at 1082.

<sup>266</sup> *Id.* at 1080–85.

<sup>267</sup> *Id.* at 1079–80.

<sup>268</sup> *Id.* at 1079.

<sup>269</sup> *Id.* at 1079–80. Judge Reinhardt further argued:

Proposition 8 worked a singular and limited change to the California Constitution: it *stripped* same-sex couples of the right to have their committed relationships recognized by the State with the designation of ‘marriage,’ which the state constitution had previously guaranteed them, while leaving in place all of their other rights and responsibilities as partners—rights and responsibilities that are identical to those of married spouses and form an integral part of the marriage relationship.

*Id.* at 1076 (emphasis added).

<sup>270</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

thus voided, if courts adopt his logic in other cases, such rulings will have large consequences for state constitutionalism. If generally applied, the rule would entrench judicial decisions that embrace certain new constitutional rights claims and would prevent the people from overriding these decisions through democratic means.

It is important to note, however, that the U.S. Supreme Court has not embraced the view that a contested state constitutional right, once recognized, cannot be withdrawn. Instead, the Court has affirmed the principle that it is generally permissible for citizens to vote to reduce state constitutional rights to the federal standard.<sup>271</sup> The Court's clearest statement of this principle came in *Crawford v. Board of Education* (1982). As we have seen, that case presented a classic pattern of contestation over state constitutional rights. When the California Supreme Court defined a right (to racial desegregation of public schools) in a way that exceeded the federal minimum, the people responded by adopting a state constitutional amendment (Proposition 1 of 1979) to override the court's judgment and reduce the scope of the right.<sup>272</sup> Opponents challenged the amendment all the way to the U.S. Supreme Court, but the Court upheld the people's power to reduce an expansive state constitutional right, noting that it "reject[ed] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede."<sup>273</sup> To rule otherwise, it said, would be "destructive of a State's democratic processes and of its ability to experiment."<sup>274</sup> While *Romer* warns against state amendments that limit rights in a "sweeping and comprehensive" way,<sup>275</sup> the Supreme Court has affirmed a more general principle that it is permissible for the people to restrict or withdraw state-level rights that extend beyond federal minimums.<sup>276</sup>

Similarly, on many occasions, state supreme courts have upheld the people's power to overturn a judicial decision to recognize a state constitutional right. Notably, in 2009, the California Supreme Court upheld, as a matter of state constitutional law, the people's legitimate power to reverse the court's decision to recognize a state

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<sup>271</sup> See *Crawford v. Bd. of Educ. of the City of L.A.*, 458 U.S. 527, 535 (1982).

<sup>272</sup> CAL. CONST. art. I, § 7. See *Crawford*, 458 U.S. at 535 (referencing Proposition 1).

<sup>273</sup> *Crawford*, 458 U.S. at 535 (footnote omitted).

<sup>274</sup> *Id.*

<sup>275</sup> *Romer v. Evans*, 517 U.S. 620, 627 (1996).

<sup>276</sup> *Crawford*, 458 U.S. at 535.

constitutional right of same-sex couples to marry.<sup>277</sup> In a long, detailed opinion, the court recounted many occasions where the people had disagreed with its interpretations of state constitutional rights and had adopted constitutional amendments to override them. The court noted

our prior decisions—reviewed at length above—establish that the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be modified and diminished *by a change in the state Constitution itself*, effectuated through a constitutional amendment approved by a majority of the electors acting pursuant to the initiative power.<sup>278</sup>

Both the U.S. Supreme Court and state courts have thus affirmed the people's power to override judicial decisions conferring state constitutional rights, so long as the people comply with state requirements for constitutional amendments and do not violate federal law. Applied to today's most prominent controversy in state constitutional law—the struggle over the state constitutional definition of marriage—the rules seem to be as follows: absent a U.S. Supreme Court determination that the federal Constitution requires states to allow same-sex couples to marry, state supreme courts may go beyond existing federal constitutional requirements and recognize a state constitutional right to such marriages, but it is likewise permissible for the people of a state either to preempt or override such a decision by adopting the traditional definition of marriage through state constitutional amendment.<sup>279</sup>

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<sup>277</sup> *Strauss v. Horton*, 207 P.3d 48, 63–64 (Cal. 2009).

<sup>278</sup> *Id.* at 105.

<sup>279</sup> It can be argued that Hawaii's marriage amendment overturned, rather than preempted, a judicial decision recognizing marriage rights of same-sex couples. However, the Hawaii Supreme Court had not issued a final order in the *Baehr* litigation before the people adopted that state's marriage amendment. Compare HAW. CONST. art. I, § 23 (detailing the constitutional amendment enabling the legislature to enact a law limiting marriage to opposite-sex couples that was ratified in 1998), with *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at \*8 (Haw. Dec. 9, 1999) (noting the marriage amendment precluded any relief sought by those in favor of same-sex marriage). Moreover, it can be argued that it is preferable to overturn rather than preempt judicial recognition of a state constitutional right because a preemptive amendment may be unnecessary and "gratuitous." See J. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution for?*, 56 DUKE L.J. 545, 570 (2006). The Ninth Circuit's decision in *Perry*, of course, concludes the opposite. See generally *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *vacated for lack of standing sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (holding that the constitutional amendment banning same-sex marriage unconstitutionally removed the judicially granted right to marriage by same-sex couples).

The Supreme Court's opinion in *United States v. Windsor* (striking down section 3 of the federal Defense of Marriage Act) casts doubt on the future of most states' marriage laws and suggests that, at present, a narrow majority of the Court disfavors any law that defines marriage as a union between a man and a woman.<sup>280</sup> At some point, the Court will have to address squarely the question of whether the Constitution prohibits states from enacting such laws. But unless any state that now allows same-sex marriage reinstates the traditional definition of marriage, that litigation will not present the question of whether a state may "withdraw" rights, and thus will not alter this existing feature of state constitutionalism.

The Supreme Court's decision in *Hollingsworth v. Perry* does, however, place a different constraint on the people's power to vote on state constitutional rights by giving state officials a *de facto* veto over certain voter-approved amendments if the officials refuse to defend the amendment when it is challenged after the election in federal court.

In *Perry*, the governor and attorney general of California declined to defend Proposition 8 in federal district court and the measure's proponents stepped in as defendant-intervenors.<sup>281</sup> When the plaintiffs won a judgment at the trial level, and state officials refused to appeal, the Ninth Circuit, after seeking an opinion from the California Supreme Court, determined that the proponents had standing to appeal.<sup>282</sup> But, as noted above, when the case reached the U.S. Supreme Court, a narrow majority of the justices held that the proponents lacked Article III standing.<sup>283</sup> This was the first time the Supreme Court had directly ruled on the power of state ballot measure proponents to defend the measure in federal court when the state declines to do so. Although the full consequences of the new rule remain to be seen, the Court has handed state officials the means to defeat at least some voter-approved ballot measures by simply refusing to defend them in federal litigation. As Justice Kennedy noted in his *Hollingsworth* dissent, because many initiatives face federal court challenges, "the impact of that veto

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<sup>280</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (declaring section 3 of the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006)), unconstitutional).

<sup>281</sup> *Perry*, 133 S. Ct. at 2660.

<sup>282</sup> *Perry*, 671 F.3d at 1070–71; *Perry v. Brown*, 52 Cal. 4th 1116, 1127 (2011).

<sup>283</sup> *Perry*, 133 S. Ct. at 2668.

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could be substantial.”<sup>284</sup>

#### V. THE CASE FOR STATE-LEVEL REFERENDUMS ON CONTESTED RIGHTS

This review of the record from the past four decades confirms that voting on the definition and scope of rights has become an established feature of the state constitutional tradition. Nevertheless, some contemporary rights advocates have advanced the argument that rights should *never* face popular votes. This section answers that argument and posits that within a dual constitutional system, allowing state-level referendums on contested rights provides important benefits.

Those who oppose referendums on rights embrace a strong form of what may be called the federal model of rights. This model, taught for decades in every law school in the United States, is perhaps best summarized by U.S. Supreme Court Justice Robert H. Jackson in *West Virginia State Board of Education v. Barnette*,<sup>285</sup> the World War II era case declaring that states may not require students to salute the American flag.<sup>286</sup> Jackson wrote:

The very 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 officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>287</sup>

It must be said, however, that Justice Jackson’s defense of “higher law” constitutionalism and judicial supremacy in the definition of constitutional rights can be stretched too far. Even at the federal level, the people clearly do have power to override the U.S. Supreme Court and to define constitutional rights through democratic means.<sup>288</sup> It was the people, through their

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<sup>284</sup> *Id.* at 2671 (Kennedy, J., dissenting).

<sup>285</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>286</sup> *Id.* at 642.

<sup>287</sup> *Id.* at 638.

<sup>288</sup> On four occasions, the people through their representatives have amended the U.S. Constitution to override the U.S. Supreme Court’s constitutional interpretation. *Chisholm vs. Georgia*, 2 U.S. 419, 479–80 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI, limiting the right citizens of another state or citizens of foreign countries to bring

representatives, who adopted the Bill of Rights and the Constitution's other rights guarantees using established constitutional procedures and, *by the same procedures*, the people can choose to modify those rights. For example, when in *Texas v. Johnson*<sup>289</sup> (1989), the U.S. Supreme Court declared that the First Amendment protects one's ability to burn the American flag as an exercise of one's right to free speech, Congress responded by debating a constitutional amendment to overturn the Court's decision and protect the flag from desecration.<sup>290</sup> The proposed amendment narrowly failed to achieve Article V's requirement of a two-thirds vote of both houses of Congress, but if it had received congressional endorsement, as well as the further requirement of ratification by three-fourths of the states, it would have validly overturned *Texas v. Johnson* and placed a constitutional limit on the First Amendment right of free expression.<sup>291</sup> Similarly, the people, through their representatives, could choose to overturn other controversial Supreme Court interpretations of federal constitutional rights in cases ranging from *Roe v. Wade* to *Citizens United v. Federal Election Commission*.<sup>292</sup> The very high Article V threshold for federal constitutional amendments makes these outcomes unlikely—but not, as some suggest, illegitimate. Article V creates a practical, rather than a principled or absolute, restriction

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suit against a state (1795); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1857), *superseded by constitutional amendments*, U.S. CONST. amend. XIII, banning slavery throughout the United States (1865), and U.S. CONST. amend. XIV, § 1, extending citizenship to all persons born in the United States (1868); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 586 (1895), *superseded by constitutional amendment*, U.S. CONST. amend. XVI, authorizing the federal income tax (1913); and *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI, § 1, preventing restriction of the voting rights on the basis of age for persons 18 years old and older (1971).

<sup>289</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>290</sup> *Id.* at 414, 420. The proposed flag anti-desecration amendment was approved by the House of Representatives in five consecutive Congresses from 1995 to 2005. Laurie Kellman, *Senate Panel OKs Flag-Burning Amendment*, ASSOCIATED PRESS (Apr. 29, 1999, 11:27 AM), <http://www.apnewsarchive.com/1999/Panel-OKs-Anti-Flag-Burn-Amendment/id-5c55694f6a2f735c8755f4e10a0378b9>. In 2006, the amendment fell one vote short of adoption by the Senate, 66–34. *Flag-Burning Amendment Fails by a Vote*, CNN (June 28, 2006, 8:56 AM), <http://www.cnn.com/2006/POLITICS/06/27/flag.burning>.

<sup>291</sup> See U.S. CONST. art. V (outlining the procedure by which the Constitution is amended); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?* 100 YALE L. J. 1073, 1089–92 (1991) (providing a contrary—and minority—view that the proposed flag anti-desecration amendment impermissibly limited free speech and would have been unenforceable if ratified).

<sup>292</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 904 (2010) (holding that corporations as well as natural persons have First Amendment rights).

on popular participation in the definition of federal constitutional rights. That said, as a practical matter, the courts, not the people, have the last word in defining federal constitutional rights in almost every case.

Some scholars believe that this *federal* model should also apply to *state* constitutional law. They have sharply criticized the prevailing state constitutional model with its democratic checks on courts and its popular participation in the definition of rights.<sup>293</sup> This critique disregards the virtues of a state constitutionalism in which the people have a voice in defining the scope of rights and correcting courts when they expand rights beyond the meaning of the constitutional text. A dual system of constitutional rights protection—one that recognizes judicial supremacy in the definition of *federal* constitutional rights but allows more popular participation in the definition of *state* constitutional rights above the federal baseline—has a number of advantages. In considering these advantages, it is crucial to remember that state constitutionalism operates within a broader federal system that provides robust civil rights and liberties to all citizens in all states. Federal supremacy over state law eliminates the danger that voters at the state level will restrict rights below the federal minimum. Instead, voters are able to deliberate on how far, if at all, state-level rights should extend beyond the federal standard. As the U.S. Supreme Court noted in *Crawford*, this arrangement allows for state-level experimentation. States have a unique opportunity both

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<sup>293</sup> Consider, for example, a leading commentary on the California Constitution. JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION* (G. Alan Tarr ed., 2011). The commentators celebrate the California Supreme Court's leadership in expanding state constitutional rights and describe popular referenda to limit rights as a "deplorable countertrend." *Id.* at 26. In the commentators' view, state constitutional rights are unsafe "at the hands of an aroused California electorate indifferent to the integrity of the California Constitution and determined to squeeze as dry as possible the constitutional rights of some disfavored minority." *Id.* at 23. Such criticisms of the state constitutional model have spread in recent decades largely due to a concern about outcomes. As political scientist John Dinan has noted, the commentary looked quite different during the Progressive Era, when many scholars were concerned about abuse of judicial power in the establishment of (economic) rights and embraced efforts to place popular checks on judicial power at the state level. Dinan, *supra* note 14, at 1020–26. By contrast, today most legal commentators support the post-1970 rights revolution in state constitutional law and thus oppose the use of popular referenda to limit or reverse its progress. *Id.* at 1028–32. Dinan notes that scholars have not always opposed popular checks on state courts; during the Progressive Era, when courts were expanding constitutional rights to contract and property, many legal commentators supported the people's ability to limit these rights through state constitutional amendment. *Id.* at 1021–32. The scholarly view has "evolved" as state courts began pursuing a more progressive agenda in the 1970s. *See id.*

to expand rights above the federal floor and, on reflection, to pull back. In individual states, newly asserted rights can be explored and tested against competing rights claims and other values. The historical record shows that the people have not pushed back against most judicial expansions of state constitutional rights—popular override is an important, but exceptional, check on judicial power. The combination of judicial interpretation of state constitutional rights and popular oversight of courts (through referenda) allows emerging rights claims to be settled in a way that achieves greater popular legitimacy than if courts were acting alone.

Conversely, at least three foreseeable consequences would flow from a rule that the people cannot overturn judicial decisions that expand state constitutional rights. First, such a rule would likely encourage state-level judicial activism. Without the deterrent effect of potential voter override, some courts would likely be more apt to overstep their proper boundaries by recognizing, and thus entrenching, an excessive catalogue of rights, thus removing too many issues from normal democratic politics. The second probable consequence is a corollary of the first. If citizens lack the power to check courts retrospectively, they will likely resort to *prospective* limitations on rights such as state constitutional amendments containing lockstep provisions. These kinds of preemptive amendments will likely proliferate as insurance against state court action—as has already occurred on the marriage issue. Third, a rule against overriding judicial decisions through referenda could easily lead to more efforts to remove state judges from the bench. Unlike federal judges who enjoy the protection of life tenure,<sup>294</sup> almost all state court judges must periodically face election.<sup>295</sup> If voters cannot overturn what they consider to be judicial excess by overturning a specific decision through constitutional amendment, they will be more prone to try to reconstitute courts. The recent removal of three members of the Iowa Supreme Court illustrates the point. That court held in *Varnum v. Brien* (2009) that the Iowa Constitution guarantees the right of same-sex couples to marry.<sup>296</sup>

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<sup>294</sup> Edward Lazarus, *Life Tenure for Federal Judges: Should it be Abolished?*, CNN (Dec. 10, 2004, 4:08 PM), <http://www.cnn.com/2004/LAW/12/10/lazarus.federal.judges>.

<sup>295</sup> See *Methods of Judicial Selection*, FUND FOR MODERN COURTS, [http://www.moderncourts.org/advocacy/judicial\\_selection/methods.html](http://www.moderncourts.org/advocacy/judicial_selection/methods.html) (last visited Aug. 5, 2013).

<sup>296</sup> *Varnum v. Brien*, 763 N.W.2d 862, 883–84, 906–07 (Iowa 2009) (“[S]ame-sex couples

The decision generated widespread opposition, but Iowa's restrictive rules for state constitutional amendment made it difficult for the people of that state to adopt an amendment to override the court on that single issue. Instead, in 2010, they mounted a campaign to oust three signatories of the *Varnum* decision, Chief Justice Marsha K. Ternus and Associate Justices Michael J. Streit and David L. Baker—and defeated all three.<sup>297</sup> There would have been less energy to remove these justices if Iowa voters had been able to address one controversial decision through the process of constitutional amendment, rather than being forced to direct their anger in a blunt way at the court itself. A restriction on “voting on rights” would foreseeably generate other similar efforts and, ironically, lead to a greater erosion of the independence of state courts.

Referendums on judicial expansion of contested state constitutional rights, by contrast, provide for judicial accountability while relieving pressures to remove judges when they issue controversial decisions. Moreover, within the context of the federal system, such referendums balance the nation's dual commitments to popular sovereignty and rights, allow for the testing of rights claims against other values, and forge a greater democratic legitimacy for new rights once they are recognized. This well-established practice of democratic participation in the definition of rights should be recognized as a limited, but legitimate and important, feature of American constitutional design.

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are similarly situated to opposite-sex couples.”).

<sup>297</sup> See Jessie Cardinale, *Chief Justice Marsha Ternus: An Inside Look Into the Tenure of Iowa's Former Chief Justice*, 74 ALB. L. REV. 1811, 1814 (2011); see also David E. Posen, *What Happened in Iowa?*, 111 COLUM. L. REV. SIDEBAR 90, 90 (2011).