

GOOD ENOUGH FOR GOVERNMENT WORK: THE INTERPRETATION OF POSITIVE CONSTITUTIONAL RIGHTS IN STATE CONSTITUTIONS

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INTRODUCTION

The United States Supreme Court ruled in *DeShaney*¹ and reaffirmed in *Castle Rock*² that absent conditions of confinement, the Due Process Clause imposes no affirmative obligations upon government to protect an individual's life, liberty, or property.³ These decisions reflect the Court's broader understanding of the United States Constitution as a guarantor of negative rights but devoid of assurance of positive rights.⁴ While controversial and subject to considerable criticism,⁵ these decisions were not particularly surprising. To the contrary, *DeShaney* and *Castle Rock* provide a logical capstone to a series of earlier decisions from the Burger Court.

Whereas the Warren Court had inched ever closer towards constitutionalizing certain positive social and economic

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¹ *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 191 (1989).

² *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005).

³ Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1853 (2006).

⁴ See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551–53 (2006); William E. Forbath, *The Politics of Race, Rights, and Needs—and the Perils of a Democratic Victory in Post-Welfare America: Some Reflections on the Work of Felicia Kornbluh*, 20 YALE J.L. & FEMINISM 195, 195 (2008); Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT'L L.J. 487, 499–500 (2008).

⁵ See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409–50 (1990); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1514 (1989).

constitutional rights, the Burger Court firmly applied the brakes and reversed course.⁶ For example, in rejecting a constitutional challenge brought by recipients of welfare funds, the Burger Court concluded in *Dandridge*, almost two decades before *DeShaney*, that “the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”⁷ The Court added that “the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.”⁸ The Burger Court also declined to find a constitutional right to a public education,⁹ shelter,¹⁰ or abortion funding for indigent women.¹¹ Thus, when

⁶ CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 149, 153–54 (2004).

By 1970, it was not at all clear that the Court would not eventually recognize a set of social and economic rights. In retrospect, the crucial event was the election of President Nixon in 1968, and his four appointments to the Court: Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972. These appointees proved decisive to a series of extraordinary decisions, issued in rapid succession, limiting the reach of Warren Court decisions, and eventually making clear that social and economic rights do not have constitutional status outside of certain restricted domains. During the period from 1970 to 1973, the Court cut off the emerging development.

Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 21 (2005) [hereinafter Sunstein, *American Constitution*].

⁷ *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

⁸ *Id.*

⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–39 (1973).

¹⁰ *Lindsey v. Normet*, 405 U.S. 56, 63–74 (1972).

¹¹ *Harris v. McRae*, 448 U.S. 297, 316–18 (1980). The Court opined in *Harris* that [a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.

Id. at 317–18 (citations omitted). The Court has not interpreted the Constitution so as to create an “affirmative obligation upon the state to provide the necessary conditions in which citizens can freely exercise abortion rights. Instead, the Court informs us that the state will only be prohibited from acting in ways that deny citizens the right to avoid reproduction through the use of contraception and abortion” April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM.

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Judge Richard Posner stated that the United States Constitution “is a charter of negative rather than positive liberties,”¹² he was not so much inciting revolution as marking the path of prior Supreme Court precedent as it marched towards *DeShaney* and *Castle Rock*.

Like the constitutions of many countries, especially those adopted after 1945, state constitutions have charted a different course.¹³ Unlike their federal counterpart, state constitutions unambiguously confer positive constitutional rights.¹⁴ “[S]tate constitutions not only provide . . . negative rights, but also often include *positive* mandates for rights protection or government action.”¹⁵ Or, “[p]ut another way, state constitutional language mandates that states use their plenary authority in specific ways to achieve explicit and highly self-conscious policy goals.”¹⁶ Thus, while *DeShaney* and *Castle Rock* either harshly excluded or prudently liberated, depending upon one’s view, federal courts from the work of interpreting positive constitutional rights, their state court brethren have neither been so limited nor relieved. Instead, state courts must confront the challenge posed by positive rights. In addressing such rights, the interpretive approaches adopted by state courts have reflected a rich diversity. But it cannot be ignored that many state courts have struggled mightily with the task.

This article focuses upon a species of state constitutional rights to which there are no federal counterparts, positive constitutional rights, and the interpretation thereof by state courts. The goal is both descriptive and normative. The article first defines what constitutes a positive constitutional right and then highlights examples in state constitutions. The article next addresses differences between interpreting state constitutions and the Federal Constitution and between interpreting positive and negative rights in state constitutions. The article then describes the various approaches state courts have taken to interpreting affirmative

J. GENDER & L. 147, 186 (2007).

¹² *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

¹³ MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 169 (1999); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 526–27 (1992).

¹⁴ Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 18 (1993) [hereinafter Hershkoff, *State Constitutions*]; Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 7, 10 (G. Alan Tarr & Robert F. Williams eds., 2006) [hereinafter Williams, *Rights*].

¹⁵ Williams, *Rights*, *supra* note 14, at 10. “The federal Constitution is often said to contain only negative rights . . . On the other hand, state constitutions, in addition to negative rights, also contain a number of positive rights.” *Id.* at 25.

¹⁶ Hershkoff, *State Constitutions*, *supra* note 14, at 18.

constitutional rights. Ultimately, the argument is advanced that there are five primary types of affirmative rights provisions in state constitutions, each of which requires a distinct interpretive approach.

I. WHAT ARE POSITIVE CONSTITUTIONAL RIGHTS?

The difference “between positive and negative rights is an intuitive one.”¹⁷ Positive rights derive their meaning through contrast with negative rights; the space between these two concepts gives meaning to the respective terms.¹⁸ Whereas affirmative or positive rights are essentially “private entitlements *to* protection by the state,” negative rights are “protections *against* the aggressive state.”¹⁹ A constitutional right is affirmative where “it imposes on government some obligation to bestir itself, to act, in a manner conducive to the fulfillment of certain interests of persons.”²⁰ In contrast, “negative rights entail freedom *from* government action. To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom.”²¹ Positive constitutional rights suggest “a form of affirmative obligation on the part of the government to provide something to people. By contrast, a ‘negative’ right indicates that the government may not do something to people, or deny them certain freedoms.”²² The underlying historical rationale between positive and negative rights has been well stated by Judge Posner: “The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”²³

Negative and positive rights, however, are best understood as

¹⁷ Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001).

¹⁸ See generally Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1164 n.13 (1985) (“This conception of differentiation, starting from the premise that no specific expression has meaning by itself, but instead derives significance in a *relational* contrast with others . . .”).

¹⁹ CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001).

²⁰ Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1893 (2001).

²¹ Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 n.2 (2001) (citing Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990)). Alternatively, to enforce a positive right, a citizen “compel[s] the government to take action to provide certain services.” *Id.*

²² Williams, *Rights*, *supra* note 14, at 25; see also Cross, *supra* note 17, at 864 (noting that “[o]ne category is a right to be free *from* government, while the other is a right to command government action”).

²³ Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

ends of a continuum rather than wholly separate dichotomous concepts. The distinction between positive and negative rights is not perfectly pure either in terms of absolute separations based upon imposition of financial costs on the government or between governmental action and inaction. “[T]he difference between negative and positive rights is not that one of them has budgetary implications and the other does not. Negative rights, too, cost money.”²⁴ For example, “in order to give substance” to private property protections, expenditures on police, courts, and a legal system are necessary.²⁵ Even classic negative rights such as freedom of speech, guarantees against unreasonable searches and seizures, protections against compelled self-incrimination, and the right to a jury trial, as a practical matter, impose financial costs upon the state.²⁶ Whether police officers become necessary for protecting a controversial group speaking in a public park or more costly criminal investigative methods are required because of limitations imposed by the Fourth, Fifth, or Sixth Amendments, there is an attendant financial cost.²⁷ The imposition of expense is even more immediately apparent with the constitutional obligation to provide indigent defendants with representation for purposes of defending against criminal prosecutions.²⁸ Nevertheless, there appears to be a practical distinction in terms of “the size of the budget consequences Protecting [negative] constitutional rights is [relatively] cheap, though not free. Protecting social welfare rights is expensive.”²⁹

Similarly, “[t]he distinction between state action and inaction does not entirely help to draw a clear line. Several ‘negative’ rights may also imply state action.”³⁰ Professor David Sklansky has

²⁴ Carlos Closa, *Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 4 INT'L J. CONST. L. 581, 585 (2006) (book review).

²⁵ See Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1236 (1995).

²⁶ See Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 46–47 (2006); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 576–79 (1992).

²⁷ Williams, *Rights*, *supra* note 14, at 25.

²⁸ John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law For the Redress of Wrongs*, 115 YALE L.J. 524, 593 (2005).

²⁹ Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2004); *see also* Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 153 (2005) (describing the amount of resources and necessary requirements that contribute to the costs of protecting positive rights).

³⁰ Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 AM. U. INT'L L. REV. 101, 106 (2006).

termed such provisions “quasi-affirmative rights” as they require governmental action to realistically meet constitutional requirements.³¹ For example, the government must act to provide assistance of counsel for indigent criminal defendants under the Sixth Amendment.

While the distance between positive and negative rights may be only a matter of degrees on a continuum, the difference between the light and dark shades of gray here is significant. The “distinction helpfully underscores the fact that the realization of [positive rights] generally requires more elaborate measures and longer-term planning on the part of the state.”³² Differentiation between positive and negative rights in terms of action versus restraint and levels of expenditures is neither incoherent nor inconsistent in apprehending these rights.³³

For some the lack of a pure separation based on expenditures or action versus inaction proves to be too much to accept that a genuine difference exists between positive and negative rights.³⁴ Even if one does not accept the above discussed division as a meaningful basis of distinction, there is a second basis that may, nevertheless, prove meaningful. Economic rights, so-called second generation rights such as health care, housing, education, etc., are the equivalent of positive rights, while negative rights include classic political freedoms, so-called first generations rights such as freedom of speech and religion.³⁵ For those who do not accept the utility of the positive and negative rights division, the task of this article will be better understood as addressing second-generation rights in state constitutions.

II. WHAT POSITIVE CONSTITUTIONAL RIGHTS EXIST IN STATE CONSTITUTIONS?

Positive rights in state constitutions are a multifarious sort,

³¹ David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230 (2002).

³² Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 193 (2008).

³³ See Sklansky, *supra* note 31, at 1230.

³⁴ See, e.g., Wiles, *supra* note 26, at 45–48.

³⁵ Burns H. Weston, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 ME. L. REV. 317, 335 (2008); Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, 18 YALE J.L. & HUMAN. 273, 282 (2006); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1840 n.62 (2003); Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 444–45 (1998).

protecting a wide variety of interests. There are relatively unique provisions such as the Idaho Legislature's constitutional duty to act to prevent the spread of livestock diseases,³⁶ the North Carolina General Assembly's duty to care for orphans,³⁷ and the Wyoming Legislature's duty to encourage virtue and temperance.³⁸ There are also provisions that appear in numerous state constitutions such as victims' rights measures³⁹ and open courts guarantees.⁴⁰ A limited cross-section of common affirmative rights are discussed in more detail herein including state constitutional provisions relating to education, assistance for indigent persons and physically or mentally challenged persons, as well as state constitutional provisions relating to healthcare and the environment.

A. Education Clauses in State Constitutions

The United States Supreme Court has declared that "education is perhaps the most important function of state and local governments."⁴¹ The electorate generally concurs with this assessment.⁴² Not surprisingly, every state constitution contains a clause expressly addressing education.⁴³

³⁶ IDAHO CONST. art. XVI.

³⁷ N.C. CONST. art. XI, §4.

³⁸ WYO. CONST. art. VII, §20.

³⁹ See generally Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 385 (1999) (discussing constitutional rights for victims of crime and the potentially negative implications of adopting a federal victim's rights amendment).

⁴⁰ See generally William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 340–42 (1997) (discussing the ways by which the open courts provision of the Tennessee Constitution could be rehabilitated and restored as a jurisprudential tool).

⁴¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁴² See, e.g., Geoffrey Klimas, *Financial Effects of Disasters*, 26 ANN. REV. BANKING & FIN. L. 200, 205 (2007) (explaining how Florida voters indicated that education was the most important voting issue in 2006); Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1967 (2006) (noting that Virginians identified education as the most important issue in the 2005 governor's election); Eugene C. Brickleyer, Jr. et al., *Preservation of Coastal Spaces: A Dialogue on Oregon's Experience with Integrated Land Use Management*, 9 OCEAN & COASTAL L.J. 239, 268 (2004) (noting a statewide survey that reported education as an identified topic of importance for voters); see also IssuesPA, New IssuesPA/Pew Poll Shows Pennsylvanians Aren't Satisfied with State's Direction, <http://www.issuespa.net/articles/16118> (last visited May 21, 2010) (discussing how education is a key issue to Pennsylvanians).

⁴³ William E. Thro, *Thorough and Efficient Systems of Education*, in 2 *ENCYCLOPEDIA OF EDUCATION* 106 (Charles J. Russo ed., 2008); BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED EDUCATION REFORM* 7 (2008); ARTHUR J. TOWNLEY, *SCHOOL LAW: A CALIFORNIA PERSPECTIVE* 9 (2001); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and its Aftermath*, 94 VA. L. REV. 1963, 1973–74 (2008); Karla A. Turekian, *Comment, Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1369 (1997). It is periodically asserted in scholarly

These clauses have an impressive lineage. Of the original twelve state constitutions adopted during the Revolutionary War,⁴⁴ five contained education clauses. The North Carolina Constitution of 1776 provided “[t]hat a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities.”⁴⁵ The Georgia, Pennsylvania, and Vermont Constitutions included similar provisions.⁴⁶ Massachusetts’s Constitution offered a more intricate rendering:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of

publications that the Mississippi Constitution is the sole exception in that it does not contain an education clause. See, e.g., Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 392 n.157 (2008) (stating that the Mississippi Constitution is without a positive education clause); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 229 (1990) (stating that every state constitution, with the exception of Mississippi’s, has an education provision). That view is incorrect. Article 8 of the Mississippi Constitution is addressed entirely to education, and article 8, section 201 of the Mississippi Constitution expressly provides that “[t]he Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.” MISS. CONST. art. VIII, § 201; see also 7 JEFFREY JACKSON & MARY MILLER, *ENCYCLOPEDIA OF MISSISSIPPI LAW* § 65:3 (2009) (explaining that in 1987 the Constitution was amended to provide for a mandatory system of free public education).

⁴⁴ During the American Revolutionary War, twelve former colonies adopted state constitutions. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 154 n.157 (2005). Of these twelve, eight states adopted constitutions in 1776 (Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia), three in 1777 (Georgia, New York, and Vermont), and one in 1780 (Massachusetts). HENRY W. FARNAM, *CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860* 120 (Clive Day ed., The Lawbook Exchange, Ltd. 2000) (1938).

⁴⁵ N.C. CONST. of 1776, art. XLI.

⁴⁶ GA. CONST. of 1777, art. LIV (“Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out.”). PA. CONST. of 1776, § 44 (“A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities.”). VT. CONST. of 1777, ch.II, § XL (“A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.”).

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education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar-schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.⁴⁷

From this foundation, state constitutional education provisions have moved through four stages of historical development.⁴⁸ The initial phase, from approximately 1776 through 1834, was marked by uncertainty as to constitutionalizing such rights with slightly less than half of state constitutions (eleven out of twenty-four) including such provisions as of 1834.⁴⁹ These early provisions either reflected the soaring language of the Massachusetts Constitution or the simpler clauses of the Georgia, North Carolina, Pennsylvania, and Vermont Constitutions.⁵⁰ State constitutions of the era provided few specifics as to the administration, operation, or method of funding schools.⁵¹

During the second stage of development, ranging from 1835 to 1912, two significant shifts occurred. One, a right to education was adopted in almost every state. As early as 1868, thirty-six of thirty-seven state constitutions guaranteed a public education.⁵² Two, education clauses became much “more detailed and bureaucratic,”⁵³ with state constitutions addressing issues such as school

⁴⁷ MASS. CONST. of 1780, ch. V, § 2.

⁴⁸ Paul L. Tractenberg, *Education, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 241, 242–249 (G. Alan Tarr & Robert F. Williams eds., 2006).

⁴⁹ *Id.* at 243.

⁵⁰ *Id.* at 243–44.

⁵¹ *Id.* at 244.

⁵² Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008).

⁵³ DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954* 55 (1987).

administration, boards of education and superintendents of schools, state school funds, school taxes, teacher credentialing, and age ranges for students.⁵⁴

While the second stage reflected significant “concentrated constitutional activity,” during the third stage, from approximately 1913 to 1954, state constitutional activity slipped into a lull.⁵⁵ Few modifications were made to existing provisions and few new provisions were enacted.⁵⁶ It was the quiet before the storm.

The fourth stage, which began in 1954 with the Supreme Court’s decision in *Brown v. Board of Education* and which continues through the present, has been dominated by an explosion in litigation and a myriad of constitutional amendments with the ground still shaking from *Brown*’s aftershocks. While education related litigation was not unknown prior to *Brown*, the Supreme Court’s watershed decision generated a substantial increase therein.⁵⁷ Initially, this litigation was focused upon desegregation. The desegregation effort proved to be extraordinarily prolonged⁵⁸ in large part due to active resistance⁵⁹ but also as a result of judicial trepidation about inflaming an even more vitriolic reaction through

⁵⁴ Trachtenberg, *supra* note 48, at 245.

⁵⁵ *Id.* at 245, 247.

⁵⁶ *Id.* at 247.

⁵⁷ Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1438–39 (2007).

⁵⁸ In *Brown II*, the remedial decision tied with the original *Brown* decision, the Court instructed district courts “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.” *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955); *see generally* Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 582–83 (2006) (exploring in detail the phrase “all deliberate speed”). The pace of adherence proved to be so slow and resistance so intense as to warrant the Supreme Court’s statement nine years after *Brown II* that “[t]he time for mere ‘deliberate speed’ has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia.” *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964). The Court reiterated the same point four years later. *Green v. County Sch. Bd.*, 391 U.S. 430, 438 (1968). In 1969, failures to properly integrate schools were still such, fourteen years after *Brown II*, that Justice Black wrote:

Federal courts have . . . struggled with the phrase “all deliberate speed.” Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. ‘All deliberate speed’ has turned out to be only a soft euphemism for delay.

Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969) (writing as a Circuit Justice).

⁵⁹ Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 995 (2005); Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1587–88 (2004).

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speedier desegregation efforts.⁶⁰

Although desegregation proved to be a slow moving process, school related litigation began to shift focus in the late 1960s to issues of funding equality between school districts.⁶¹ Initially, this litigation was pursued under the Equal Protection Clause of the United States Constitution.⁶² But this front was largely foreclosed by the *San Antonio Independent School District v. Rodriguez* decision,⁶³ in which the United States Supreme Court determined that even substantial funding disparities do not violate the Equal Protection Clause.⁶⁴

Following in the wake of this decision, school related litigation shifted to state constitutional provisions.⁶⁵ Litigation theories predominantly focused on funding disparities between districts and the adequacy of educational funding.⁶⁶ The underlying litigation strategy was coupled with pursuit of constitutional amendments addressing issues of school quality, funding, and safety.⁶⁷ Having begun as concise basic provisions in the Revolutionary War era, state education clauses have become extraordinarily intricate provisions of governance that are often the subject of litigation.

⁶⁰ Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 LAW & INEQ. 1, 3 (2006); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 623–28 (1983).

⁶¹ RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 9:7 (1994).

⁶² Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 136–37 n.62 (2008); Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 824 (2006).

⁶³ San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 51 (1973).

⁶⁴ See Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 9 (2006); Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 858 (2006); see also PAETZOLD & WILLBORN, *supra* note 61, at § 9:7; Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT., 165, 173 (2007).

⁶⁵ PAETZOLD & WILLBORN, *supra* note 61, at § 9:7; Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 291, 293 (2008) [hereinafter Oluwole & Green, *No Child Left Behind*]; William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 20–21 (2007).

⁶⁶ See, e.g., Oluwole & Green, *No Child Left Behind*, *supra* note 65, at 291, 293; Koski, *supra* note 65, at 20–21; Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions that are the Basis for School Finance Litigation*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 58, 62–63 (2007); Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Education Rights*, 57 DUKE L.J. 755, 756 (2007).

⁶⁷ Trachtenberg, *supra* note 48, at 247–48.

B. Assistance for Indigent Persons

While other affirmative rights lack the same historical pedigree as education provisions, affirmative rights beyond education are not entirely a recent creation. To the contrary, in 1868, nine out of thirty-seven state constitutions, or just less than a quarter thereof, contained non-education affirmative rights provisions.⁶⁸

While the Federal Constitution does not reference assistance to the poor,⁶⁹ numerous state constitutions expressly address the State's relationship with impoverished residents.⁷⁰ The origins of such rights in state constitutions can be traced to reconstruction constitutional conventions in the south called in the wake of the Civil War.⁷¹ Indiana traces its constitutional provision for welfare for the poor back even further to the Indiana Constitution of 1816 and its imposition of a duty to provide asylums for the poor, a practice that began during the 1790s in Indiana's territorial days.⁷² Today, the state constitutions of at least fifteen states expressly address poverty including Alabama, California, Hawaii, Indiana, Kansas, Louisiana, Missouri, Mississippi, Montana, New Mexico,

⁶⁸ Calabresi & Agudo, *supra* note 52, at 111.

⁶⁹ There has been considerable debate over whether the United States Constitution does or should protect the basic welfare of its poorest citizens with Professor Frank Michelman offering a forceful argument in favor of such a constitutional duty. *See, e.g.*, Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659 (1979); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962–1019 (1973); Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 7–59 (1969); *see also* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1826 (2001) (stating that “[n]o one has thought and written more deeply and imaginatively about constitutional welfare rights than Frank Michelman, and no one has approached the problem from as many fruitful perspectives”). The arguments for recognition of such rights have not persuaded the federal courts. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205 (2008). These arguments appear to many in the context of today's legal culture to be “off the wall.” J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1733 (1997).

⁷⁰ Liu, *supra* note 69, at 205 n.4; Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868–69 (2008).

⁷¹ JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 204 (2009).

⁷² IND. CONST. of 1818, art. IX, § 4 (providing that “[i]t shall be the duty of the general assembly, as soon as circumstances will permit, . . . to provide one or more farms to be an asylum for those persons, who by reason of . . . other misfortunes, may have a claim upon the aid and beneficence of society, on such principles that such persons may therein find employment and every reasonable comfort, and lose by their usefulness the degrading sense of dependence”); BOARD OF STATE CHARITIES OF INDIANA, THE INDIANA BULLETIN No. 112 (1918) (providing an informative look at Indiana's asylums for the poor); *see also* William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790–1820*, 18 N. ILL. U. L. REV. 1, 25–26 (1997) (discussing Indiana's initial constitution and its consideration of the needs of the poor).

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New York, North Carolina, Oklahoma, West Virginia, Texas, and Wyoming. These provisions can be divided into three categories: (1) authorization to provide for the poor, (2) creation of a governmental entity to aid the poor, and (3) imposition of a duty upon the state to provide for the poor.

With regard to the authorization category,⁷³ there are two sub-categories thereof, broad authorizations to act and narrowly focused provisions. Article XII, section 8 of the Louisiana Constitution is representative of the former; it provides that “[t]he legislature may establish a system of economic and social welfare [and] unemployment compensation . . .”⁷⁴ The California, Hawaii, Montana, and New Mexico Constitutions include similar provisions.⁷⁵ Alternatively, the Indiana and Mississippi Constitutions are more specific, authorizing the creation of farms as asylums for the poor.⁷⁶ With three separate provisions addressing impoverished residents, the Texas Constitution has both general provisions and a more specific provision directed towards the creation of county poor-houses.⁷⁷

Missouri and West Virginia’s Constitutions fall into the second category requiring the creation of a governmental position with responsibility for addressing poverty but giving little direction as to what obligations are imposed upon this governmental actor. West Virginia’s Constitution provides for the appointment of county “Overseers of the Poor.”⁷⁸ The Missouri Constitution provides for creating a Department of Social Services with the director thereof being “charged with promoting . . . social services to the citizens of

⁷³ As will be further discussed later in this article, these authorization provisions in state constitutions do not truly create affirmative rights; however, because they are often discussed in the literature as positive rights, they are set forth in this article subject to further discussion regarding their failure to create any rights. *See infra* Part V.A.

⁷⁴ LA. CONST. art. XII, § 8.

⁷⁵ CAL. CONST. art. XVI, § 11; HAW. CONST. art. IX, § 3; MONT. CONST. art. XII, § 3, cl. 3; N.M. CONST. art. IX, § 14. Montana previously had a mandatory provision (requiring that “the legislature *shall* provide”) as opposed to a provision that merely authorized the legislature to provide assistance for those in need of aid. Katherine Barrett Wiik, *Justice for America’s Homeless Children: Cultivating a Child’s Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875, 931 n.282 (2009). The Montana Constitution was amended in 1988 to alter this provision so as to merely authorize rather than require the legislature to act. *Id.*

⁷⁶ IND. CONST. art. IX, § 3; MISS. CONST. art. XIV, § 262. Indiana’s Constitution of 1851 as originally adopted replaced the mandatory language of the Indiana Constitution of 1816 with the authorization language of “county boards shall have power to” provide for farms as asylums for the unfortunate, which was in turn amended in 1984 to provide that “counties may” provide for farms as asylums for the unfortunate. IND. CONST. of 1816, art. IX, § 3.

⁷⁷ TEX. CONST. art. III, § 51-a; art. IX, § 14; art. XI, § 2.

⁷⁸ W. VA. CONST. art. IX, § 2.

the state as provided by law.”⁷⁹

There are six state constitutions that go further, imposing an express affirmative obligation upon the state to act to aid the poor.⁸⁰ For example, the Alabama Constitution provides that “[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.”⁸¹ Similar provisions appear in the Kansas, New York, North Carolina, Oklahoma, and Wyoming Constitutions.⁸²

C. Physically or Mentally Challenged Persons

In comparison to poverty related provisions, state constitutional provisions addressing the state’s relationship with physically or mentally challenged residents, considered textually, are more likely to impose mandatory affirmative obligations upon the state. For example, the constitution of Idaho requires that institutions “shall be established and supported by the state in such manner as may be prescribed by law” “for the benefit of the insane, blind, deaf and dumb.”⁸³ Virtually identical provisions appear in the constitutions of Arizona, Colorado, and Nevada.⁸⁴ The Washington Constitution adds a specific reference requiring aid to developmentally disabled persons, but focuses its attention, in general, more narrowly on disabled children as opposed to adults.⁸⁵ The constitution of Arkansas leaves even less room for uncertainty, declaring “[i]t shall be the duty of the General Assembly to provide by law for the

⁷⁹ MO. CONST. art. IV, § 37.

⁸⁰ William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 553–54 & n.99 (1998).

⁸¹ ALA. CONST. art. IV, § 88.

⁸² KAN. CONST. art. VII, § 4 (“The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . other misfortune, may have claims upon the aid of society. . . . [P]rovided, however, t]he state may participate financially in such aid and supervise and control the administration thereof.”); N.Y. CONST. art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”); N.C. CONST. art. XI, § 4 (“Beneficent provision for the poor . . . is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.”); OKLA. CONST. art. XVII, § 3 (“The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . misfortune, may have claims upon the sympathy and aid of the county.”); WYO. CONST. art. VII, § 18 (“Such charitable . . . as the claims of humanity and the public good may require, shall be established and supported by the state in such manner as the legislature may prescribe.”).

⁸³ IDAHO CONST. art. X, § 1.

⁸⁴ ARIZ. CONST. art. XXII, § 15; COLO. CONST. art. VIII, § 1; NEV. CONST. art. XIII, § 1.

⁸⁵ WASH. CONST. art. XIII, § 1.

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support of institutions for the education of the deaf and dumb, and of the blind.”⁸⁶ The constitutions of Indiana, Michigan, North Carolina, and Ohio contain similar provisions.⁸⁷ The Mississippi Constitution imposes a duty to provide for the treatment and care for the mentally ill while merely authorizing assistance for others.⁸⁸ The constitutions of Hawaii, Massachusetts, Montana, and New York all expressly authorize but do not require assistance to certain categories of physically or mentally challenged persons.⁸⁹

D. Public Health and Healthcare

At least twelve state constitutions address either the state’s role with regard to public health in general or healthcare for the poor specifically. The Alaska Constitution declares that “[t]he legislature shall provide for the promotion and protection of public health.”⁹⁰ The constitutions of Hawaii, Michigan, New York, South Carolina, and Wyoming also set forth a similarly broad, but undefined duty to provide for the protection and promotion of the public health.⁹¹ The Hawaii, Georgia, Mississippi, and Texas Constitutions expressly authorize the state to assist the needy in obtaining healthcare.⁹² Missouri’s Constitution creates a Department of Social Services and charges the director thereof with “promoting improved health.”⁹³ The Alabama Constitution authorizes the state to “acquire, build, establish, own, operate and maintain hospitals . . . and other health facilities” and to appropriate funds for this purpose,⁹⁴ while the Louisiana Constitution authorizes the establishment of a public health system.⁹⁵

⁸⁶ ARK. CONST. art. XIX, § 19.

⁸⁷ IND. CONST. art. IX, § 1; MICH. CONST. art VIII, § 8; N.C. CONST. art. 11, § 4; OHIO CONST. art. VII, § 1.

⁸⁸ MISS. CONST. art IV, § 86; MISS. CONST. art. XIV, § 262.

⁸⁹ HAW. CONST. art. IX, § 2; MASS. CONST. art. XVIII, § 3; MONT. CONST. art XII, § 3; N.Y. CONST. art. XVII, § 4.

⁹⁰ ALASKA CONST. art. VII, § 4.

⁹¹ HAW. CONST. art. IX, § 1; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XVII, § 3; S.C. CONST. art. VII, § 1; WYO. CONST. art. VII, § 20.

⁹² HAW. CONST. art. IX, § 3; GA. CONST. art. III, § 9, ¶ 6(i); MISS. CONST. art. IV, § 86; TEX. CONST. art. III, § 51-a.

⁹³ MO. CONST. art. IV, § 37.

⁹⁴ ALA. CONST. art. IV, § 93.12.

⁹⁵ LA. CONST. art. XII, § 8.

E. Environmental Rights

Turning from economic and healthcare rights to environmental rights, the confluence of a burgeoning environmental movement and state constitutional reform efforts “led to the passage of a number of state constitutional amendments designed to provide protection for the environment.”⁹⁶ The “content of these provisions varies considerably, from provisions that are only potentially ‘environmental’ to others that are clearly ‘green.’”⁹⁷ There are four broad categories of environmental rights in state constitutions: (1) authorizations of environmental legislation; (2) broad policy statements with no express imposition of a duty upon the legislature to act thereupon; (3) broad policy statements imposing a duty upon the state to safeguard the environment; and (4) narrowly focused environmental provisions imposing a duty upon the state as to some particular area of environmental responsibility.

The authorization provisions are remarkably diverse. The Georgia Constitution, which generically authorizes environmental legislation, is the broadest.⁹⁸ Other states’ provisions tend to be more narrowly focused. For example, the Oregon and Washington Constitutions authorize governmental loans to private entities for environmental purposes.⁹⁹ Oregon addresses forest rehabilitation and reforestation and the creation or improvement of pollution control facilities,¹⁰⁰ while Washington directs funds to improving existing structures to reduce energy and water waste.¹⁰¹ The Kansas, Nevada, New Hampshire, North Dakota, Ohio, Tennessee, and Wisconsin Constitutions also authorize the state to act for a specified environmental purpose.¹⁰²

⁹⁶ JACQUELINE P. HAND & JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS 269 (1988).

⁹⁷ John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 307 (2000).

⁹⁸ GA. CONST. art. III, § 6, ¶ 2(a)(1).

⁹⁹ OR. CONST. arts. XI-E, XI-H; WASH. CONST. art. VIII, § 10.

¹⁰⁰ OR. CONST. arts. XI-E, XI-H.

¹⁰¹ WASH. CONST. art. VIII, § 10.

¹⁰² KAN. CONST. art. XI, § 9 (authorizing governmental involvement in the development and conservation of water resources); NEV. CONST. art. X, § 1 (allowing the legislature to create property tax exemptions for property used for energy conservation purposes or for developing alternatives to fossil fuels); N.H. CONST. pt. 2, art. 5 (permitting the creation of special taxes on wood and timber for purposes of financing forest conservation); N.D. CONST. art. X, § 22 (authorizing a trust fund for energy conservation programs); OHIO CONST. art. II, § 36 (allowing for state involvement in the conservation of water-related resources and the regulation of mining); TENN. CONST. art. XI, § 13 (authorizing the General Assembly to protect and preserve fish and game); WIS. CONST. art. VIII, § 10 (authorizing expending funds to preserve and develop forests).

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Some state constitutional provisions instead set forth broad statements of policy. For example, in addition to authorizing environmental legislation, the Virginia Constitution declares the State's environmental policy:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.¹⁰³

The Alabama and North Carolina Constitutions contain similar provisions setting forth the state's environmental policy without expressly imposing a duty to act to further that policy.¹⁰⁴

At least thirteen state constitutions go further by imposing a duty upon the state to safeguard the environment. For example, the Pennsylvania Constitution provides:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁰⁵

Similar provisions appear in the state constitutions of Alaska, Florida, Hawaii, Louisiana, Massachusetts, Michigan, New Mexico, New York, Rhode Island, and Texas.¹⁰⁶ The Illinois Constitution reaches even further, expressly providing that environmental rights are held individually and are enforceable against governmental and private actors:¹⁰⁷ "Each person has the right to a healthful

¹⁰³ VA. CONST. art. XI, § 1; *see also* VA. CONST. art. XI, § 2 (setting forth the ways by which the state may further its environmental policies).

¹⁰⁴ ALA. CONST. art VI, § 219.07; N.C. CONST. art. XIV, § 5.

¹⁰⁵ PA. CONST. art. I, § 27.

¹⁰⁶ ALASKA CONST. art. VIII, §§ 1, 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI, § 9; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 52; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; R.I. CONST. art. I, § 17; TEX. CONST. art. XVI, § 59.

¹⁰⁷ The imposition of a constitutional limitation or duty upon private actors is rare; "[o]rdinarily, constitutional limitations do not apply to private actors." Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian*

environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.”¹⁰⁸ The Montana Constitution contains a similar guarantee.¹⁰⁹

A number of states have amended their constitutions to include mandatory environmental provisions that are narrowly focused. For example, the Ohio Constitution directs the state to finance or assist in financing capital improvements for projects that enhance the use and enjoyment of natural resources by individuals.¹¹⁰ Utah’s Constitution requires the legislature to prevent the destruction of forests on state lands,¹¹¹ and the Wyoming Constitution requires protection of the state’s water resources.¹¹² Arkansas’s Constitution creates a Game and Fish Commission, which is charged with responsibility for wildlife conservation and imposes an excise tax with funds to be used for environmental enhancement with percentages allocated to the Game and Fish Commission, Department of Parks and Tourism, Department of Heritage, and the Keep Arkansas Beautiful Fund.¹¹³ These are a few examples of many similar provisions.¹¹⁴

Service Providers, 18 J.L. & POL. 539, 573 (2002). States rarely impose constitutional limitations upon private actors with the exceptions largely limited to “weakening or dispensing with the state action requirement in cases where individuals sought access to private property, like shopping malls, for expressive purposes.” Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 330 (1990). But in comparison with the federal constitution, which with the exception of the Thirteenth Amendment prohibition on slavery or involuntary servitude does not address private conduct, Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 1, 2 n.1 (2005), state constitutions are more likely to constitutionally limit citizens of the state though such restrictions still remain the exception rather than the rule.

¹⁰⁸ ILL. CONST. art. XI, § 2.

¹⁰⁹ MONT. CONST. art. IX, § 1.

¹¹⁰ OHIO CONST. art. VIII, § 21.

¹¹¹ UTAH CONST. art. XVIII, § 1.

¹¹² WYO. CONST. art. I, § 31.

¹¹³ ARK. CONST. amends. XXXV, LXXV.

¹¹⁴ Maine’s Constitution provides that state park land, public lots, and any other real estate held by the state for conservation and recreational purposes may not be reduced or its use altered except by a two-third super-majority vote of the members of the Maine Senate and House of Representatives and that any proceeds from such a sale must be reinvested for the same purposes. ME. CONST. art. IX, § 23. Nebraska’s Constitution prohibits alienating natural resources on state lands but allows for leasing and development thereof. NEB. CONST. art. III, § 20; *see also* IOWA CONST. art. VII, § 9 (providing that all revenue derived from license fees and all funds received for hunting, fishing, and trapping shall be used exclusively for activities related to those purposes); W. VA. CONST. art. VI, § 55 (requiring that all funds derived from the sale of all permits and licenses to hunt, trap, and fish “be expended solely for the conservation, restoration, management, educational benefit, recreational use and

III. WHAT IS DIFFERENT ABOUT INTERPRETING STATE CONSTITUTIONAL AFFIRMATIVE RIGHTS PROVISIONS?

Having explored a sampling of the positive rights enshrined in state constitutions, we now turn to the interpretation thereof by state courts. An underlying premise of this article is that there is something different about the task of interpreting affirmative rights in state constitutions than interpreting constitutional rights under the United States Constitution. This premise is built upon two components. One, interpreting state constitutions whether focusing on a negative or positive right presents a different task than interpreting the United States Constitution. Two, in addressing state constitutions, there are differences in interpreting positive and negative rights.

A. Interpreting State Constitutions is a Different Task Than Interpreting the Federal Constitution

“[S]tate constitutions are not simply miniature versions of the United States Constitution.”¹¹⁵ State constitutions “differ from their federal counterpart in crucial respects that affect how a jurist, public official, or citizen should interpret them.”¹¹⁶ Variances exist “in their origin, function, and form.”¹¹⁷ Five major differences are discussed herein: (1) state constitutions exist against a backdrop of residual plenary authority; (2) interpretation of original intent or original meaning of state constitutions varies from the federal approach; (3) state constitutions differ in their function and form; (4) there is less development of argument and fewer scholarly materials available for state judges; and (5) state courts confront federalism concerns from a different vantage point than the federal courts.

1. Limited Enumerated Powers/Residual Plenary Authority

The federal government is a government of limited enumerated powers set forth in the United States Constitution.¹¹⁸ States, in

scientific study of the state’s fish and wildlife”).

¹¹⁵ G. Alan Tarr, *State Constitutional Interpretation*, 8 TEX. REV. L. & POL. 357, 357 (2004).

¹¹⁶ *Id.*

¹¹⁷ Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 191 (2002) [hereinafter Williams, *Brennan Lecture*].

¹¹⁸ Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. &

contrast, retain broad residual plenary authority.¹¹⁹ Accordingly, whereas the federal government can only act where constitutionally authorized to do so, state governments are generally free to act in any manner not prohibited by the United States Constitution or their state constitution.¹²⁰ This variance can impact how state courts interpret state constitutions and federal courts the United States Constitution.¹²¹

A number of state courts have delved into this divide. In 1865, the Kentucky Supreme Court explained the consequences for judicial review as follows:

[A]s Congress derives its power from grants by the people of pre-existent State sovereignties, an enlightened inquirer into the constitutionality of any of its acts, looks only for a delegation of power by the Federal Constitution; for that Constitution expressly declares that all power not delegated by it, is reserved to the States or to the people. In this class of cases, therefore, he who asserts the power holds the affirmative, and, unless he "maintains it," the controverted act should not be enforced by law by the judiciary. On the contrary, the party affirming that a legislative act of a State is prohibited by the State Constitution, must prove it, and, unless the proof is clear, the contested act must be admitted to be law. The distinctive difference between the two classes of cases is, that, in the former, the power must be shown to have been delegated; but, in the latter, it must appear to have been prohibited.¹²²

The Colorado Supreme Court in 1884 linked more deferential review of state than federal legislation with the state legislature's plenary authority and Congress's limited authority.¹²³ The court stated:

There would be greater force in the arguments employed to demonstrate the invalidity of the law of 1881, if the state constitution, like the national constitution, was a grant of

MARY L. REV. 1501, 1543–44 (2009); Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 216 (2006).

¹¹⁹ Klass, *supra* note 118, at 1543–44.

¹²⁰ Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 965 (1994).

¹²¹ See Nicole Stelle Garnett, "No Taking Without a Touching?" *Questions From an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 776 (2008).

¹²² *Griswold v. Hepburn*, 63 Ky. 20, 24 (1865).

¹²³ *Alexander v. People*, 7 Colo. 155, 160 (1884).

enumerated powers. In such case we would look into the constitution to see if the grant was broad enough to authorize the legislature to declare what vote should be necessary to remove a county seat. But the legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, we look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited.

Another rule is, that when the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist.¹²⁴

This rationale is not a relic of nineteenth-century state court judicial decision-making. To the contrary, the Missouri Supreme Court in 1994 reasoned that “[u]nlike the Congress of the United States, which has only that power delegated by the United States Constitution, the legislative power of Missouri’s General Assembly . . . is plenary, unless . . . it is limited by some other provision of the constitution. Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly.”¹²⁵ The California and Rhode Island Supreme Court have also recently associated the state’s plenary authority with a more deferential review of legislation under their respective state constitutions.¹²⁶ Professor Robert A. Schapiro has observed “the continuation of deferential review in the states evinces an ongoing commitment to a theory of plenary state governmental power.”¹²⁷

2. Whose Original Intent or Original Meaning to Whom?

From the approval of a constitutional convention through the drafting of a new constitution to its ratification, the United States Constitution was generated by representatives of the people rather

¹²⁴ *Id.*

¹²⁵ *Bd. of Educ. of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 532–33 (Mo. 1994) (citations omitted).

¹²⁶ *Pac. Legal Found. v. Brown*, 624 P.2d 1215, 1221 (Cal. 1981) (quoting *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 164–65 (1971)); *In re Richard A.*, 946 A.2d 204, 211 (R.I. 2008); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44–45 (R.I. 1995).

¹²⁷ Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 695 (2000).

than the people directly.¹²⁸ Under Article V, constitutional amendments are also controlled by representatives of the people rather than the people directly. All but one constitutional amendment to the United States Constitution was approved through ratification by state legislatures, with the sole exception having been approved via state conventions.¹²⁹ Professor Akhil Amar has noted that the framers considered the use of ratifying conventions for adoption of the Federal Constitution to be superior to ratification by the ordinary state legislatures because “the convention *was* in theory the virtual embodiment of the People of that state.”¹³⁰

While it may have been the virtual embodiment of the people, the ratification of the United States Constitution reflected a commitment to representative democracy whereas in the states the

¹²⁸ In February 1787, the Articles of Confederation Congress called for a convention of delegates from the thirteen states that were charged with revising the Articles of Confederation. Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 466 (2009). The delegates were selected by the legislatures of the several states. *McCullough v. Maryland*, 17 U.S. 316, 403 (1819). Debating the Constitution in Philadelphia during the blistering hot summer of 1787, the framers opted to bypass the state legislatures in seeking ratification of their replacement for the Articles of Confederation government in favor of state constitutional conventions. Article VII of their proposed Constitution provided that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.” Maggs, *supra*, at 458; *see generally* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006) (discussing the Constitutional Convention and ratification of the Bill of Rights).

¹²⁹ Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 83 (2004); Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 542 n.16 (2004).

¹³⁰ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1459 (1987). Professor Amar explained the rationale for this conclusion as follows:

Why was it sensible for Americans to transubstantiate a convention into the virtual embodiment of the People? After all, as with an ordinary legislative assembly, a convention assembly may improve the ultimate quality of public deliberation, but only by excluding most citizens, thereby raising fiduciary/agency problems. An answer based on organization theory/incentive analysis might focus on how a ratification convention is structured differently from an ordinary legislature in ways that enhance monitoring and improve public accountability. First, the People select convention delegates in a special election. Second, delegates are generally convened to consider a single issue (ratification). Third and related, the basic choice set is binary (yes-no), reducing agenda manipulation problems and decreasing the monitoring problems that exist in an ordinary legislature with virtually infinite possibilities of side deals and vote trading. Fourth, conventions immediately disband and disperse among the People, reducing the problem of legislators entrenching themselves and developing their own institutional perspectives. Finally, a convention enhances a sense of public-spiritedness and individual moral responsibility among both voters and delegates.

Id. at 1459 n.147.

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ratification and amendment of constitutions, and often even the proposal of constitutional provisions through the initiative process, is driven by direct democracy. This distinction is not without impact. More than a century ago, Justice Thomas Cooley explained that “as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people.”¹³¹ In accordance therewith, a number of state supreme courts have indicated their interpretation of state constitutional provisions is directed towards attempting to ascertain, or at least includes, the intent of the electorate in approving the constitutional amendment. For example, the Florida Supreme Court has indicated that “[o]ur goal in construing a constitutional provision is to ascertain and effectuate the intent of the framers and voters.”¹³² The Indiana Supreme Court also looks to ascertain the “common understanding” of the drafters and the voters who ratified the constitutional provision.¹³³ The Missouri Supreme Court has indicated that “[a] constitutional provision is interpreted according to the intent of the voters who adopted it.”¹³⁴ New Hampshire’s Supreme Court has stated “[i]n interpreting an article in our constitution, we will give the words the same meaning that they must have had to the electorate on the date the vote was cast.”¹³⁵ Oregon’s Supreme Court has also declared that “[i]n interpreting voter-initiated constitutional provisions, our goal is to discern the intent of the voters.”¹³⁶

While originalism is certainly not the only approach to interpreting the United States Constitution, few non-originalists would argue original meaning or intent is entirely irrelevant; rather, the argument between originalists and non-originalists focuses on the propriety of utilizing additional considerations in

¹³¹ THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, *in* CONSTITUTIONAL LIMITATIONS 66 (Special ed., 1987).

¹³² *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So.2d 503, 510 (Fla. 2008) (citing *Carribean Conservation Corp. v. Fla. Fish & Wildlife Comm’n*, 838 So.2d. 492, 501 (Fla. 2003)).

¹³³ *Bonner ex rel. Bonner v. Daniels*, 907 N.E.2d 516, 519 (Ind. 2009) (quoting *Collins v. Day*, 644 N.E.2d 72, 75–76 (Ind. 1994)).

¹³⁴ *Conservation Fed’n of Mo. v. Hanson*, 994 S.W.2d 27, 30 (Mo. 1999) (quoting *Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 950 S.W.2d 854, 859 (Mo. 1997)).

¹³⁵ *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1377 (N.H. 1993) (quoting *Grinnell v. State*, 435 A.2d 523, 525 (1981)).

¹³⁶ *Li v. State*, 110 P.3d 91, 97 (Or. 2005) (citing *Flavorland Foods v. Wash. County Assessor*, 54 P.3d 582 (2002)).

constitutional interpretation.¹³⁷ Under the various theories of federal originalism, “originalists may focus on framers’ intent, ratifiers’ intent, the dominant understanding of framers and ratifiers combined, or the public meaning of the text.”¹³⁸ None of these strands, however, fully reconcile with originalist state constitutional interpretation.

Justice Hugo Black, “the original originalist on the modern Supreme Court”¹³⁹ and arguably its most successful proponent, utilized originalism as a clarion call for jurisprudential reformation in returning to first principles, in his view the intentions of the founders and framers of the United States Constitution and its subsequent amendments.¹⁴⁰ For Justice Black, “the actual subjective intention of [the] Founders was dispositive” in constitutional interpretation.¹⁴¹

Another prominent originalist, Judge Robert Bork¹⁴² appeared at one point to embrace a similar view though focusing more specifically on those who ratified the Constitution.¹⁴³ For Judge Bork, “[t]here is no other source of legitimacy . . . if we are to have judicial review [than] to root that law in the intentions of the founders.”¹⁴⁴ In his view, constitutional interpretation through originalism was an endeavor in “finding the intent of the founders at a required level of generality and then requiring consistent application.”¹⁴⁵

¹³⁷ Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 74 (2009).

¹³⁸ *Id.* at 5.

¹³⁹ Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1799 (2006); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2 (1980).

¹⁴⁰ David A. Strauss, *Why Conservatives Shouldn’t Be Originalists*, 31 HARV. J.L. & PUB. POL’Y 969, 975 (2008); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 677–80 & n.7 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 519–20 (1965) (Black, J., dissenting); Engel v. Vitale, 370 U.S. 421, 429–33 (1962); Reid v. Covert, 354 U.S. 1, 5–10 (1957) (plurality opinion); Adamson v. California, 332 U.S. 46, 70–81 (1947) (Black, J., dissenting); Ackerman, *supra* note 139, at 1799.

¹⁴¹ John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613, 630 (1991); *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 273 (1949); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 360 (1994) (explaining how Black interpreted the Constitution by looking to the framers’ intentions).

¹⁴² See generally Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1079 (2009) (discussing Bork’s disapproval of constitutional interpretation that is inconsistent with the context it was ratified in).

¹⁴³ “It is the ratifiers, not the Philadelphia convention, who are the law givers, I might point out.” Robert H. Bork, *The Fifth Annual Judicial Conference of the United States of Appeals for the Federal Circuit*, 119 F.R.D. 45, 68 (West 1988).

¹⁴⁴ *Id.*

¹⁴⁵ Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1409 (2007).

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In a transition that is dated to a 1986 speech by then Judge Antonin Scalia, a paradigm shift was born with Scalia's assertion that originalists should "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."¹⁴⁶ More than a labeling change was on the horizon, as the soon to be Justice Scalia was moving originalism away from the subjective intention of the founders towards the original meaning of the text to a reasonable person¹⁴⁷ with Judge Bork also moving to adopt this view.¹⁴⁸ This form of originalism is identified not with seeking the framers' intent but instead a "public understanding" of their words:¹⁴⁹ "The search for original understanding is for the meaning that a reasonable person in the relevant setting would have assigned the language."¹⁵⁰

But as noted by Professor Richard S. Kay,

[t]he search for the understanding of the competent English speaker of 1787–1789 bears all the risks associated with the process of positing the behavior of the "reasonable person" in numerous common law doctrines. The perfect objectivity of that fictional character must be compromised the moment we inject him or her into a real factual context. We need to endow the reasonable person with some particular characteristics of time, place, and status. In defining our reasonable eighteenth-century speaker of English, we must make some choices as to education, region, vocation and the information he or she possessed concerning the costs and risks of any particular rule. . . . These choices may make a difference in the resulting interpretation. There is no a priori way to decide just where to stop our elaboration. . . .

[I]n the literature of public meaning originalism, we find a range of descriptions of that hypothetical speaker or reader.

¹⁴⁶ Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 & n.10 (2006) (quoting Antonin Scalia, Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986), in OFFICE OF LEGAL POLICY, ORIGINAL MEANING: A SOURCEBOOK 106 (U.S. Dept. of Justice 1987)).

¹⁴⁷ *Id.* at 48.

¹⁴⁸ ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) [hereinafter BORK, TEMPTING OF AMERICA].

¹⁴⁹ Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 431 (2008); see also DOUGLAS H. GINSBURG, AEI LEGAL CTR. FOR THE PUB. INTEREST, ORIGINAL PUBLIC MEANING OF THE CONSTITUTION: OUT OF EXILE? 21 (2008), available at <http://www.aei.org/docLib/20090218-gauerlecturepublication.pdf>.

¹⁵⁰ Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366, 1368 (1998).

[Judge] Robert Bork simply points to “the public of that time.” Justice Scalia adds a minor qualification when he writes of “intelligent and informed people of the time.” [Professor] Randy Barnett calls for adherence to “the objective meaning that would be understood by a reasonable person in the relevant community of discourse.” [Professor] Gary Lawson initially posited “the ordinary meanings that the Constitution’s words, read in linguistic, structural and historical context, had at the time of the document’s origin.” More recently, he and [Professor] Guy Seidman have provided a far more elaborate description of the hypothetical person whose understanding should control the Constitution’s meaning: “This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law.”¹⁵¹

The approach of many originalists, accordingly, leaves little space between the original meaning as understood by the ratifiers and the concept of original public meaning itself.¹⁵²

While Judge Bork’s formulation of original meaning analysis, “the public at the time,” comes extremely close to the state formulation of original intent, there still exist differences with Judge Bork’s approach between state constitution and Federal Constitution originalism. While Judge Bork would look to convention debates, public discussion, newspaper articles, and dictionaries,¹⁵³ something that state courts would do as well,¹⁵⁴ he would also consider more technical readings derived from

¹⁵¹ Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721–22 (2009).

¹⁵² Douglas G. Smith, *Does the Constitution Embody a “Presumption of Liberty”?*, 2005 U. ILL. L. REV. 319, 325–26 (2005); Volokh, *supra* note 142, at 1058 n.9; *see also* Kay, *supra* note 151, at 723 (asserting that “[r]educing the reasonable person to the reasonably well-informed ratifier with all the relevant evidence in hand more or less collapses the difference between intended and public meaning”).

¹⁵³ BORK, *TEMPTING OF AMERICA*, *supra* note 148, at 143–44.

¹⁵⁴ For example, “[o]ften state courts will examine . . . evidence of the voters’ intent derived from official ballot pamphlets and other materials presented to voters prior to the referendum,” including official addresses to the people from constitutional conventions. Williams, *Brennan Lecture*, *supra* note 117, at 196. Also, state courts have relied upon newspaper accounts to provide insight into what voters would have been informed of as to the purpose and effect of a state constitutional provision. *Id.* at 197.

the works of imminent scholars and commentators, known to be influential on the thinking of the political elite from which the framers and adopters of the Constitution and Bill of Rights were drawn. As a minimum, the list of scholars and commentators should include Blackstone, Coke, Grotius, Pufendorf, Burlamaqui, Vattel, Locke, and Otis . . .¹⁵⁵

State courts' emphasis on direct democracy ratification has resulted in a more pronounced focus upon deriving intent through a simplified plain meaning understanding of the language and avoidance of technical readings of state constitutional provisions so much so that courts have eschewed application of certain canons of construction that would be applied by federal courts.¹⁵⁶ Justice Cooley offered the following explanation for such an approach:

it is not to be supposed they [(the electorate)] have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that was the sense designed to be conveyed.¹⁵⁷

Justice Cooley added that “[n]arrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.”¹⁵⁸ Simply stated, even at their closest point, state constitutional originalism and federal constitutional originalism never fully reconcile. The answer to the question of original meaning to whom or intent of whom is often different for federal courts than for state courts, and not surprisingly, so is the accompanying approach to understanding original intent or meaning.

¹⁵⁵ J. D. Draddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 L. REV. MICH. ST. U. DET. C.L. 809, 854 (1999).

¹⁵⁶ See, e.g., Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 858 (Ariz. Ct. App. 2005); Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004); Am. Axle & Mfg., Inc. v. City of Hamtramck, 604 N.W.2d 330, 335 (Mich. 2000); Vreeland v. Byrne, 370 A.2d 825, 830 (N.J. 1977); Kuhn v. Curran, 61 N.E.2d 513, 517–18 (N.Y. 1945); Victoria Guilfoyle, Note, *Constitutional Law—Education—State-Wide School Voucher Program Declared Unconstitutional Under the “Uniformity” Provision of Florida’s Education Article*, *Bush v. Holmes*, 919 So.2d 392 (Fla. 2006), 38 RUTGERS L.J. 1329, 1347 n.114 (2007).

¹⁵⁷ COOLEY, *supra* note 131, at 81.

¹⁵⁸ *Id.* at 73–74.

3. Function and Form: Extensive Policy Enshrining Instruments with Multiple Amendment Epochs

Another major difference between state constitutions and the Federal Constitution appears in their function and form. The “length and detail of many state constitutions and the regularity with which state constitutions are revised, amended, and even redrafted” varies significantly from their federal counterpart.¹⁵⁹ The United States Constitution is approximately 6,700 words and has been amended twenty-seven times.¹⁶⁰ In contrast, the Alabama Constitution of 1901, the state’s sixth constitution,¹⁶¹ is more than 350,000 words and has been amended more than 800 times.¹⁶² While Alabama’s Constitution is an extreme example,¹⁶³ all state constitutions are longer, and most substantially so, than the United States Constitution.¹⁶⁴

Whereas the Federal Constitution establishes the framework of the government and secures certain basic rights, state constitutions “have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws.”¹⁶⁵ This extensiveness results from addressing numerous topics unmentioned in the Federal Constitution,¹⁶⁶ and doing so in a manner that is seemingly more statutory in nature.¹⁶⁷ As a result, state constitutions “seem to call for more judicial interpretation and intervention on a variety of obligations placed on state

¹⁵⁹ John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1163–64 (2005).

¹⁶⁰ DAVID R. BERMAN, *STATE AND LOCAL POLITICS* 77 (9th ed. 1999).

¹⁶¹ Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 760 n.97 (2007).

¹⁶² John Dinan, *Accounting for Success and Failure of Southern State Constitutional Reform, 1978–2008*, 3 CHARLESTON L. REV. 483, 489 (2009).

¹⁶³ Alabama’s Constitution is the world’s longest written constitution. D J Brand, *Constitutional Reform—The South African Experience*, 33 CUMB. L. REV. 1, 1 (2002).

¹⁶⁴ Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1328–29 (2001).

¹⁶⁵ RACHEL KANE ET AL., 16 OHIO JUR. 3d CONSTITUTIONAL LAW § 4 (2001).

¹⁶⁶ Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota’s Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 873 (2007); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983).

¹⁶⁷ Anderson & Oseid, *supra* note 166, at 873; see also JOHN NORTON POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* 14 (4th ed., Houghton, Osgood & Co. 1879); Kathleen M. Sullivan, *Constitutionalizing Women’s Equality*, 90 CAL. L. REV. 735, 747 (2002); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 121 n.276 (1999).

government.”¹⁶⁸ Their “pronounced specificity . . . does not inhibit, but rather facilitates, responsible constitutional decisionmaking by state courts,” while arguably providing for greater perceived legitimacy in deciding a constitutional claim based upon the highly detailed language of state constitutions rather than the more generalized language of the Federal Constitution.¹⁶⁹ State constitutions’ sheer verbosity requires a high degree of textual analysis and an extremely close textual inspection.¹⁷⁰ As noted by Professor William Swindler, “[b]ecause state constitutions are all too detailed and explicit, there is a built-in orientation toward strict construction.”¹⁷¹

State constitutions function “not only as a framework for governing but also as an instrument of governance.”¹⁷² Unlike their federal counterpart, state constitutions “are rich sources of substantive provisions” that “reflect public policy” in a wide variety of areas.¹⁷³ Many of these provisions have been designed by successive waves of state constitutional populists, who believe that government is “unaccountable and beholden to special interests” and that it is “important to limit [the government’s] power by constitutionalizing policy choices and circumscribing officials’ freedom of action.”¹⁷⁴ That policy limitation also applies to the judiciary with the electorate having grown increasingly suspicious that judges are asserting their own policymaking preferences into judicial decisions, and accordingly, on a state level have taken action to limit the decisional capacities and policy pursuits available to courts.¹⁷⁵

¹⁶⁸ Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 553 (2004); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999) [hereinafter Hershkoff, *Positive Rights*].

¹⁶⁹ James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1515–16 (1998).

¹⁷⁰ Williams, *Brennan Lecture*, *supra* note 117, at 214.

¹⁷¹ William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 593 (1971).

¹⁷² G. Alan Tarr & Robert F. Williams, *Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191, 193 (1998).

¹⁷³ Lermack, *supra* note 145, at 1431–32.

¹⁷⁴ G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 742 (1998) [hereinafter Tarr, *Models*].

¹⁷⁵ See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 168 (1998) [hereinafter TARR, *UNDERSTANDING*]; Williams, *Rights*, *supra* note 14, at 8–9; Patience Drake Roggensack, *To Begin a Conversation on Judicial Independence*, 91 MARQ. L. REV. 535, 541 (2007); see generally Douglas S. Reed, *Popular Constitutionalism: Toward A Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 872–74 (1999) (discussing the evolution in state constitutional law known as the “new judicial federalism”).

“[W]hile the Federal Constitution ‘embodies a political theory and a coherent constitutional design,’ state constitutions often have been frequently amended or otherwise changed, which process can often dilute or obscure a founding philosophy.”¹⁷⁶ As Professor G. Alan Tarr has noted, “[f]or state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been [in] seeking coherence in the federal Constitution.”¹⁷⁷ Thus, “an interpreter cannot always look to the whole to illuminate the meaning of its various parts;” consequently, state constitutions are tied “much closer to ‘clause bound’ interpretation.”¹⁷⁸

Additionally, the relative ease with which most state constitutions can be amended helps influence the exercise of judicial review. Arguments can be made that a less aggressive form of judicial review is warranted given that judicial modernizing is not as necessary where the electorate may more easily amend the constitution to meet modern demands; or a more aggressive form of review is warranted, given that there is less need for judicial restraint because decisions by the court can be more easily reversed by the electorate.¹⁷⁹

4. Lack of Development

In interpreting state constitutions, state court judges are confronted by certain limitations that are either not applicable to judges interpreting the Federal Constitution or which are at least comparatively less problematic. While complaints about the quality of briefing are common,¹⁸⁰ lawyers have been particularly deficient in addressing state constitutions, often failing to raise state constitutional arguments even though doing so is warranted, or only briefly mentioning the state constitution without developing an argument.¹⁸¹ Many lawyers suffer from tunnel vision in

¹⁷⁶ Anderson & Oseid, *supra* note 166, at 873.

¹⁷⁷ TARR, UNDERSTANDING, *supra* note 175, at 194.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 568 (1978) (noting that “[s]tate constitutions are easier to amend and may therefore provide less justification for flexible interpretation”); Reed, *supra* note 175, at 874–75.

¹⁸⁰ Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 798–99 (2006).

¹⁸¹ See Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner’s Failed Discourse*, 24 RUTGERS L.J. 927, 933 (1993) [hereinafter Linde, *State Constitutions*]; Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

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approaching constitutional questions, thinking only about the Federal Constitution; they are either entirely not aware of state constitutional provisions or do not understand the differences in state constitutional interpretation.¹⁸² Attorneys are not the only ones who can suffer from this tunnel vision; to the contrary, it also can afflict state court judges and their law clerks.¹⁸³

While recent years have witnessed a significant increase in academic scholarship related to state constitutions, there is still considerably less scholarly commentary available to assist lawyers, judges, and law clerks on state constitutional law issues. Additionally, while research into the history of various aspects of the United States Constitution has been extraordinarily impressive, there are serious concerns about whether the existing historical materials in many states are adequate for constitutional analysis.¹⁸⁴ Simply stated, the bar and academy have been of less assistance in helping state judges understand state constitutions.

5. Federalism from a State Vantage Point

It has been asserted that “[s]tate courts, interpreting their own state constitutions” have “no federalism concerns.”¹⁸⁵ This is an overstatement. Federalism concerns are instead viewed from a different vantage point than the federalism concerns confronting federal judges.

The foundation of the state court’s ability to independently review its state constitution and the preservation of the state supreme court’s role as the principle expositor thereupon derives from federalism.¹⁸⁶ Beyond that foundation, Professor James Gardner

Constitutional Law, 63 TEX. L. REV. 1141, 1161–63 (1985).

¹⁸² Michael F.J. Piecuch, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1764–65 (1997); Nathan Sabourin, Comment, *We’re from Vermont and We Do What We Want: A “Re-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1166 (2008); *see also* Hershkoff, *Positive Rights*, *supra* note 168, at 1194–95; Linde, *State Constitutions*, *supra* note 181, at 933; Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 392–93 (1980).

¹⁸³ *State v. Jewett*, 500 A.2d 233, 235 (Vt. 1985) (quoting Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978)); *see also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995).

¹⁸⁴ *See* Anderson & Oseid, *supra* note 166, at 873–74.

¹⁸⁵ Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 234 (2007).

¹⁸⁶ *See* Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the Edmunds Decision*, 47 DUQ. L. REV. 503, 505 (2009).

has offered an intriguing theory asserting that “the identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power.”¹⁸⁷ In Professor Gardner’s view, state constitutions can and should be “weapons of state resistance to national tyranny in a federal system of divided power.”¹⁸⁸

Professor Gardner has offered an additional interesting insight into the implications of interpreting sub-national constitutions within a system of federalism:

If a constitution reflects the identity of the polity that creates it, the identity of a state polity in a federal system is yoked in a significant way to the national identity, and thus cannot differ greatly from it. But this seepage of identity from state to nation and from nation to state is in considerable tension with the premise of constitutional positivism holding that the authors of a constitution have a political identity that is determinate. In the American system of federalism, it is difficult to tell where national identity ends and state identity begins. Again, then, the more realistic position is to conceive of state constitutions as the joint product of the state and national polities.¹⁸⁹

The consequences of the aforementioned principle for interpretation of state constitutions is significant in numerous respects but appears most prominently in adherence to, or at least extreme deference to, federal interpretation of state constitutional provisions that are similar to federal provisions. In a broader sense, the impact extends to the constitutional values of a given state being strongly imbued with national identity and understanding.¹⁹⁰ As noted by then New Hampshire Supreme Court Justice Souter, state courts must perform a delicate balance, “[i]f we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice

¹⁸⁷ James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1004 (2003).

¹⁸⁸ *Id.*

¹⁸⁹ James Gardner, *Whose Constitution Is It?: Why Federalism and Constitutional Positivism Don’t Mix*, 46 WM. & MARY L. REV. 1245, 1258 (2005) [hereinafter Gardner, *Whose Constitution?*].

¹⁹⁰ See *id.* at 1270–71 (stating that the meaning of the state constitutions is determined not just from state materials, but also by the history, values, and experiences on the national level as well).

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incoherent.”¹⁹¹

B. Interpreting Positive Rights Is Different Than Interpreting Negative Rights

Whereas the first distinct element of interpreting positive state constitutional rights is the variance between interpretation of federal and state constitutions in general, the second component is a divide between interpreting positive and negative rights in state constitutions themselves. Three of the primary differences between the interpretation of affirmative and negative rights are discussed herein: (1) the absence of federal precedent on which to rely; (2) the greater enforcement complexities that arise for state courts in addressing positive rights; and (3) the greater relevance of transnational jurisprudence and experiences.

1. Absence of Federal Precedent Interpreting Positive Rights

With the dynamic constitutional change brought about by the Warren Court, state constitutionalism became an afterthought, relegated at best to a secondary consideration, when not entirely forgotten.¹⁹² All of the oxygen of constitutionalism was sucked out of the state constitutions and breathed into the Federal Constitution. Reflecting upon the impact on state constitutional law, Justice Brennan wrote “I suppose it was only natural that when during the 1960’s our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions.”¹⁹³ With a judicial reformation underway in the federal courts, “it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law.”¹⁹⁴

The Warren Court had lead a jurisprudential revolution, but in

¹⁹¹ *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

¹⁹² See Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 404–05 (1987); Antony B. Klapper, Comment, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 787–88 (1993).

¹⁹³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

¹⁹⁴ A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976); see also Charles G. Douglas, III, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 133 (1988) (asserting that “[s]tate judges started to parrot federal cases and law clerks researched them to the exclusion of state charters”).

his 1968 Presidential campaign, Richard Nixon would stake much of his candidacy on the contention that this revolution was reflective of judicial activism run amuck that needed to be curtailed, particularly emphasizing a desire to respond to the Warren Court's criminal procedure jurisprudence by appointing "law and order" judges.¹⁹⁵ With Nixon's election and opportunity to appoint four justices to the United States Supreme Court, the Burger Court would, in fact, shift the Court's movement from the path of the Warren Court.¹⁹⁶ In a 1977 *Harvard Law Review* article, Justice Brennan enlisted state judiciaries in a counterattack against the conservative course change of the Burger Court.¹⁹⁷

Justice Brennan's appeal became immersed in politics largely because it appeared to constitute a naked political end-run around the conservative course change of the United States Supreme Court.¹⁹⁸ Regardless of the political debate surrounding Justice Brennan's article, he was undoubtedly correct that state courts are the supreme arbiter of the meaning of the rights guaranteed under their state constitutions, and he undoubtedly helped to breathe new energy into addressing state constitutional rights.¹⁹⁹

Largely dormant during the Warren Court years, state constitutionalism has re-emerged under the moniker of judicial federalism, though its practice by state courts is intermittent and inconsistent.²⁰⁰ If the original sin of judicial federalism is Justice Brennan's politicized end-run around the Burger court, the debate over the application of state constitutionalism has not escaped this taint. The primary focus in discussing judicial federalism remains

¹⁹⁵ Carl T. Bogus, *Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 2 (2008); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396–97 (2006); see also Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1277 (2008).

¹⁹⁶ Sunstein, *American Constitution*, *supra* note 6, at 22.

¹⁹⁷ Brennan, *supra* note 193, at 500–04.

¹⁹⁸ See generally Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 49 (2001/02) (discussing the beginning of judicial federalism as being a "strategic political" measure and the criticism leveled at courts that followed suit); Paul W. Kahn, *Two Communities: Professional and Political*, 24 RUTGERS L.J. 957, 968 (1993) (citing Earl M. Maltz, *False Prophet-Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988)).

¹⁹⁹ TARR, UNDERSTANDING, *supra* note 175, at 169; Williams, *Rights*, *supra* note 14, at 8; Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 288–302 (1998); Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1841–45 (2004).

²⁰⁰ See generally Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 72–87 (2006) (examining the inconsistent role and application of state constitutionalism).

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on the propriety of divergent interpretations of state constitutional provisions that correspond with federal constitutional rights.

Despite Justice Brennan's appeal, like Charles Schultz's *Peanuts* character Linus holding onto his blue blanket, state courts have become quite accustomed to the security of federal constitutional precedent. When given the opportunity to strike out in a different direction, state courts instead, generally, engage in a lock-step analysis with the federal courts.²⁰¹ Professor G. Alan Tarr has argued that "too many states continue to rely automatically on federal law when confronted with rights issues. . . . [T]oo many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs."²⁰² While disagreeing with Professor Tarr on the advisability of such an approach, Professor Schapiro concurs that "federal law has continued to provide the presumptive starting point for state constitutional analysis, and in interpreting state constitutions, courts generally adhere to federal doctrine."²⁰³ The concepts and reasoning of constitutional analysis are dominated by discussions and decisions under the Federal Constitution, which form an extraordinarily strong undertow pulling upon state courts.²⁰⁴ As a result of reliance on federal constitutional precedent, state courts "are out of practice speaking under their state constitutions."²⁰⁵

A lively debate has arisen over the propriety of state courts adopting a lockstep approach to interpreting state constitutional provisions. Advocates of state court adherence to federal precedent (1) question whether states are really distinct political communities with divergent identities, (2) assert the importance of national values to constitutional interpretation, (3) note that many state provisions are modeled on the Federal Constitution, (4) suggest reliance preserves judicial resources by allowing state courts to tap into a huge volume of decisions addressing the requirements of the Federal Constitution, (5) caution that reliance avoids varying

²⁰¹ Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

²⁰² TARR, UNDERSTANDING, *supra* note 175, at 208.

²⁰³ Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 82 (1998) [hereinafter Schapiro, *Contingency*].

²⁰⁴ See John Devlin, *Louisiana Associated General Contractors: A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 909 (2003); Schapiro, *Contingency*, *supra* note 203, at 82–87.

²⁰⁵ Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 79 (2007).

mandates that could be confusing for state officials, and (6) claim that reliance fosters judicial restraint.²⁰⁶

These critiques of judicial federalism, however, simply have no resonance when it comes to the interpretation of rights that have no federal counterpart. “If the right is guaranteed only by the state constitution, there is no issue as to the relative weight of a nonexistent federal right.”²⁰⁷ The constitutional analysis conducted by the federal courts “may yield no guidance to state courts asked to interpret . . . the substantive meaning of positive rights.”²⁰⁸ Unmoored from federal precedent, rather than embroiled in the quandaries surrounding deviation from the federal interpretation of similar provisions, state courts instead have an opportunity to realize “[t]he full potential of state constitutionalism [by] giving effect to distinct rights embodied in the state constitutions.”²⁰⁹ As noted by Indiana Chief Justice Randall T. Shepard, “[w]hile the scholar is free to ask whether state constitutions should even be considered as constitutions at all, the state court judge is stuck in the more intractable position of having to decide what to do when two interested parties assert that their state constitution means either this or that.”²¹⁰ The interpretation of positive constitutional rights in state constitutions is a significantly different enterprise than interpreting negative rights under state constitutions if for no other reason than state courts do not have the smothering security blanket of federal precedent on which to hold tightly. As both a practical and theoretical matter, it is difficult to overstate the importance of the absence of a corresponding federal provision in distinguishing the interpretation of affirmative state constitutional rights from their negative rights counterparts.

2. Complexities of Judicial Enforcement of Affirmative Rights

As a result of their imposition of affirmative obligations upon

²⁰⁶ See, e.g., Gardner, *Whose Constitution?*, *supra* note 189, at 1246; Schapiro, *Contingency*, *supra* note 203, at 82–87.

²⁰⁷ Anderson & Oseid, *supra* note 166, at 873.

²⁰⁸ Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 360 (2006); see also Leah J. Tulin, Note, *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 95 GEO. L.J. 1979, 2014 (2007).

²⁰⁹ Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and The Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITTS. L. REV. 231, 239 (1998).

²¹⁰ Randall T. Shepard, *The Renaissance in State Constitutional Law: There are a Few Dangers, But What's the Alternative*, 61 ALB. L. REV. 1529, 1531 n.8 (1998).

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governmental actors, state constitutions “differ from federal civil rights guarantees, in kind as well as in text.”²¹¹ Positive as compared with negatives rights “can require very different approaches, particularly from the standpoint of judicial enforcement, to rights protection.”²¹² In considering positive constitutional rights, an “attitude of negativism pervades the entire American judiciary. They believe that courts are not very good at enforcing positive rights . . .”²¹³ Former Connecticut Supreme Court Justice Professor Ellen A. Peters has offered an explanation of the difficulty courts confront:

[S]tate courts have a dual assignment. They must not only define the scope of the affirmative state constitutional obligation at stake, but they must also determine whether the state has fulfilled its constitutional duty. Defining the constitutional right is the quintessential judicial obligation, but at least initially, elected officials, rather than judges, can better determine the precise contours of the appropriate policy response.²¹⁴

Separation of powers concerns rise to the forefront when the judiciary confronts affirmative rights based constitutional challenges. “Whereas the enforcement of negative rights only demands that a court invalidate legislation or prevent governmental action, positive rights enforcement requires a court to obligate the legislature to act, thus entering into the arena traditionally reserved for the political branches.”²¹⁵ Judicial decision-making regarding affirmative rights immerses courts more deeply within the affairs of the executive and legislative branches.²¹⁶ While there are exceptions, the tendency of foreign judiciaries whose national constitutions contain affirmative rights provisions has been to avoid aggressive enforcement of such rights out of concern about distorting budgets, interfering in policy-making, and exceeding separation of powers limitations.²¹⁷ State judiciaries’ discomfort with enforcing substantive affirmative rights

²¹¹ Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558 (1997).

²¹² Williams, *Rights*, *supra* note 14, at 10.

²¹³ Scott T. Johnson, *The Influence of International Human Rights Law on State Courts and State Constitutions*, 90 AM. SOC’Y INT’L L. PROC. 259, 269 (1996).

²¹⁴ Peters, *supra* note 211, at 1558.

²¹⁵ Pascal, *supra* note 70, at 864.

²¹⁶ Williams, *Brennan Lecture*, *supra* note 117, at 192.

²¹⁷ Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice Through South Africans’ Right to Health Jurisprudence*, 27 MED. & L. 661, 665–66 (2008).

has been similarly evident.²¹⁸

3. Global Precedent

While federal precedent is enormously influential with state courts regarding negative rights but largely inapplicable in addressing positive rights provisions, transnational jurisprudence inversely has a greater potential to be influential in regard to positive constitutional rights. “Because state constitutions are not coextensive with the Federal Constitution and many include positive rights that can be found in human rights and foreign law, there may be greater opportunities for the comparative use of such sources to interpret state constitutional provisions.”²¹⁹ While there are certain areas of law where the influence of foreign courts is likely to be minimal, given the well-established nature of jurisprudence on the subject within a jurisdiction, there are other “emerging issues” where “there is much room for fruitful transnational inquiry.”²²⁰ When state courts address positive rights, the jurisprudence of foreign courts “can provide insight into how other courts have made positive rights justiciable.”²²¹ With similar positive rights provisions appearing in foreign constitutions, though wholesale transplantation would be problematic, “international sources can help state courts develop their jurisprudence by providing empirical examples of how rights are enforced in other countries.”²²²

IV. HOW ARE STATE COURTS INTERPRETING POSITIVE RIGHTS PROVISIONS?

While some positive rights provisions have been rarely or never litigated before state appellate courts, others have been the focus of repeated constitutional challenge. The most marked quality of state court interpretation of affirmative rights provisions is the diversity of approaches. For example, courts in different states interpret virtually identical state education clauses, some borrowed directly

²¹⁸ Pascal, *supra* note 70, at 900.

²¹⁹ Cynthia Soohoo & Suzanne Stoltz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 476 (2008).

²²⁰ Margaret H. Marshall, “Wise Parents Do Not Hesitate to Learn From Their Children”: *Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1643 (2004).

²²¹ Soohoo & Stoltz, *supra* note 219, at 477.

²²² *Id.*; see also Hershkoff, *Positive Rights*, *supra* note 168, at 1141–43.

from sister states, in diametrically opposite fashions.²²³ Strangely, there even appears to be an inverse relationship between the degree of enforcement by state courts and the seeming strength, when considered textually, of the constitutional provision at issue.²²⁴ Considered more broadly, positive rights have been found to be political questions, non-self-executing provisions, or to require strict scrutiny. They have been found to impose mandatory duties upon the state but to allow the legislature full autonomy, or at least extraordinarily broad deference, in defining the scope of these duties. Courts have also utilized enforcement mechanisms characterized by democratic experimentalism and judicial management. Finally, a number of the affirmative rights provisions have not been interpreted because litigants have failed to advance litigation predicated upon them before state courts.

A. Affirmative Constitutional Rights as Political Questions

Constitutional provisions generally, and most especially affirmative constitutional rights, may ultimately end up not being enforced by the courts as a result of non-justiciability under the political question doctrine.²²⁵ Application of this doctrine reflects a judicial determination that the "subject matter is inappropriate for judicial consideration."²²⁶ Unlike a variety of other restrictions on judicial review that may be overcome by seeking judicial consideration under different factual circumstances "a holding of nonjusticiability is absolute in its foreclosure of judicial scrutiny" of an issue.²²⁷

The political question doctrine primarily arises from the operation of separation of powers concerns.²²⁸ In *Baker v. Carr*, the United States Supreme Court identified six strains of political questions:

[(1)] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

²²³ Trachtenberg, *supra* note 48, at 261–64.

²²⁴ *Id.* at 264.

²²⁵ John L. Horwitz, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 349 (1996).

²²⁶ RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16, at 430 (4th ed. 2007).

²²⁷ *Id.* at 431–32.

²²⁸ *Baker v. Carr*, 369 U.S. 186, 210 (1962).

discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; [and (6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.²²⁹

Following in the wake of the *Baker v. Carr* decision, the National Municipal League in its Model State Constitution advised against including positive rights on the theory that such rights would not be enforceable under the political question doctrine.²³⁰ The National Municipal League's advice "stemmed from the belief that 'judicially manageable standards' could not be derived from positive guarantees, which rendered these guarantees non-justiciable."²³¹ These concerns have proven prescient. In the education context, a number of state courts have treated challenges based upon affirmative constitutional rights as non-justiciable political questions.²³²

For example, the Nebraska Supreme Court applied the political question doctrine as a basis for not addressing the question of whether the funding provided to the state's public schools was constitutionally adequate.²³³ Having considered the experiences of other states' supreme courts that had attempted to address the constitutional adequacy of education in their respective states, the court concluded that judicial abstention was the better course. The Nebraska Supreme Court stated, "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp."²³⁴

²²⁹ *Id.* at 217.

²³⁰ NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 27–28 (6th ed. 1963).

²³¹ Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1058 n.8 (1993).

²³² See generally Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009) (investigating why state courts have resurrected the political question doctrine in educational adequacy claims).

²³³ Neb. Coalition for Educ. Equity and Adequacy v. Heineman, 731 N.W.2d 164, 164 (Neb. 2007).

²³⁴ *Id.* at 183; see also Michelle L. Sitorius, Note, *Nebraska Coalition for Educational Equity & Adequacy v. Heineman*, 273 NEB. 531, 731 N.W.2D 164 (2007)—*The Political Question Doctrine: A Thin Black Line Between Judicial Deference and Judicial Review*, 87

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The Illinois Supreme Court also concluded that deciding what constitutes a constitutionally adequate education is a political question for the voters and their representatives, not the courts.

What constitutes a “high quality” education,²³⁵ and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary’s field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.²³⁶

The court expressed concern that

To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But nonexperts—students, parents, employers and

NEB. L. REV. 793, 819 n.210 (2009) (“The Stygian swamp is a reference to Greek mythology and the Stygios—a ‘wild and awful place’ according to Plato—that feeds the River Styx, which surrounds Hades.” (quoting PLATO, PHAEDO 183 (Reginald Hackforth trans., Cambridge University Press 1st ed. 1955))).

²³⁵ The Illinois Constitution provides that:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.

ILL. CONST., art. 10, § 1.

²³⁶ Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996).

others—also have important views and experiences to contribute which are not easily reckoned through formal judicial factfinding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.²³⁷

A number of other states including Florida, Oklahoma, Pennsylvania, and Rhode Island have also dismissed challenges to the adequacy of the public education system by concluding that the issue is non-justiciable.²³⁸ Similarly, the North Carolina Supreme Court found the issue of whether pre-kindergarten programs are constitutionally required to constitute a political question.²³⁹

B. Non-Self-Executing Provisions

Whether considered to be a sub-category of the political question doctrine²⁴⁰ or a separate but related doctrine,²⁴¹ a number of states courts also have declined to enforce positive rights based upon the conclusion that such provisions are not self-executing. In his highly influential treatise on state constitutional law, Justice Cooley described the divide between self-executing constitutional provisions and those that are not as follows:

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.²⁴²

²³⁷ *Id.*

²³⁸ *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1066 (Okla. 2007); *Marrero ex rel. Tabalas v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58–59 (R.I. 1995).

²³⁹ *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365, 391 (N.C. 2004).

²⁴⁰ *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 260 (Mont. 2005) (stating that “[b]oth the United States Supreme Court and [the Montana Supreme] Court recognize that non-self-executing clauses of constitutions are non-justiciable political questions”); Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 62–63 (2006).

²⁴¹ FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 95 (2006); José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 335 (1993).

²⁴² COOLEY, *supra* note 131, at 121.

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A non-self-executing provision offers “general principles” that “may need more specific legislation to make it operative.”²⁴³ In other words, enforcement of non-self-executing provisions, which are more common in state constitutions than the federal constitution,²⁴⁴ requires further legislative enactments to provide a basis for judicial review.²⁴⁵

State constitutional environmental rights provisions are often deemed unenforceable as non-self-executing provisions.²⁴⁶ A number of state constitutions include policy statements indicating adherence to environmental protection but do not provide any greater specificity.²⁴⁷ Addressing such provisions, “state courts have concluded that [they] are not self-executing and do not require either state or private parties to take any particular actions.”²⁴⁸

For example, in a case concerning a component of Virginia’s environmental protection constitutional provision, which also provides for preservation of historical sites, the Virginia Supreme Court explained its determination that the entire article was non-self-executing as follows:

Article XI, § 1, contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law.... [I]ts language invites crucial questions of both substance and procedure. Is the policy of conserving historical sites absolute? If not, what facts or circumstances justify an exception? Does the policy apply only to the State and to state-owned sites, or does it extend to private developers and to privately-owned sites? Who has standing to enforce the policy? Is the Governor of the Commonwealth an essential party-defendant? Is the remedy solely administrative, solely judicial, or a mixture of the two? If the remedy is judicial,

²⁴³ *Davis v. Burke*, 179 U.S. 399, 403 (1900).

²⁴⁴ Rob Natelson, *Montana Constitution Project Unveiled at UM: Documents 'May Change Way We Think' About Intent*, 33 MONT. LAW. 14, 15 n.7 (2008).

²⁴⁵ Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 175 (2005); James “Beau” Eccles, *Down to the Bare Walls*, 66 TEX. B.J. 952, 955 & n.6 (2003); Natelson, *supra* note 244, at 15 n.7.

²⁴⁶ JACQUELINE P. HAND & JAMES CHARLES SMITH, *NEIGHBORING PROPERTY OWNERS* § 9:19 n.211 (1988 & Supp. 2009).

²⁴⁷ Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158–59 (2003) [hereinafter Thompson, *Constitutionalizing*].

²⁴⁸ *Id.* at 161.

which court has jurisdiction over the subject matter and over the parties?²⁴⁹

Similarly, the Florida Supreme Court concluded that a water pollution amendment would constitute a political question because “too many policy determinations remain unanswered [such as the various] rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished.”²⁵⁰ The court added that the amendment raised too many questions including “what constitutes ‘water pollution’; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted.”²⁵¹ Many state constitutional environmental provisions have suffered the same fate and have been left unenforced.²⁵²

State court determinations that affirmative rights provisions are non-self-executing are not limited, however, to environmental rights provisions. For example, the Michigan Court of Appeals applied the doctrine to a claim that state health insurance is required for the otherwise uninsured. Michigan’s Constitution provides that “[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.”²⁵³ The Michigan Court of Appeals found that this “provision is not self-executing; it requires legislative action.”²⁵⁴

C. Recognition of a Duty, but with Extraordinary or Complete Deference to the Legislature

Courts have frequently adopted an interpretive approach recognizing the mandatory duty imposed on the legislature by the Constitution, but deferring absolutely or almost completely to the legislature as to the scope of the right afforded by the state constitution.²⁵⁵ The Alabama Supreme Court’s response to

²⁴⁹ Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676–77 (Va. 1985); *see also* City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955) (reaching the same conclusion for a Texas constitutional provision).

²⁵⁰ Advisory Op. to the Gov’r, 706 So. 2d 278, 281 (Fla. 1997).

²⁵¹ *Id.*

²⁵² Fernandez, *supra* note 241, at 334.

²⁵³ MICH. CONST. art. IV, § 51.

²⁵⁴ Mich. Universal Health Care Action Network v. State, No. 261400, 2005 WL 3116595, at *2 (Mich. Ct. App. Nov. 22, 2005).

²⁵⁵ Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 124–25 (1994); Pascal, *supra* note 70, at 874–76; Wiik, *supra* note 75, at 928–29.

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challenges based upon Alabama Constitution Article IV, Section 88, which provides that “[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor,”²⁵⁶ is emblematic of the sense of some state courts that they are incapable of responding to potential constitutional failures with regard to affirmative rights. The court noted that this section “makes it the duty of the legislature to require the several counties to make adequate provision for the maintenance of the poor. Appellee points to the fact that this is a mandatory duty. But of course there is no way to force the legislature to perform that duty . . .”²⁵⁷

Even where state courts have not so starkly declared a sense of incapacity to remedy constitutional failures, many state courts have, nevertheless, with regard to the scope of affirmative rights, rendered these issues *de facto* purely political matters. For example, the Kansas Constitution imposes a duty upon county governments to provide for the poor: “The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society.”²⁵⁸ The Kansas Supreme Court has repeatedly interpreted this provision as imposing a duty to act to aid the poor. For example, the court stated that while the Kansas Constitution

gives utterance to the universal voice of sympathy, it does much more; it gives voice to a universally recognized state duty, to be discharged in the interest of the public welfare . . . Since the pauper is both indigent and incapable of self-help, and since no one else is charged with the duty of keeping him, the state must . . . take care of him.²⁵⁹

Having noted that statutory provisions “make it the duty of the overseer to care for the poor and to see that they are given relief, and [make it] the duty of the board of county commissioners to raise money and pay for such care and relief,” the Kansas Supreme Court has declared that the state constitution “enjoins this care and commands that counties of the state shall provide for the poor and those who have claims upon the sympathy and aid of society.”²⁶⁰ But as noted by the court itself, “[t]he real issue is the depth, and

²⁵⁶ ALA. CONST. art. IV, § 88.

²⁵⁷ Atkins v. Curtis, 66 So. 2d 455, 458 (Ala. 1953).

²⁵⁸ KAN. CONST. art. VII, § 4.

²⁵⁹ Beck v. Bd. of Comm’rs of Shawnee County, 182 P. 397, 400 (Kan. 1919).

²⁶⁰ Caton v. Bd. of Comm’rs of Osborne County, 205 P. 341, 343 (Kan. 1922).

breadth, of that duty.”²⁶¹ In answering this question, the court has declined to give any contour to the scope of that duty and instead deferred entirely to the legislature.²⁶²

In adopting this approach, the Kansas Supreme Court drew upon the jurisprudence of the New York state courts in addressing Article XVII, § 1 of the New York Constitution. The New York Court of Appeals has explained that

This provision was adopted in 1938, in the aftermath of the great depression, and was intended to serve two functions: First, it was felt to be necessary to sustain from constitutional attack the social welfare programs first created by the State during that period; and, second, it was intended as an expression of the existence of a positive duty upon the State to aid the needy.²⁶³

New York has, in fact, instituted a welfare program for the needy. Three categories of cases have been raised in challenging aspects of the program: (1) challenges involving persons who argue they fall within the statutory definition of needy but have, nevertheless, been denied benefits; (2) challenges involving individuals who do not fall within the statutory definition of needy but who assert that they should be included because they are similarly situated with persons who are receiving benefits; and (3) challenges arguing the legislature is failing to provide sufficient benefits or benefits of the appropriate type.²⁶⁴

As to the first type of claim, New York courts have taken the view that “the legislature has no authority to depart from a definition of needy that the political process has itself generated. The court applies in these cases a bright-line approach, without any balancing, thus vigorously enforcing standards that presumably come with the aura of democratic accountability.”²⁶⁵ Enforcement of these claims has extended beyond remedying errant benefit denials to eliminating procedural hurdles that may create difficulties for otherwise entitled claimants to receive benefits. For example, the New York Court of Appeals determined that although a particular administrative requirement served a valid cost-cutting objective, it could not be implemented because the objective could not be

²⁶¹ Bullock v. Whiteman, 865 P.2d 197, 202 (Kan.1993).

²⁶² *Id.* at 202–03.

²⁶³ Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977) (citation omitted).

²⁶⁴ Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631, 636–39 (1997) [hereinafter Hershkoff, *Rights*].

²⁶⁵ *Id.* at 637–38.

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“achieved by methods which ignore the realities of the needy’s plight and the State’s affirmative obligation to aid all its needy.”²⁶⁶

In addressing suits from the second category of plaintiffs, those asserting a functional equality with those who qualify for benefits, the courts have been extremely deferential to the legislature’s line-drawing of who is needy and who is not. The courts have, in general, presumed a plenary legislative authority “to define the standards that construct the statutory category of needy and that limit membership in the group of needy persons eligible for assistance. In the cases so far, the court will rarely accept a substantive challenge to the underinclusiveness of the state’s classification.”²⁶⁷ Accordingly, if “the statutory border is plausibly cast in economic terms, [then] the court is typically satisfied that the legislature has complied with [the Constitution’s] mandate and it does not scrutinize the actual reasonableness of the law.”²⁶⁸

As for the third category of plaintiffs, those asserting that the benefits afforded are inadequate, the court has given the legislature complete autonomy to determine adequacy. The New York Court of Appeals has determined that “the Legislature is vested with discretion to determine the amount of aid.”²⁶⁹ The court has indicated that the New York “Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term ‘needy.’”²⁷⁰ Although the courts have viewed the issue as being justiciable and analyzed claims upon the merits with regard to questions pressing the adequacy of the benefits provided, “in practice the legislature is afforded discretion that is final and beyond review.”²⁷¹

D. Democratic Experimentalism

Some state courts have taken a more active role in defining the scope of affirmative rights and done so in a manner somewhat in accord with new governance democratic experimentalism theories. New governance models seek to move away from “a top-down, hierarchical rule-based system where failures to adhere are

²⁶⁶ *Tucker*, 371 N.E.2d at 452.

²⁶⁷ Hershkoff, *Rights*, *supra* note 264, at 638–39.

²⁶⁸ *Id.* at 639.

²⁶⁹ *Bernstein v. Toia*, 373 N.E.2d 238, 244 (N.Y. 1977).

²⁷⁰ *Tucker*, 371 N.E.2d at 452.

²⁷¹ Hershkoff, *Rights*, *supra* note 264, at 639; see also Raquel Aldana, *On Rights, Federal Citizenship, and the “Alien”*, 46 WASHBURN L.J. 263, 301–02 (2007).

sanctioned, or unregulated market-based approaches,” and replace such approaches with “a more participatory and collaborative model of regulation in which multiple stakeholders, including, depending on the context, government, civil society, business and nonprofit organizations, collaborate to achieve a common purpose.”²⁷²

Professors Michael C. Dorf and Charles F. Sabel have advanced an approach to constitutional interpretation based upon new governance models. They suggest that

Judicial review by experimentalist courts . . . becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them. Constitutional review in particular becomes a jurisprudence of impermissible arguments and obligatory considerations—the former forbidding the actors to pursue ends found to be unconstitutional; the latter enjoining them to give particular attention to their choice of means when constitutional values appear to be at risk.²⁷³

To facilitate experimentation and improvement, multiple governmental units pursue policy goals on parallel tracks with each unit generating data on its progress. This data generation empowers greater participation by an informed citizenry in assessing the utility of governmental services and the imposition of best practice requirements by the judiciary as benchmarks with rights become increasing rigorously pursued.²⁷⁴

The Texas Supreme Court’s approach to education clause issues has reflected to some degree Professors Dorf and Sabel’s democratic experimentalism approach to constitutional interpretation.²⁷⁵ Article VII, Section 1 of the Texas Constitution provides that “[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.” Interpreting this provision, the Texas Supreme Court

²⁷² Klein, *supra* note 43, at 394.

²⁷³ Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389–90 (1998) (emphasis omitted).

²⁷⁴ Klein, *supra* note 43, at 394.

²⁷⁵ *Id.* at 397–402.

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stated the following:

This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.²⁷⁶

The court added that "[i]f the system is not 'efficient' or not 'suitable,' the legislature has not discharged its constitutional duty and it is our duty to say so."²⁷⁷ The court defined some of the constitutional parameters of the constitutionally mandated public education, but declined to instruct the legislature as to specifics or mechanisms for achievement.²⁷⁸ The court, however, rejected a series of legislative plans for remedying the constitutional violation before approving a legislatively created approach that coupled finance changes with a system that set standards and provided for continuing on-going monitoring and publicly available information.²⁷⁹

Similarly, the Kentucky Supreme Court and the Massachusetts Supreme Judicial Court opted to set forth goals for the legislature to strive to achieve.²⁸⁰ To provide an efficient system of education under the Kentucky Constitution, the Kentucky Supreme Court concluded that the legislature "must have as its goal to provide each and every child" with seven capacities that the court considered to be minimum requirements.²⁸¹ While finding that the state's

²⁷⁶ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989).

²⁷⁷ *Id.* (emphasis omitted).

²⁷⁸ *Id.* at 399.

²⁷⁹ Klein, *supra* note 43, at 400.

²⁸⁰ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

²⁸¹ *Rose*, 790 S.W.2d at 212. Those capacities include

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to

education system needed to be fundamentally reformed, the court left to the general assembly's discretion the question of how best to reform the state's education system so long as it acted reasonably to pursue the goals specified by the court or even higher goals.²⁸² The Massachusetts Supreme Judicial Court followed the same approach, adopting the same goals. In doing so, the court declared "[a]s has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume that the Commonwealth will fulfill its duty to remedy the constitutional violations that we have identified."²⁸³

E. Strict Scrutiny

Whereas education clause challenges have achieved considerable litigation success for those challenging the adequacy of state education systems, for the most part "constitutional guarantees of environmental rights have generally not been taken very seriously by courts Such statements are often viewed by judges and commentators alike as voicing aspirations rather than creating substantive law."²⁸⁴ The Montana Supreme Court's approach to Article II, Section 3 of its state constitution stands as a counterexample. The constitutional provision provides as follows:

All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.²⁸⁵

Addressing this provision, the Montana Supreme Court held [T]he right to a clean and healthful environment is a fundamental right . . . and . . . any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to

compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id.

²⁸² *Id.*

²⁸³ *McDuffy*, 615 N.E.2d at 554.

²⁸⁴ Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 628 (2004).

²⁸⁵ MONT. CONST. art. II, § 3.

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effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.²⁸⁶

Article IX, Section 1 adds the following to the foundation laid by Article II, Section 3:

(1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.

(2) The legislature shall provide for the administration and enforcement of this duty.

(3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.²⁸⁷

Concluding the latter provision is interrelated with Article II, Section 3, the court determined that it would also "apply strict scrutiny to state or private action which implicates either constitutional provision."²⁸⁸ Under these standards, the Montana Supreme Court invalidated a statute creating an exception to the state's environmental protections laws and found a contract between private parties to be void as an illegal contract because of its deleterious environmental consequences.²⁸⁹

The Montana Supreme Court is not the only state court to have interpreted an affirmative rights provision as requiring the application of strict scrutiny. In addressing a one year expulsion of a student for bringing a firearm onto school property, the West Virginia Supreme Court concluded that strict scrutiny was required.²⁹⁰ The court determined that "any denial of the right to an education cannot withstand strict scrutiny unless the State can demonstrate some compelling State interest to justify that denial."²⁹¹ The court reasoned that "[i]mplicit within the constitutional guarantee of 'a thorough and efficient system of free schools' is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education."²⁹² Nevertheless, the

²⁸⁶ Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (1999).

²⁸⁷ MONT. CONST., art. IX, § 1.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1249; Cape-France Enters. v. Estate of Peed, 29 P.3d 1011, 1017.

²⁹⁰ Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 914 (W.Va. 1996).

²⁹¹ *Id.*

²⁹² *Id.*

court determined that “by refusing to provide any form of alternative education, [the government] has failed to tailor narrowly the measures needed to provide a safe and secure school environment.”²⁹³ Ultimately, the court concluded that “the ‘thorough and efficient’ clause of Article XII, Section 1 of the West Virginia Constitution, requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year.”²⁹⁴

F. Judicial Management

While strict scrutiny imposes an arduous burden on the political branches, “[n]o example of the active judicial participation . . . is perhaps more notorious than the [nearly four]-decade saga surrounding school finance litigation in New Jersey. This litigation has been described by even those who are partial towards the court’s involvement as a ‘war.’”²⁹⁵ Two series of cases, *Robinson v. Cahill* and *Abbott v. Burke*, which have been addressed by the New Jersey appellate courts dozens of times over the last four decades have been vehicles for application of a judicial management approach to state constitutional affirmative rights.²⁹⁶ In *Robinson*, the New Jersey Supreme Court, while advancing the constitutional importance of equal opportunity in education, rejected the state’s equal protection clause as the basis for greater funding for poor schools and instead embraced the education clauses of the state constitution.²⁹⁷ The *Abbott* litigation, which arose after *Robinson*, “reflects the court’s simultaneous contraction and expansion of its role in the dialogue that had consumed many New Jersey lawmakers and citizens. *Abbott* significantly expanded the judicial scope, but targeted the court’s effort at fewer and more discrete school districts.”²⁹⁸ Instead of focusing on influencing school policy for all children in New Jersey, the court turned its attention to improving educational opportunities for students in the most disadvantaged schools.²⁹⁹ These districts have become known as

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 99 (2000).

²⁹⁶ See *id.* at 99–100.

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 101.

²⁹⁹ *Id.*

“Abbott districts.”³⁰⁰

With regard to the operation of schools in “Abbott districts,” the New Jersey courts have assumed “the role of ‘education policymaker.’”³⁰¹ For example, pursuant to the state constitution, the New Jersey Supreme Court has ordered the implementation of full-day kindergarten programs as well as half-day programs for three and four year-olds.³⁰² For these programs, the court has required particular certifications for pre-school teachers and specified class-sizes.³⁰³ The court has also ordered the use of supplemental assistance programs with accompanying software and instructional materials.³⁰⁴ The court has also placed a heavy emphasis on literacy and mathematics in early education.³⁰⁵ The court has ordered construction of new facilities and provided timelines for completion thereof³⁰⁶ and has mandated technology and college preparatory programs at the high school level.³⁰⁷ Simply stated, “the New Jersey Supreme Court [is] heavily involved in overseeing the administration of the state’s public school system.”³⁰⁸

G. Unlitigated Provisions

While many affirmative rights provisions have been litigated in state courts, others have been completely ignored. Litigants often fail to advance their rights under state constitutions thereby failing to place these provisions before state judiciaries.³⁰⁹ For example,

³⁰⁰ John B. Wefing, *Chief Justice Richard J. Hughes and His Contributions to the Judiciary of New Jersey*, 36 SETON HALL L. REV. 1257, 1270–71 (2006).

³⁰¹ Alexandra Greif, Note, *Politics, Practicalities, and Priorities: New Jersey’s Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL’Y REV. 615, 624 (2004).

³⁰² Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 217, 233 (2008); Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 135 (2007).

³⁰³ Allison Harper, Note, *Building on Traditional Lawyering by Organizing Parent Power: An Emerging Dimension of Early Childhood Advocacy*, 14 GEO. J. ON POVERTY L. & POL’Y 339, 355 (2007).

³⁰⁴ Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 633 n.179 (2008).

³⁰⁵ *Id.*

³⁰⁶ Daria E. Neal, *Healthy Schools: A Major Front in the Fight for Environmental Justice*, 38 ENVTL. L. 473, 482 (2009); Broun & Puriefoy, *supra* note 302, at 236 n.81.

³⁰⁷ Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1274 n.31 (2007).

³⁰⁸ Chia & Seo, *supra* note 302, at 136.

³⁰⁹ See Victor E. Schwartz et al., *The Supreme Court’s Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 908 (2009); Sheldon H. Nahmod, *State Constitutional Torts: Deshaney, Reverse-Federalism and*

“the vast majority of states that have constitutional provisions directly addressing the care of individuals with mental disabilities or mental illnesses have not been the site of state-law-based right-to-treatment litigation.”³¹⁰ Likewise, fewer than half of the state constitutional provisions relating to health-care have been litigated in state appellate courts.³¹¹ As a result, these issues are simply not addressed by the courts.³¹² It has been suggested that “[a] generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of the Warren [Court decisions] left state constitutional law in a condition of near atrophy in [most] states.”³¹³ While judicial federalism has brought new life, especially with regard to state constitutional criminal law provisions, many affirmative rights have yet to be enlivened through litigation.

V. HOW SHOULD AFFIRMATIVE RIGHTS IN STATE CONSTITUTIONS BE INTERPRETED?

When interpreting affirmative rights provisions, state courts find themselves navigating between Scylla and Charybdis.³¹⁴ On one side, constitutional violations are left unredressed, resulting in devastating harms to individuals and communities as well as the constitution; on the other side, aggressive enforcement of affirmative rights may result in usurpation of the authority of political branches, improper limitations on the electorate’s

Community, 26 RUTGERS L.J. 949, 958 (1995).

³¹⁰ Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 13 n.84 (2003); see also Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1264–65 (1987); Alan Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 9 (1982).

³¹¹ See Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1, 40–41 (forthcoming 2010), available at <http://ssrn.com/abstract=1421504>.

³¹² See Shane R. Heskin, Comment, *Florida’s State Constitutional Adjudication: A Significant Shift as Three New Members Take Seats on the State’s Highest Court?*, 62 ALB. L. REV. 1547, 1554 (1999).

³¹³ JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS CLAIMS AND DEFENSES § 1.01 n.11, at 1–4 (4th ed. 2006).

³¹⁴ [T]hese are the two sea monsters from Homer’s *Odyssey*. Scylla and Charybdis dwelled on opposite sides of a narrow strait so that sailors attempting to avoid Charybdis would fall prey to Scylla and vice versa. The monsters symbolize a state where one is between two dangers and moving away from one will cause you to be in danger of the other.

Damien Geradin et al., *The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. SCI. & TECH. L. 144, 176 n.125 (2008).

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governing capacity, a reduction in administrative flexibility, and a diminishment in the judiciary's prestige. State constitutional affirmative rights provisions can be classified in a variety of ways. Herein, the provisions are divided into five categories based upon the general approach that should be applied in addressing these measures: (1) provisions which have been identified in scholarly discourse as positive rights provisions but which in reality merely authorize the state to take action; (2) non-justiciable positive rights provisions; (3) non-self-executing rights; (4) highly specific enforceable provisions; and (5) abstract enforceable provisions. The interpretation of the first four are relatively uncomplicated to address; the latter is considerably more complex.

A. Mere Authorizations to Act

A number of scholarly commentators have equated provisions that are little more than express authorizations for a state government to act with the imposition of an affirmative right.³¹⁵ While such provisions are not inconsequential, they do not create affirmative rights. They can provide a basis for governmental action, allowing action that might otherwise be prohibited under the state constitution. They can also be a source of inspiration to act. But to equate provisions that constitutionally authorize the state to act with imposition of a constitutional duty to act is misplaced. These provisions simply do not obligate the government to act. Courts should find these provisions relevant where related governmental action is challenged but should not consider these provisions as imposing affirmative obligations upon the state.

B. Non-Justiciable Directive Principles

"American state constitutions have not generally utilized the approach of including judicially unenforceable . . . directive principles as constitutional provisions."³¹⁶ Such provisions are more

³¹⁵ See, e.g., Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 447 & n.265 (2008); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 431 n.161 (2000); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 29 & n.165 (1997); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 97–98 (1992).

³¹⁶ G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1119 (2005).

common internationally both in national and sub-national constitutions.³¹⁷ While such provisions are relatively rare in the United States, some state constitution drafters have offered their own variation on the directive principles concept, perhaps best exemplified internationally by India's Constitution. The Indian Constitution constitutionalizes directive principles of state policy, an incredibly expansive array of economic and social rights and Gandhian principles.³¹⁸ The Indian Constitution expressly forbids the courts from enforcing these principles; rather, responsibility for their effectuation is the exclusive province of the political branches.³¹⁹

Such provisions are not unknown in state constitutions. For example, the Alabama Constitution declares that “[i]t is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student.”³²⁰ This principle, however, is sharply limited because the constitution also expressly provides that “nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense.”³²¹ Alabama’s Constitution originally included a more traditional right to education requiring the legislature to “establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof.”³²² But this provision was subsequently amended to prevent judicial enforcement.³²³ In

³¹⁷ Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 375 (2008); Tarr & Williams, *supra* note 316, at 1119–20.

³¹⁸ INDIA CONST. part IV; see Paras Diwan, *Three Decades of Constitutional Development: Keynote Paper*, in 1 DIRECTIVE PRINCIPLES JURISPRUDENCE 27–35 (Paras Diwan & Virenda Kumar eds., 1982); NALIN KUMAR, JUDICIARY ON GOALS OF GOVERNANCE: DIRECTIVE PRINCIPLES OF STATE POLICY 11–12 (2005).

³¹⁹ INDIA CONST. part IV, art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”).

³²⁰ ALA. CONST. art. XIV, § 256.

³²¹ *Id.*

³²² ALA. CONST. art. XIV, § 256 Code Commissioner’s Notes.

³²³ *Id.* In a 2004 statewide referendum, the voters of Alabama narrowly disapproved amendments that would have, among other measures, removed this limiting language with amendment opponents specifically raising concerns that “removing that language will lead to the constitutional construction of an enforceable right to education in Alabama by ‘activist’ judges”; that “based on the existence of an enforceable right to education, and in light of existing inequities, judges will order extensive changes in the public school system and increases in school funding”; and that “such changes and increases will result—either directly

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addressing suits challenging educational adequacy, the Alabama Supreme Court properly found that the “duty to fund Alabama’s public schools is a duty that . . . the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought.”³²⁴

While constitutionalizing non-justiciable principles is often a poor constitutional design choice,³²⁵ if a court ignored this limitation and rendered the provision judicially enforceable, it would be grievously abusing its power. When a state court addresses a constitutional challenge predicated on a provision that expressly permits no judicial enforcement or declares that it creates no enforceable right, the court should follow the model of the Alabama Supreme Court in *Ex parte James* and bow-out.

C. Non-Self-Executing Policy Provisions

A number of state constitutional provisions establish a policy but do not impose any particular duty upon the legislature to act. In the context of environmental litigation, “[c]ourts have uniformly held that such [v]alue [d]eclarations do not require anyone, including the government, to take any particular actions. In constitutional terminology, [v]alue [d]eclarations are not ‘self-executing,’ but instead rely on legislative or administrative implementation.”³²⁶

In addressing a case implicating the political question doctrine under the Federal Constitution, Justice Souter presented a useful analogue for state courts in addressing the outer-boundaries of such judicial abstention. In his concurring opinion in *Nixon v. United States*, in which the Court determined that the question of whether the Senate’s actions were sufficient to constitute having tried President Nixon before impeaching him qualified as a political question, Justice Souter conceded that judicial silence would

or indirectly—in higher state taxes.” Pratik A. Shah, *The Hypothetical Impact of Alabama’s Failed Amendment 2 on Public School Funding*, 56 ALA. L. REV. 863, 866 (2005).

³²⁴ *Ex parte James*, 836 So.2d 813, 815 (Ala. 2002).

³²⁵ See generally Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 MICH. ST. J. INT’L L. 643, 645 (2007) (“[T]his inclusion of non-justiciable directive principles in a constitution threatens to undermine the distinctiveness and purposes of a constitution [or constitutional law] in a constitutional representative democracy. . . . [W]hile non-justiciable directive principles can be constitutional law . . . they should not be.”).

³²⁶ Barton H. Thompson, Jr., *The Environment and Natural Resources*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 312–13 (G. Alan Tarr & Robert F. Williams eds., 2006).

normally be warranted on such an issue and was warranted in this case. Justice Souter indicated, however, that there is an outer-boundary beyond which the actions of the political branches may be so extreme as to exceed their authority and the impact of their actions so grievous as to warrant judicial action.³²⁷

In a similar vein, Montana Supreme Court Justice James Nelson has raised serious and legitimate concerns about the outer-boundaries of judicial abstention with regard to non-self-executing provisions in state constitutions. Justice Nelson noted that “[w]hen, in adopting their constitution, the people provided that a provision shall be implemented by the legislature, it cannot be gainsaid that the people had the right to expect, and do expect that branch of government to, in good faith, carry out its constitutionally imposed obligation to legislate.”³²⁸ By their very nature, “non-self-executing constitutional mandates are . . . enacted with the expectation that the legislature will act to implement the directive.”³²⁹ The legislature’s failure “to act upon a non-self-executing constitutional directive, which defeats or restricts the purpose of that mandate, is just as unacceptable as legislation which defeats or restricts the purpose of a self-executing right.”³³⁰ Accordingly, “a justiciable claim must, at some point, arise if the legislature fails or refuses to fulfill its obligation.”³³¹ While a state court should not create a positive right out of whole-cloth in addressing a challenge raised pursuant to a non-self-executing provision,³³² a court should not wholly abandon the field. If a legislature fails to act to effectuate a non-self-executing provision, Justice Nelson’s observations point towards the judiciary cautiously endeavoring to encourage legislative action.

D. Highly Specific Detailed Affirmative Rights Provisions

Standing on the opposite end of the spectrum from abstract non-self-executing policy statements are highly detailed state constitutional provisions. While the use of highly specific detailed provisions in a constitution causes certain difficulties, not the least of which is that the constitution may not have the flexibility

³²⁷ Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring).

³²⁸ Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 265 (Mont. 2005) (Nelson, J., concurring).

³²⁹ *Id.*

³³⁰ *Id.* at 266.

³³¹ *Id.* at 265.

³³² Pettinato, *supra* note 240.

necessary to change with shifting societal needs, the greater specificity of many state constitutional provisions eases the task of interpretation.³³³ Many recent highly specific affirmative rights provisions, such as mandatory minimum levels of increased funding for public education from kindergarten through grade twelve³³⁴ and constitutional provisions authorizing lotteries with funds specifically allocated,³³⁵ have been introduced, in part, with the goal of inviting the check of judicial enforcement upon legislative or executive discretion. The courts should not disappoint these expectations; to the contrary, the electorate should be given the benefit of their constitutional bargain.³³⁶ While there are certainly disadvantages to highly detailed specific provisions, one of them should not be judicial abdication. Rigorous enforcement of highly specific affirmative rights provisions is warranted.

E. Abstract Affirmative Rights Provisions

The most difficult quandary in approaching state constitutional rights is the interpretation of affirmative provisions that are not specific and detailed but which impose an affirmative duty upon the state to confer some benefit that imposes a significant cost upon the state, has extensive administrative requirements, and affects large numbers of persons. A significant number of affirmative rights provisions in state constitutions fall within this category.

1. Rejection of the Political Question Doctrine

A number of state courts have responded to challenges based upon abstract positive rights provisions by finding such challenges

³³³ Hershkoff, *Positive Rights*, *supra* note 168, at 1156; *see generally* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 916 (1996); Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1510 (1987) (discussing possible negative ramifications of constitutional flexibility resulting in highly specific state constitutions); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984) [*hereinafter Linde, E Pluribus*].

³³⁴ *See, e.g.*, COLO. CONST. art. IX, § 17; *see generally* DALE A. OESTERLE & RICHARD B. COLLINS, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* 220–22 (2002) (discussing article IX, § 17 of the Colorado Constitution); Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1304 (2007); Norman H. Wright, *Important Developments in State and Local Tax: Colorado*, 6 ST. & LOC. TAX LAW. 175, 175 (2001).

³³⁵ *See, e.g.*, OHIO CONST. art. XV, § 6.

³³⁶ *See* Heiple & Powell, *supra* note 169, at 1515–16.

to be non-justiciable under the political question doctrine. This approach constitutes an improper abdication of the court's constitutional role.

As applied by the federal courts, the political question doctrine has been subject to considerable criticism. Its application seems inconsistent with tripartite government composed of an executive, legislature, and judiciary, in which each checks the others.³³⁷ Utilization of the political question doctrine is also unnecessary to give effect to judicial restraint.³³⁸ To employ the political question doctrine for the purpose of facilitating judicial restraint is to conflate "deference with abdication."³³⁹ Furthermore, as for concerns about the absence of judicially manageable standards, abdication on such a basis seems suspect. When "one examines the litany of case law either interpreting the broad language of the due process or equal protection clauses or establishing standards on which to invoke the first amendment right of free speech, one must suspect the disingenuousness of the 'absence-of-standards' rationale."³⁴⁰

Furthermore, it has been argued that the political question doctrine is entirely inapplicable to state courts.³⁴¹ While this argument reaches too far, it unearths an important truth. Justiciability restrictions on the state level are less than those limiting federal courts. State common law courts quite properly "hear an array of questions that would be nonjusticiable under federal law."³⁴² That is, state courts, as common law courts of general jurisdiction, frequently, and of long-standing tradition, adjudicate matters that would be non-justiciable in federal courts.³⁴³ State courts often do not share the same constitutional limitations of the case and controversy requirements as their federal counterparts. They have fewer limitations related to standing, for

³³⁷ James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 954 (2008).

³³⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 131–32 (2d ed. 2002).

³³⁹ *Id.* at 132.

³⁴⁰ Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1046 (1985).

³⁴¹ Linde, *E Pluribus, supra* note 333, at 189–90; Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) [hereinafter Linde, *Judges*].

³⁴² Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863–64 (2001) [hereinafter Hershkoff, *State Courts*].

³⁴³ See *id.* at 1863–64; Linde, *Judges, supra* note 341, at 248; James W. Doggett, Note, "Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?, 108 COLUM. L. REV. 839, 839 (2008).

example taxpayer suits are regularly permitted, and many are empowered to give advisory opinions.³⁴⁴ It is a symptom of over-incorporation of federal constitutional norms to simply transport the federal political question doctrine into state courts without changes being made to tailor the doctrine to its more limited role in the state court context.

Even if the political question doctrine were treated in a one size fits all approach, applicable in the same manner to state and federal courts, it is not apparent that state courts are correctly applying the doctrine in finding that affirmative rights provisions are non-justiciable. As has been noted by Professor Mark Tushnet, “not much” lies within the non-justiciable realm of the political question doctrine and outside the bounds of ordinary judicial interpretation.³⁴⁵ Addressing the doctrine’s application outside the realm of foreign affairs, Professor Rebecca Brown has noted that “[i]f the plaintiff has a real stake and articulates a real injury, the Court tends to adjudicate the case, even in the face of arguments that the case should be dismissed as a nonjusticiable political question.”³⁴⁶ Plaintiffs seeking vindication of their right to education, welfare, or disability benefits, etc. have a real stake and suffer a real injury by the denial thereof.

Interpreting positive rights does not inherently press the courts into the narrow domain of cases that constitute non-justiciable political questions. To the contrary, positive rights, like their negative rights counterparts, invite judicial interpretation. “[T]he explicit textual commitment of some state constitutions” to guaranteeing affirmative rights “actively engages the state court in the elaboration of substantive norms and also legitimates this interpretive process.”³⁴⁷ Simply stated, “constitutional language requires interpretation and implementation, including language in

³⁴⁴ See Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 233 (2006); see also Hershkoff, *State Courts*, *supra* note 342, at 1861–66; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 808–10 (1992); Varu Chilakamarri, Comment, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 254–55, 259–64 (2004); Note, *Taxpayer Suits*, 82 HARV. L. REV. 224, 227 (1968).

³⁴⁵ Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1208–09 (2002); see also David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441 (1999); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984) (“[T]he political question doctrine appears to have nearly fallen into desuetude . . .”).

³⁴⁶ Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, 1993 SUP. CT. REV. 125, 147 (1993).

³⁴⁷ Hershkoff, *Positive Rights*, *supra* note 168, at 1169.

state constitutions that creates an affirmative right.”³⁴⁸ The overwhelming majority of state courts addressing affirmative rights have concluded that such challenges are justiciable.³⁴⁹ As noted by the Wyoming Supreme Court, such challenges are “no more a political question than any other challenge to the constitutionality of statutes.”³⁵⁰ To treat positive rights provisions as inherently nonjusticiable, as matters purely of politics despite their constitutionalization, is to effectively read these provisions out of state constitutions or at least to eliminate the role of a tripartite system of checks and balances with regard to these constitutional rights.³⁵¹ In other words, “the complexity of distinguishing between spheres of power” that arise when interpreting affirmative rights state constitutional provisions “is not an appropriate grounds for conceding authority altogether.”³⁵² Affirmative state constitutional rights “may not simply be remitted to politics.”³⁵³

2. Deference with Limits

While these provisions cannot be ignored, interpreting affirmative rights provisions does generate substantial difficulties for state courts. Whereas negative rights are “directly susceptible to judicial enforcement,”³⁵⁴ the interpretation of positive rights can “create deep problems of implementation, scope and enforcement.”³⁵⁵ Declaring that a constitutional affirmative right exists beyond what the legislature has afforded can result in resistance from the political branches³⁵⁶ or taxpayers, involve the judiciary deeply in the political process, lead to “troubled, ineffective implementation,” and ossify the government’s ability to respond with flexibility in trading-

³⁴⁸ James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 85 (2006).

³⁴⁹ *Id.*

³⁵⁰ Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 318 (Wyo. 1980).

³⁵¹ Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV 909, 966 (2007) [hereinafter Saiger, *School Choice*].

³⁵² Blanchard, *supra* note 209, at 268. *But see* Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools*, 59 S.C. L. REV. 531, 540 (2008).

³⁵³ Herschkoff, *Positive Rights*, *supra* note 168, at 1156.

³⁵⁴ Closa, *supra* note 24, at 585; *see also* Cass R. Sunstein, *The Negative Constitution: Transition in Latin America*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 367 (Irwin P Stotzky ed., 1993).

³⁵⁵ Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 115 (2009) [hereinafter Saiger, *Local Government*].

³⁵⁶ *See generally* Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1528 (2007) (noting that some states have actively resisted court orders with regard to education).

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off between various categories of public expenditure and between higher and lower public expenditures and rates of taxation.³⁵⁷ Although the task may be difficult, the ground unsteady, and the dangers quite real, that does not free state courts from their obligation to say what the law is, and to serve as a check upon the political branches where they fail to adhere to the obligations imposed by the state constitution.

The familiar tools of federal constitutional interpretation are applicable to the interpretation of positive rights in state constitutions, thus one could find considerations in state court decisions interpreting positive rights of “text, structure, history, precedent, purposes, framers’ intentions, values of the polity, and all the other tools and conventions familiar from our well-developed tradition of federal constitutional interpretation.”³⁵⁸ But, as discussed above, not all of these conventions of federal constitutional interpretation function in the same manner or play the same role in understanding state constitutions in general or in interpreting affirmative rights specifically.

This article has previously addressed some of the differences in interpreting positive rights in state constitutions, for example interpreting against a backdrop of residual plenary authority, less assistance from the bar and academy, an absence of federal precedent, greater enforcement difficulties, and a heightened role for international precedent, viewing original intent through the electorate’s understanding of a constitutional amendment and federalism concerns from a different vantage point, and performing an extremely close textual inspection with a clause bound rather than structural interpretive focus. Simply stated, interpreting positive state constitutional rights is not the same methodological or jurisprudential task as interpreting negative rights provisions under the Federal Constitution.

As noted above, “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”³⁵⁹ Constitutionalization of positive rights flips this paradigm on its head. The primary constitutional purpose of constitutionalizing a positive constitutional right is to safeguard against the danger of legislative

³⁵⁷ Saiger, *Local Government*, *supra* note 355, at 115–16.

³⁵⁸ See JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 2 (2005).

³⁵⁹ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

indifference.³⁶⁰ Such provisions articulate a substantive constitutional commitment and are “designed to make permanent a basic policy choice that the legislature is mandated to achieve.”³⁶¹ The obligation imposed by the state constitution upon the state is to “use its power to effectuate a policy goal that is constitutionally fixed.”³⁶²

The role of judicial review when interpreting a positive rights provision is, as it is generally in addressing the constitutionality of statutory schemes, “to keep legislative power within the bounds of law,” but in doing so, where the constitutional right is a positive one, the court “must constrain [the legislature’s] discretion so that it achieves the affirmative constitutional mandate.”³⁶³ The existence of a positive constitutional right “should . . . be understood as constraining the legislature’s otherwise unfettered discretion to choose from among competing policy alternatives.”³⁶⁴ Although the right is likely only defined in general terms, “it creates ‘an environment of constraint, of . . . ideals to be fulfilled’ that cabins the legislature’s discretion to choose only those means that will actually carry out, or at least help to carry out, the constitutional end.”³⁶⁵ The legislature retains the ability to

choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end. The relevant question is thus consequential in focus—asking whether the legislature’s approach furthers or effectuates the constitutional right at issue.³⁶⁶

A rational basis review is not adequate to address challenges arising under positive rights provisions, for such an approach ignores the question of whether the legislature has satisfied the constitutionally mandated objective, or is at least making efforts that can be expected to achieve its constitutional duty.³⁶⁷ Positive rights enforcement demands that the government act to achieve certain minimum goals and requires the courts to assess whether a

³⁶⁰ Hershkoff, *Rights*, *supra* note 264, at 640.

³⁶¹ *Id.* at 641.

³⁶² Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1415 (1999) [hereinafter Hershkoff, *Welfare Devolution*].

³⁶³ Hershkoff, *Rights*, *supra* note 264, at 641.

³⁶⁴ Hershkoff, *Welfare Devolution*, *supra* note 362, at 1414.

³⁶⁵ *Id.* at 1415 (quoting PHILLIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 11 (1980)).

³⁶⁶ *Id.* at 1414.

³⁶⁷ Hershkoff, *Positive Rights*, *supra* note 168, at 1136, 1138.

legislative or administrative scheme is, in fact, sufficiently progressing towards meeting these constitutional obligations.³⁶⁸ Rationality review is insufficient because it would not obligate the state to “justify its legislative enactments as the appropriate means to satisfy the aspirations of the state constitution.”³⁶⁹ The question for reviewing courts is not whether the statutory scheme improperly burdens or interferes with a constitutional right; rather, the court must assess “[h]ow does this policy further a constitutional right?”³⁷⁰ While the courts should be focused on actual results, they should be wary of over-reaching to impose their preferred approach or judicially determined best practices.³⁷¹ The court should, in general, defer to sensible supportable legislative approaches and be especially conscious of deferring to normative legislative judgments in allocating and directing resources in providing the right.³⁷²

A more rigorous review than federal rational basis analysis, however, raises well-founded concerns about removing issues and questions from the realm of self-government, and in doing so, eliminating citizen participation.³⁷³ A judiciary led “quest for justice” into the realm of positive rights that reaches beyond a sturdy constitutional foundation causes harmful consequences by threatening to “debase and impoverish republican government.”³⁷⁴

³⁶⁸ *Id.*

³⁶⁹ Robert Doughten, *Filling Everyone’s Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 437 (2003).

³⁷⁰ Hershkoff, *Positive Rights*, *supra* note 168, at 1184.

³⁷¹ See Saiger, *School Choice*, *supra* note 351, at 966–68.

³⁷² See *id.* The trade-offs can be extraordinarily complex in the context of addressing affirmative rights provisions. For example, in the environmental context, Professor Ruhl has noted the following:

correct environmental policy is not as clear-cut as, say, our convictions that free speech is vital and slavery is evil. The latter are not characterized by large gray areas or competing social values. But environmental policy, like economic policy, education policy, welfare policy, and most of social policy in general, is defined by hard choices and complicated, multidimensional problems. The reason the Environmental Protection Agency has over ten thousand pages of rules is because that’s how many it takes to tackle the problem. To think that environmental policy can be summed up in two sentences thus seems naïve, if not ludicrous.

J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245, 281 (1999).

³⁷³ Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 230 (2009).

³⁷⁴ Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 108 (1988). “As constitutionalization based on substantive values becomes more pervasive, the less it is likely to command widespread support. Over-constitutionalization forces some in the polity to become subordinate to the values and conceptions of the good of others and thus threatens to de-legitimize the *Verfassungsstaat* [state rule through the constitution].” Michel Rosenfeld, *The Rule of Law and the Legitimacy*

While critics of the judicial enforcement of positive rights suggest that in addressing challenges based upon positive rights the courts are intruding into the role of the legislature, this argument will be misplaced so long as courts limit themselves to a judicially restrained interpretation of the constitution.³⁷⁵ A court that exercises restraint is simply performing its traditional and vital role of serving as a check upon the political branches in assuring adherence to the state constitution.³⁷⁶ Courts overstep their “bounds no more when defining the parameters of required legislative action than when defining prohibitions on legislative behavior.”³⁷⁷

Moreover, there arguably is less reason for concern about state judges’ interpreting vague and ambiguous state constitutional provisions than federal court judges construing vague and ambiguous provisions of the federal constitution.³⁷⁸ Three of the primary objections to such interpretation by federal judges are (1) lack of accountability of the judges to the electorate, (2) the difficulty of overcoming the federal courts’ imposed restrictions due to arduous requirements for constitutional amendment under Article V of the United States Constitution, and (3) where a state law is affected, the decision reflects the views of a small number of judges removed from the state, its government, and electorate.³⁷⁹ These objections do not carry the same weight in state courts where the judges are often elected, state constitutions are more easily amended, and judges are well-versed in the legal culture of the state.³⁸⁰

Furthermore, we should expect that state judiciaries will need to play a more active role than their federal brethren in serving as a counter-majoritarian check. As noted by James Madison, the threat

of *Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1329 (2001). As a result, over-constitutionalization gives rise to a very similar problem to that produced by strict Kantian autonomy. In the latter case, legitimate law is bound to alienate one from one’s own interests as the right must remain above all interests; in the former, one always risks alienation from one’s own interests to the extent that the constitution enshrines conflicting interests.

Id. Specifically, “[i]n a pluralist polity, this means a sizeable portion of the citizenry will remain significantly alienated from the dictates emanating from the prevailing substantively grounded legal-constitutional regime.” *Id.* at 1329–30.

³⁷⁵ See Doughten, *supra* note 369, at 433.

³⁷⁶ *Id.*

³⁷⁷ Feldman, *supra* note 231, at 1061.

³⁷⁸ Posting of Eugene Volokh to The Volokh Conspiracy, <http://www.volokh.com/posts/1210969007.shtml> (May 16, 2008, 16:16 EST).

³⁷⁹ *Id.*

³⁸⁰ *Id.*

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of the tyranny of the majority is heightened in smaller polities.³⁸¹ In Federalist number 10, Madison wrote:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.³⁸²

In accord therewith, “[t]he greater potential for parochialism within state government . . . logically implicates a stronger role for the judiciary as guardian of minority interests and individual rights.”³⁸³

Additionally, research suggests that courts have performed better than critics would suggest in crafting remedial orders.³⁸⁴ Judicial deliberations are often characterized by a different focus than legislative decision-making, being predominantly “rational-analytic” while legislative decision-making is predominately a “mutual adjustment” process.³⁸⁵ Courts have generated orders predicated upon evidence presented by competing experts and have remained more nimble than expected to address changing circumstances by retaining jurisdiction.³⁸⁶

Having extolled the judiciary’s participation in enforcing positive rights, let us begin to build in some necessary restraint. One of the primary reasons for concern about the judiciary taking an extremely active policy-making partnership role with regard to the enforcement of affirmative constitutional rights is that courts in doing so stray into the realm of the legislature’s most important power and exceed one of the most critical limitations upon their own actions. In explaining why the judiciary could be entrusted with the power of judicial review, Alexander Hamilton noted in Federalist No. 78 that “[t]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely

³⁸¹ Blanchard, *supra* note 209, at 260.

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ Rebell, *supra* note 356, at 1532.

³⁸⁵ *Id.* at 1531–32.

³⁸⁶ *Id.* at 1532.

judgment.”³⁸⁷ Through enforcement of affirmative rights provisions, the judiciary begins to reach into the legislature’s purse and distribute significant funds from the state’s treasury.

But “enforcement of a positive right need not result in judicial tyranny. As long as the remedy initially allows the legislature to fashion the curative legislation, the imposition of a remedy is [arguably] even less intrusive than where a negative rights violation is involved.”³⁸⁸ This conclusion follows because the legislature when addressing a negative right prohibits the legislature’s action entirely; however, when approaching a positive right, the court need only set the legislative process back in motion and allow the legislature to operate with broad discretion in fulfilling the constitutional rights, bounded only by certain limited parameters.³⁸⁹

Judicial review involving positive rights “does not necessarily involve the determination of a particular level of resources to be spent by the state or the exact way they are to be spent.”³⁹⁰ To the contrary, “a judgment can simply consist of pointing out where a violation has occurred, and instructing that it should be remedied in whichever way the public authority deems most appropriate, or simply that an appropriate inquiry should be instigated.”³⁹¹ Such an approach is both prudent and proper. “It makes judicial as well as political sense and comports with the values represented by the doctrine of separation of powers for courts to enlist the creative talents of the legislative and executive branches of government.”³⁹² If courts afford “space and time within which to respond, political actors are more able than judges to identify remedial social strategies and social programs that will be politically acceptable and that will enforce the judicial mandate for the long term.”³⁹³ The judiciary is the branch least suited for setting policy as to affirmative rights and managing the accompanying state and local budgets.³⁹⁴ Legislatures are able to more broadly reflect the competing interests involved in an issue as they embody a

³⁸⁷ THE FEDERALIST No. 78 (Alexander Hamilton).

³⁸⁸ Feldman, *supra* note 231, at 1061.

³⁸⁹ *Id.*

³⁹⁰ Wiles, *supra* note 26, at 47.

³⁹¹ *Id.*

³⁹² Peters, *supra* note 211, at 1559.

³⁹³ *Id.*

³⁹⁴ Edward C. Mosca, *The Original Understanding of the New Hampshire Constitution’s Education Clause*, 6 PIERCE L. REV. 209, 242 (2007) (describing courts’ interference in education policy and budgets as undesirable).

multitude of competing perspectives.³⁹⁵

The nature of positive rights lends itself to such an approach. While “in the case of negative rights the court merely establishes what the state may not do. When it comes to certain social goals, . . . these can be achieved in a variety of ways.”³⁹⁶ Where

there is a prohibition on destroying or adversely affecting something, then every act which represents or brings about destruction or an adverse effect is prohibited. By contrast, if there is a command to protect or support something, then not every act which represents or brings about protection or support is required.³⁹⁷

For example, addressing a constitutional right to housing, a state appropriately could create incentives for market actors to build affordable housing, provide rent supports for tenants, or construct public housing facilities.³⁹⁸ The government, the addressee of the constitutional obligation to act, “has . . . discretion as to which method [it] will choose to satisfy the command.”³⁹⁹ It is critical for courts to recognize that “judicial enforcement of positive rights is limited by the greater discretion accorded the political branches in determining the specific act to be performed.”⁴⁰⁰ Thus, “[c]ourts appropriately have a more limited role in the enforcement of rights-based redistributive policies than other institutions whose *raison d'être* is, precisely, to make the decisions as to which is the best way to achieve a desired end.”⁴⁰¹

It has been asserted by some that state courts should take an aggressive and active role, assuming a full policy-making partnership with the legislature in ensuring enjoyment of affirmative state constitutional rights. Differences between the state and federal judiciaries and between state constitutions and the Federal Constitution are referenced in support of this position. State judges stand in dramatically different circumstances than their federal counterparts because they are often elected and are

³⁹⁵ *Id.*

³⁹⁶ Closa, *supra* note 24, at 585.

³⁹⁷ ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 308 (Julian Rivers trans., Oxford University Press 2002) (citation omitted); *see also* Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 586 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002)).

³⁹⁸ Closa, *supra* note 24, at 585.

³⁹⁹ ALEXY, *supra* note 397, at 308 (emphasis omitted); *see also* Kumm, *supra* note 397, at 586.

⁴⁰⁰ Kumm, *supra* note 397, at 586.

⁴⁰¹ Closa, *supra* note 24, at 585.

thus less subject to concerns about democratic legitimacy, are more closely linked with the state community, and exercise law-making authority as common law jurists.⁴⁰² Additionally, state constitutions can be more easily amended than the Federal Constitution, therefore what is perceived to be an errant interpretation can be more easily corrected.⁴⁰³ But “to the extent that we accept judges because of their democratic credentials, we undermine the affirmative case that is made in favor of judicial review as a distinctively valuable form of political decisionmaking.”⁴⁰⁴ Furthermore, “legislative supremacy pose[s] an additional problem for those who would assign extra decisional discretion to elective judiciaries. Even when elected at regular intervals, courts will never be as democratic as the legislature, nor will they possess its institutional competence, deliberative structure, or proactive capabilities.”⁴⁰⁵

On a more fundamental level, encouraging the judiciary to mandate judicially determined best practices or aggressively utilize constitutional provisions to achieve social justice beyond the minimum requirements of the constitution would usurp the authority of the electorate to, through their representatives, determine the best means to achieve a constitutionalized policy goal and to determine how much of a benefit beyond the constitutionally-required minimum they wish to confer. Judges, no matter how selected, are not representatives; to the contrary, as has been noted by Justice Scalia, judges do not represent the people but instead represent the law.⁴⁰⁶ Justice Ginsburg joins her colleague in this conclusion, observing that judges

are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . . Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of

⁴⁰² See, e.g., Hershkoff, *State Courts*, *supra* note 343, at 1885–90; Pascal, *supra* note 70, at 870; Wiik, *supra* note 75, at 929–31.

⁴⁰³ See, e.g., Hershkoff, *State Courts*, *supra* note 342, at 1885–87; Pascal, *supra* note 70, at 870–71 (noting that state constitutions can act as “enabling documents” to aid state judges in addressing social issues, specifically welfare benefits); Wiik, *supra* note 75, at 929–33.

⁴⁰⁴ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1394 (2006).

⁴⁰⁵ David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 327 (2008) (emphasis omitted).

⁴⁰⁶ Chisom v. Roemer, 501 U.S. 380, 410–11 (1991) (Scalia, J., dissenting).

which cannot depend on the will of the public.⁴⁰⁷

In order to maintain the necessary breathing room for a thriving representative democracy and for separation of powers to be preserved, we should be wary of inviting state judges into a full policy-making role on the basis that they are more democratic than their federal brethren. Ultimately, state court adjudication of positive rights is preferably directed towards “jumpstart[ing]”⁴⁰⁸ and spurring legislative action rather than becoming a full-partner in defining best practices as to education, welfare, healthcare, the environment, etc., or stretching positive rights provisions to achieve judicially imposed social justice aims beyond what the constitution requires.

This view is supported through the experience of courts internationally. Such courts have “tend[ed] to interpret affirmative rights in a manner that shifts the determination as to . . . how these rights will be provided to the legislative process.”⁴⁰⁹ For example, courts in Venezuela and South Africa have found greater, more lasting effect and success through identifying a positive right, providing some limited contour thereto, and directing the legislature to respond.⁴¹⁰ Instead of exercising a classic judicial supremacy command-and-control approach, these courts have found greater effectiveness through “maintaining a constitutional dialogue between the judiciary and legislature.”⁴¹¹ Such an approach has proven to be “an important means of achieving the right balance between judicial intervention and legislative and executive direction of policy.”⁴¹² In fact, “[c]ontinental [European] lawyers call such rights ‘programmatic’ to emphasize that they are not directly enforceable individual rights, but await implementation through legislative or executive action, and through budgetary appropriations.”⁴¹³ Recognizing the realities of governance and the principles underlying the separation of powers, it is without doubt that the vindication of affirmative rights will “require[] the

⁴⁰⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting).

⁴⁰⁸ See Hershkoff, *State Courts*, *supra* note 342, at 1922.

⁴⁰⁹ Christopher T. Ruder, Comment, *Individual Economic Rights Under the New Russian Constitution: A Practical Framework for Competitive Capitalism or Mere Theoretical Exercise?*, 39 ST. LOUIS U. L.J. 1429, 1443 (1995).

⁴¹⁰ Wiles, *supra* note 26, at 47–48.

⁴¹¹ *Id.* at 48.

⁴¹² *Id.*

⁴¹³ Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 528 (1992).

participation of the legislative branch to a significant degree.”⁴¹⁴ In other words, “[t]he democratically-elected legislature is the branch best able to formulate policy and to determine the allocation of public monies.”⁴¹⁵ By “deferring to political decisionmaking for the negotiation and prescription of a remedial implementation plan” courts may better elicit cooperation and defuse resistance.⁴¹⁶ In the context of addressing affirmative rights, judicial management is simply not an attractive or advisable option, so long as an alternative exists.⁴¹⁷ Judicial management simply fails to adequately recognize the constitutional discretion of the legislature as to the means by which to achieve a certain positive right and the fairly broad scope, but not unlimited discretion or meaningless constraint, of what might be reasonably thought to satisfy many affirmative rights.⁴¹⁸

But the question remains of how a court should address a recalcitrant legislature that fails to employ any, or any reasonable, means to achieve the constitutional mandate at issue. “Although courts may ultimately have to intervene quite decisively, they [should] generally do so only after the government fails to devise a satisfactory solution on its own.”⁴¹⁹ Where a legislature fails to respond to judicial encouragement, if a state constitution is to maintain its integrity, then, for affirmative rights provisions, including those for adequate food, clothing, shelter, medical care, old age pensions, etc., compliance must be directed.⁴²⁰

These guarantees cannot be allowed to be mere pious statements.⁴²¹ Were courts to permit otherwise, the resulting loss to a constitution’s standing as the supreme law, its primacy, would be of considerable concern as this is a core function of a constitution. “Primacy is . . . an indispensable element of constitutionalism. Where it is missing, the constitution cannot carry out the task for which it was invented.”⁴²² Its fundamental task is to serve as the

⁴¹⁴ Feldman, *supra* note 231, at 1061.

⁴¹⁵ *Id.*

⁴¹⁶ Peters, *supra* note 211, at 1559.

⁴¹⁷ See Saiger, *School Choice*, *supra* note 351, at 966–67.

⁴¹⁸ See Doughten, *supra* note 369, at 433.

⁴¹⁹ William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 55 (1999); Blanchard, *supra* note 209, at 268–69.

⁴²⁰ See Frank P. Grad, *The State Bill of Rights*, in CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 30, 55–56 (Samuel K. Grove and Victoria Ranney eds., 1970).

⁴²¹ See *id.* at 56–57.

⁴²² Dieter Grimm, *The Constitution In the Process of Denationalization*, in 12 CONSTELLATIONS: AN INT’L J. OF CRITICAL & DEMOCRATIC THEORY 446, 452 (2005).

supreme law that binds and limits the state.⁴²³

The “distinction, between a government with limited and unlimited powers, is [abolished], if [those] limits do not confine the [persons] on whom they are [imposed].”⁴²⁴ “The [constitution] is either a [superior], paramount law, unchangeable by ordinary means, or it is on a level with ordinary [legislative] acts, and like other acts, is alterable when the [legislature shall please] to alter it.”⁴²⁵ There is no compromise between the two. In considering these possibilities “[i]f the former part of the alternative be true, then a [legislative] act contrary to the [constitution] is not law: if the latter part be true, then written [constitutions] are [absurd] attempts, on the part of the people, to limit a power, in its own nature illimitable.”⁴²⁶ The framers of “written [constitutions] contemplate them as forming the fundamental and paramount law.”⁴²⁷ The supremacy function of a constitution is subverted where the constitution affords the “[legislature] a practical and real omnipotence, with the [same] breath which [professes] to [restrict] their powers within narrow limits.”⁴²⁸ Under such an errant understanding, a constitution “is [prescribing] limits, and declaring that [those] limits may be [passed] at [pleasure].”⁴²⁹

In addition to the violation itself, the consequences of not adhering to the constitution include undermining the rule of law, reducing the status of the constitution in the public’s eyes, and setting a dangerous precedent for future governmental violations. Because a constitution “continues to retain the positivistic force of law . . . , if the rule of law is to be valued, the directives of the [c]onstitution must be obeyed, unless and until modified in the manner prescribed . . . or until the system is openly rejected in favor of some new governing structure.”⁴³⁰ In failing to honor constitutional provisions, even difficult ones to enforce such affirmative rights, the public’s respect for the constitution is diminished, for “guaranteeing these rights without the prospect of enforcement would result in degrading the efficacy of rights in the

⁴²³ *Id.*

⁴²⁴ *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803).

⁴²⁵ *Id.* at 177.

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.* at 178.

⁴²⁹ *Id.*

⁴³⁰ Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1353 (1990).

public consciousness.”⁴³¹ As Madison noted, allowing violation of a constitution helps to endanger constitutional rights because “once the ‘parchment barrier’ [is] violated, the government . . . set[s] the precedent for ignoring the Constitution.”⁴³² Simply stated, “it is hardly desirable to have a system in which many constitutional rights are ignored.”⁴³³

Although a court should seek to engage the legislature in remedying a constitutional deficiency, where the court does need to take a more active role due to legislative recalcitrance, there exist practical means of crafting remedial measures that may reduce interference. For example, the court has available remedies that do not require legislatures to adopt wholly novel programs; rather, the court may instead require an expansion or extension of existing programs.⁴³⁴ Similarly, although the federal constitution does not provide guidance in the interpretation of positive rights, that does not mean that federal law is irrelevant. In interpreting positive rights provisions, state courts should consider national statutory and administrative law.⁴³⁵ Federal law may establish a floor beneath which state rights to education, environmental protection, welfare, healthcare, etc., cannot fall and may even provide a ceiling preventing the imposition of higher standards, through preempting stricter state controls.⁴³⁶ Where an interpretation of a state constitutional affirmative right would create a conflict with overriding federal law, the best course of action for the court is to pretermit the state constitutional issue with the case being controlled by the federal law, rather than embracing an unnecessary conflict. In other words, while state courts should not waiver from their duty to confront the legislature where necessary to do so, the court should still seek to limit conflict where doing so is consistent with vindicating the constitutional right at issue or at

⁴³¹ James Thuo Gathii, *Retelling Good Governance Narratives on Africa’s Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 1027 (2000).

⁴³² Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 476 (1996) (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 297 (Charles F. Hobson & Robert A. Rutland eds., 1977)); see also Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 MICH. ST. J. INT’L L. 643, 694 (2007).

⁴³³ Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 443 (2002) (quoting Cass R. Sunstein, *Against Positive Rights*, in *WESTERN RIGHTS?: POST-COMMUNIST APPLICATION* 225, 228 (András Sajó ed., 1996)); see also Usman, *supra* note 432, at 694.

⁴³⁴ See Ryan, *supra* note 348, at 86.

⁴³⁵ Thompson, *Constitutionalizing*, *supra* note 247, at 173–74.

⁴³⁶ *Id.*

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least immaterial thereto.

VI. CONCLUSION

As interpreted by the United States Supreme Court, the federal constitution protects negative but not positive rights. State constitutions undeniably have charted a different course, constitutionalizing a wide variety of positive rights. For example, state constitutions enshrine rights to a public education, and require the state to act to care for the poor and the disabled and to safeguard the public health and the environment. The interpretation of affirmative rights in state constitutions differs from experiences in interpreting federal constitutional rights both because interpreting state constitutions is a different enterprise than interpreting the federal constitution and because there are differences in interpreting affirmative and negative rights within state constitutions themselves. State courts have utilized a wide variety of approaches to interpret affirmative rights provisions, running the gamut from treating these measures as pure political questions to taking-on an extensive and extremely involved policy-making role in shaping the scope and directing the effectuation of these rights.

Provisions that have been identified as positive rights in scholarly discourse can be grouped into five primary categories in order to offer guidance as to the respective applicable interpretive approach: (1) provisions which merely authorize the state to take action; (2) non-justiciable positive rights provisions; (3) non-self-executing rights; (4) highly specific enforceable provisions; and (5) abstract enforceable provisions. The first four are relatively uncomplicated; the latter is considerably more complex.

As for the latter category, the judiciary's constitutional role requires judges to interpret and enforce affirmative rights provisions. Although the enforcement of such provisions is fraught with difficulties for the judicial branch, positive rights are not simply *de jure* or *de facto* political questions but instead enforceable constitutional rights that impose a duty upon the government to act to achieve a particular policy objective. The political branches, however, are significantly better suited to meet the goals constitutionalized as affirmative rights in a manner that will not only be palatable to the political branches themselves but also to the electorate. Separation of powers concerns also warrant deference to the legislature, provided its actions are truly adequately and

sensibly directed towards the achievement of these constitutionalized ends. That does not mean that any asserted or judicially discovered rational basis for adopting the approach utilized by the legislature will be adequate to justify the legislature's approach or that the court should simply ignore the state's failure to achieve its constitutionally mandated objectives. While the court must identify a constitutional failing where it arises, it should leave the initial task of crafting a remedy to the legislature. Only where the political branches are recalcitrant and refuse to adhere to the mandate of the constitution should courts embrace a conflict with the political branches in order to vindicate the constitution. In considering what the constitution requires, the courts should be particularly cautious so as not to over-constitutionalize. The reach of affirmative rights provisions is so expansive (education, welfare, the environment, etc.) that the dangers to representative government from the court pursuing social justice, as opposed to requiring adherence to the minimum standards required by the constitution, are heightened. It would be well-worthwhile for a court confronting what it believes to be a constitutional violation in failing to make the constitutionally necessary efforts to achieve an affirmative right to keep firmly in mind Professor Charles Black's rephrasing of the question before them: "When we are faced with these difficulties of 'how much,' it is often helpful to step back and think small, and to ask not, 'What is the whole extent of what we are bound to do?' but rather, 'What is the clearest thing we ought to do first?'"⁴³⁷

⁴³⁷ Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1114 (1986).