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AMERICA'S MISUNDERSTOOD
CONSTITUTIONAL RIGHTS

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In contemporary rights jurisprudence and theory, the Fourteenth Amendment and the Federal Bill of Rights are most frequently conceptualized as bulwarks against majoritarian abuses. From Brown v. Board of Education to Obergefell v. Hodges and even District of Columbia v. Heller, federal rights are primarily

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understood as enforceable legal constraints on popular majorities (especially intrastate majorities). Viewed through this lens, state constitutional rights are often dismissed as fundamentally dysfunctional because they are too easily amended through majoritarian political processes to constrain popular majorities. After all, what good is a state constitutional right to marriage equality, for example, if it can be quickly eliminated by a majority vote?

This article provides the first dedicated assessment of this perspective on state constitutional rights by drawing on a largely neglected set of sources: the debates of all known state constitutional conventions where state bills of rights were forged and reformed (105 conventions from 1818 to 1984). These sources suggest that prevailing critiques of state constitutional rights are misguided and limit our understanding of American public law. Although the Federal Bill of Rights may function as an important constraint on popular majorities, state bills of rights serve a different purpose. They were created primarily as a device for democratic majorities to control wayward government officials and representatives. State bills of rights were not designed to operate as higher law beyond the reach of legitimate democratic majorities. To the contrary, they were built to function as higher law beyond the reach of government, but always within the immediate reach of the people.

Excavating this perspective on state bills of rights not only places them in their proper historical and theoretical context, but it also disentangles them from their federal counterparts and enables more sophisticated inquiries into how constitutional rights function within our federal system. These findings also have timely implications for federal and state rights jurisprudence. With the Supreme Court now likely to reevaluate the breadth of certain federal protections—perhaps in favor of giving state courts more space to develop state constitutional rights—it is important that we have clarity regarding the deep structure of state constitutional rights. My findings show that despite well-intentioned exhortations from prominent judges and scholars, state constitutional rights are not built to provide an alternative corpus of meaningful counter-majoritarian protections—at least not in the same way as federal constitutional rights.

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INTRODUCTION

In 1972, civil rights advocates and death penalty opponents won a huge victory before the California Supreme Court.¹ The Court ruled that capital

¹ See *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (holding that the death penalty, an “impermissibly cruel” practice, violated the Declaration of Rights in the California Constitution), *invalidated by* CAL. CONST. art. I, §27. On *Anderson’s* significance, see Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 213 (2003), describing how

punishment violated the state's bill of rights.² The ruling ended the death penalty in California and extended criminal protections far beyond the Federal Bill of Rights. It was a significant decision. But it was quickly undone. Nine months later, in a statewide referendum, California voters amended their bill of rights to reinstate the death penalty and prohibit future court rulings rendering the death penalty unconstitutional.³

This narrative is now familiar and increasingly common.⁴ Almost every election cycle, voters in states around the country decide on changes to their state's bills of rights.⁵ Voters have, for example, cut back protections for criminal defendants,⁶ formalized privacy protections,⁷ banned same-sex marriage,⁸ authorized public assistance for parochial schools,⁹ constitutionalized a right to hunt and fish,¹⁰ and enhanced gun and property rights.¹¹ This "amendomania" has caused state bills of rights to grow dramatically in length, scope, and detail.¹²

Anderson triggered an "initial recognition that state courts could evade U.S. Supreme Court decisions" that limited rights and expand individual protections under state bills of rights.

² *Anderson*, 493 P.2d at 899.

³ See CAL. CONST. art. I, § 27 ("All statutes of this State in effect on February 17, 1972 . . . relating to the death penalty are in full force and effect . . . The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution."). Public outcry following the *Anderson* ruling was swift, in part, because the ruling had the immediate effect of transforming the sentences of 107 current death-row inmates into life sentences, and two of those inmates were Charles Manson and Sirhan Sirhan, who was convicted of the assassination of Robert Kennedy. See *State Supreme Court Bans Death Penalty: Life Terms Ordered for 107*, SAN DIEGO UNION-TRIB., Feb. 19, 1972, at A1; *Death Penalty Backed in California*, 66-24, N.Y. TIMES, Sept. 7, 1972, at 67.

⁴ See Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2064 (2013) (noting that "voting on rights has become a regular feature of" state constitutionalism).

⁵ See JOHN DINAN, *STATE CONSTITUTIONAL POLITICS* 73-153 (2018) (providing definitive survey of rights amendments).

⁶ See FLA. CONST. art. I, § 12 (adopted 1982); see also *State v. Lavazzoli*, 434 So. 2d 321, 322 n.1, 323-24 (Fla. 1983) (explaining that the 1982 amendment added language prohibiting Florida courts from construing the exclusionary rule more broadly than "decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution").

⁷ See MONT. CONST. art. II, § 10 (adopted 1972) ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").

⁸ UTAH CONST. art. I, § 29 (adopted 2004), *invalidated by Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁹ See N.J. CONST. art. IV, § 3 (permitting state provision of reasonable transportation for school-aged children to and from any school in the state).

¹⁰ WIS. CONST. art. I, § 26 (adopted 2003).

¹¹ See KAN. CONST. bill of rts. § 4 (adopted 2010) (granting individuals the right to keep and bear arms for defense, hunting and recreational use, and other lawful purposes).

¹² See *infra* subsection I.B.2 (providing original data measuring this growth).

Many scholars view the popular responsiveness of state constitutional rights as a fundamental defect.¹³ Critiques take various forms, but they generally rest on the assumption that, in certain key respects, state bills of rights should function like the Federal Constitution. Specifically, as Justice Robert Jackson declared in 1943, the “purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts.”¹⁴ From this perspective, state constitutional rights seem obviously defective. Rather than sitting beyond ordinary politics, they are frequently the epicenter of political slugfests.¹⁵ Rather than ensconcing courts as their guardians, they displace courts through unrelenting popular intervention and micromanagement.¹⁶ It is understandable, therefore, that state bills of rights have been described as “primitive”, “ineffective”, “flabby”, and even “namby-pamby.”¹⁷

But these critiques have skipped a step. They fail to consider that state constitutional rights may be designed with different priorities and objectives. In this regard, scholars have long observed that state constitutions are structured around a set of public fears regarding democracy that differ from the assumptions underlying the Federal Constitution.¹⁸ Alan Tarr has argued,

¹³ See Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1701-02 (2010) (explaining that state constitutions are generally easier for the majority to change and are thus more majoritarian); James M. Fisher, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 45 (1983) (describing state constitutional jurisprudence as “result-oriented” and prone to majoritarianism); The Honorable J. Harvie Wilkinson III, Essay, *Gay Rights and American Constitutionalism*, 56 DUKE L.J. 545, 570-80 (2006) (criticizing state constitutional rights for their ease and frequency of amendment because “[m]aking distinctions among citizens based upon facets of their identity is not what American constitutions do.” Rather, “[c]onstitutions should be articulations of fundamental law, not second layers of positive law”).

¹⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Justice Jackson continued: “[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.” *Id.*

¹⁵ See Chemerinsky, *supra* note 13.

¹⁶ See John Dinan, Foreword, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 984 (2007) (“[S]tate amendments throughout American history have been adopted in response to a wide variety of court decisions”); Mila Versteeg & Emily Zackin, *Constitutions Unentrenched*, 110 AM. POL. SCI. REV. 657, 664 (2016) (describing increased state constitutional detail as a “vehicle[] of democratic control over courts”). See generally Miller, *supra* note 4.

¹⁷ LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 184 (1985); see also G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 77-78 (1998) (describing Levy’s theory of state bills of rights as one where “state guarantees reveal an inexperience and ineptitude in constitution making, which was overcome by the time of the federal Constitution;” thus making state bills of rights “primitive” predecessors of the Federal Bill of Rights).

¹⁸ Gordon Wood’s influential account, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC (1969), is often credited with first documenting and articulating a clear disjunction between state and federal constitutional theory. See TARR, *supra* note 17, at 92 n.124. At the core of Wood’s account is the idea that state constitutionalists had an evolving distrust of pure

for example, that federal constitutional design is committed to the Madisonian belief that self-interested majorities are a dominant threat to democracy.¹⁹ On this view, “majority faction” is a concern because democratic processes enable majorities to capture government for their own ends at the expense of minorities and individual liberties.²⁰ Under the Federal Constitution, judicial review and a deeply entrenched constitutional text have come to play a key role in counteracting the danger that Madison conceptualized.²¹

State constitutions, on the other hand, tend to orient around a different concern. State constitutionalism seems obsessed with the fear that government will be captured, not by a self-serving democratic majority, but by an elite minority.²² Indeed, state constitutions have various structural

representative government, which they viewed as easily captured by elites, and a corresponding trust in popular majority rule as a necessary check on representative institutions. *See, e.g.*, WOOD, *supra*, at 127-96 (outlining and documenting early concerns about agency costs associated with elected executives and legislatures and the role of popular accountability in counteracting agency costs). Another influential account in this regard is DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL (1980). *See id.* at 75-84 (tracing how early American constitutional theory in the states focused on “popular government” as a vehicle for addressing various agency concerns). For a more recent account that ties these ideas together in an assessment of contemporary state constitutionalism, see generally G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87 (Elliot Abrams ed. 2002).

¹⁹ *See* TARR, *supra* note 17, at 78, 78 n.73 (1998) (noting that the state constitutional concern with minority faction stands in “contrast with *Federalist* no. 10 [written by Madison], as well as modern rights theory”); *see also* Tarr, *supra* note 18 (developing this contrast further).

²⁰ In *Federalist* 10, Madison described this problem as “the superior force of an interested and overbearing majority.” THE FEDERALIST NO. 10, at 123 (James Madison) (Penguin Books 1987).

²¹ Madison placed most hope in structural arrangements such as federalism, separation of powers, and representative decision-making. *See* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1514-15 (2002) (outlining Madison’s three primary concerns regarding the constitutional government of the 1780s); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 667 (2011) (noting that Madison was skeptical of constitutional rights as countermajoritarian constraints and that he favored separation of powers as a solution to majority faction). However, contemporary rights theory is based on Madison’s conceptualization of majority tyranny, with judicial review as a critical piece of the contemporary solution. *See id.* at 667 (noting that countermajoritarian application of the Federal Bill of Rights is the product of “retrospective[] reinterpret[ation]”); *infra* Section I.A (describing this approach).

²² *See* TARR, *supra* note 17, at 78-81 (discussing fears that “minority faction[s]” were the greatest threat to government). This fear is prolific in state convention debates. *See* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA, 1850, at 683 (Ind. Hist. Collections Reprint 1935) (1850) [hereinafter IND. 1850] (“It is a notorious fact . . . that hitherto the agents of corporations have been able . . . to carry through the Legislature almost any measure which their principals deemed of sufficient importance to expend money enough to carry.”) (statement of Morris of Washington); 2 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION 1917-1918, at 947 (1918) (“We have found that in our legislative bodies these organized human selfish forces were very powerful and, indeed, at times were able to thwart the will and judgment of the majority.”).

features that reflect skepticism of representative government.²³ That skepticism is, of course, layered, nuanced, and contextual. It includes generic concerns about government accountability, as well as deeper cynicism about the efficacy of representative government. But if there is a single thread that connects state constitutions across jurisdictions and time, it is a populist fear that government is prone towards capture and recalcitrance.²⁴

All of this suggests that there is good reason to investigate state bills of rights on their own terms rather than assuming that they fit the federal mold. To that end, this Article analyzes prevailing critiques of state bills of rights by situating them in the context of the convention debates where those rights were forged, reformed, and operationalized. To do this, I collected and reviewed all known convention debates where state bills of rights were discussed (105 conventions from 1818 to 1984).²⁵ This dataset includes debates from every decade during that period and at least one record from all but six states.²⁶ Based on this review, I find that prevailing accounts of state constitutional rights are misguided and fundamentally misunderstand their structure and design.

My core claim is that although the Federal Bill of Rights may operate as a bulwark against abusive majorities, state bills of rights grew from the belief that extra precautions are necessary to prevent government officials from using their political power to thwart or oppress democratic majorities. This approach emphasizes that representative government creates opportunities and incentives for officials to pursue their own private interests at the expense of the people. Importantly, it also views direct popular intervention as a necessary antidote for government recalcitrance. On this view, a bill of rights is an “ordinance of the people”—a dynamic set of substantive instructions and limitations on government that is adopted and jealously maintained by the people themselves.²⁷ To be sure, certain foundational rights (like political

²³ The most obvious are the initiative and referendum. See DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 3-4 (1989) (discussing citizens’ ability to propose and vote on ordinances). Others include recall and the divided executive.

²⁴ See Tarr, *supra* note 18, at 87, 89-90 (noting the belief “that the primary danger facing republican government is minority . . . rather than majority faction”); Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1646 (2014) (highlighting the general desire to, and mechanisms implemented to, limit discretion at the legislative, executive, and judicial levels); Versteeg & Zackin, *supra* note 16, at 659 (2016) (“[C]onstitutional drafters chose specificity over entrenchment as a means to constrain the exercise of political power.”).

²⁵ Appendix A lists the conventions.

²⁶ Appendices B and C illustrate the temporal and geographic distributions of the dataset.

²⁷ See Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 CONN. BAR J. 3, 17 (1991) [hereinafter *Conn. 1818*] (describing the Connecticut bill of rights as an “ordinance of the people” because “it could not be improper to settle certain points—the people were possessed of certain rights, to abridge the power of the legislature, and enlarge the power of the executive or

equality within the electorate) necessarily flow from this approach, but its defining feature is to establish the bill of rights as an active instrument of popular control over government rather than an enduring and magisterial enumeration of the “great rights of mankind.”²⁸ This is why state bills of rights almost universally begin with the right of the people to alter or reform government.²⁹ It is also why, in many states, the bill of rights has ballooned to include long, detailed provisions that are clearly responsive to particular government failures.³⁰

This alternative approach to constitutional rights is evident from two pervasive themes in the convention debates. First, delegates explicitly articulated this perspective.³¹ Although discussion over adopting the Federal Bill of Rights was resolved by at least 1791, states continued to debate whether it was necessary and useful to separately enumerate rights in state constitutions. Delegates raised various issues in this regard, but the dominant perspective was that a bill of rights is important because legislatures and officials cannot be trusted.³² The debates reflect remarkably little support for the idea that constitutional rights should operate as entrenched, intergenerational constraints on democratic processes.³³

judiciary” and noting further that “[s]ome of the states had made such regulations, and confined their legislatures within such limits, as to prevent the enacting of any law on certain subjects”).

²⁸ James Madison, *Amendments to the Constitution: [8 June 1789]*, in 12 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 196, 198 (Charles F. Hobson & Robert A. Rutland eds., 1979).

²⁹ See VA. DECLARATION OF RTS. OF 1776, § III (“[A] majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish [the government].”). These provisions are ubiquitous in current state bills of rights. See Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 133 (2018) (identifying that, as of 2018, forty-nine states have provisions).

³⁰ For example, Michigan has a 350-word section in its bill of rights addressing human embryo and embryonic stem-cell research. MICH. CONST. art. I, § 27. It was adopted by initiative in response to specific legislative opposition on the issue. See DINAN, *supra* note 5, at 245 (“Voters in . . . Michigan in 2008 approved similarly phrased amendments . . .”).

³¹ See V PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 3264 (Albany, Weed, Parsons & Co. 1868) [hereinafter N.Y. 1867–68] (“The theory of our action so far, has been that we cannot trust the Legislature, because from various causes the Legislature would often disregard what was required . . . and therefore, it is necessary to provide for this in the organic law.”).

³² See PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, at 170 (N.J. Writers’ Project of the Works Projects Admin. 1942) [hereinafter N.J. 1844] (“How dark are the evils that unbridled legislation has inflicted on the community. We are called upon . . . to guard all the avenues by which the people’s rights may be invaded. By adopting the declaration of rights, we will circumscribe the action of the legislature . . .”).

³³ I REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA 63 (1906) [hereinafter I VA. 1901–02] (“I do not believe that the people of any generation have the right to fetter the hands of their posterity. It is against common right; it is against the essential principles of free government; it is against all modern ideas of civilization; and it is against the express letter of our Bill of Rights, which says that the people have the inalienable and indefeasible right at any time to alter or change their Constitution.”).

Indeed, as a delegate to New York's 1821 convention characteristically explained: "It is not . . . because I am afraid of the people, that I would provide these checks[;] [i]t is because I fear that the representatives of the people will not be faithful to their trust."³⁴ Thus, in contrast to the federal model, delegates frequently expressed their understanding that the principal purpose of a state bill of rights is to "explicitly . . . state . . . that these powers are inherent in the people, and to say emphatically to the Legislature that they are simply the agents of the people."³⁵

Second, and perhaps most importantly, delegates have practiced this approach continuously through the decades. The debates reveal that delegates used their bills of rights primarily to respond to actual, perceived, and anticipated failures of representative government to deliver on popular preferences.³⁶ This happened in a variety of ways. Sometimes, delegates pursued reform to constitutional rights because the legislature was subject to undue influence by private interests.³⁷ Other times, delegates reformed rights in response to concerns that the legislative process was ill-suited to a particular issue because logrolling and compromise diluted popular policy priorities.³⁸ In still other instances, rights reform responded to non-compliance by executive officials and local governments.³⁹ And in many instances, delegates used rights amendments to override court rulings that blocked popular policies.⁴⁰ These changes covered issues from imprisonment for debt, racial exclusion, worker's rights, gender equality, environmental rights, and many more. The debates demonstrate that the state approach to constitutional rights is not a relic of the founding. It has remained an active part of the state constitutional tradition.

At this point, a few important qualifications and clarifications are proper. First, I do not claim that the state approach to constitutional rights is normatively preferable to the federal approach. Indeed, my findings show that, although state constitutional rights have sometimes empowered admirable popular campaigns to undo an oppressive status quo, they have also facilitated popular prejudices, hate, self-interest, and even secession. The state approach

³⁴ REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW-YORK 59 (Albany, E & E. Hosford 1821) [hereinafter N.Y. 1821].

³⁵ THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835–36, at 287 (Harold M. Dorr ed., 1940) [hereinafter MICH. 1835–36].

³⁶ See *infra* Part III (tracing this practice through various issues over time).

³⁷ See *infra* subsection III.A.1 (describing antebellum efforts to limit influence of private corporations).

³⁸ See *infra* subsection III.A.3 (describing racial exclusion provisions as products of concerns about logrolling).

³⁹ See *infra* subsection III.A.2 (describing state governments' failures regarding imprisonment for debt).

⁴⁰ See *infra* subsections III.C.1–2 (describing workers' rights amendments as responsive to court decisions).

surely has grave normative costs. My claim, however, is that, for better or worse, state bills of rights have never purported to function the way that the Fourteenth Amendment and the Federal Bill of Rights now operate. Whatever their failures, state bills of rights represent an intentional alternative approach to constitutional rights. Simply ignoring that approach because it does not fit the federal mold risks dangerously oversimplifying American public law. Indeed, one of the important implications of my findings is that Americans live under two very different kinds of constitutional rights that often point in opposite directions because they perform different functions. Recognizing this duality highlights the unique significance of *federal* rights and opens more fruitful lines of inquiry regarding the effectiveness of state constitutional rights and their normative justifications.

Additionally, I do not mean to suggest that all states have had identical experiences with the design and practice of constitutional rights. Differences between states exist. That said, my review of the debates reveals a remarkable degree of convergence regarding certain core issues. My claim is that, as compared to the federal model, the states generally converge on an approach that prioritizes rights as instruments of popular control over government rather than entrenched counter-majoritarian constraints.

Finally, my primary focus in this Article is to articulate and substantiate the states' distinct approach to constitutional rights. I plan to explore the implications of my findings as part of a long-term research agenda. However, I conclude this Article by teasing a few important implications. For one thing, by highlighting the distinctive features of state constitutional rights, my findings lay the groundwork for more sophisticated inquiries into how constitutional rights function within our federal system as a whole and help move us past truisms about the nature and function of constitutional rights writ large.

Relatedly, my findings are especially important at a moment when the Supreme Court seems likely to reevaluate the scope of certain federal rights. Justices past and present have expressed sympathy for "judicial rights federalism"—the idea that state and federal courts share a joint and equivalent responsibility for advancing rights under their respective constitutions.⁴¹ But the Supreme Court should be skeptical of arguments suggesting that state constitutional rights can operate as local substitutes or fail-safes for federal rights. Although the texts of state and federal rights can be similar, state constitutional rights were built to empower rather than constrain state majorities. In other words, state constitutional rights are not like-kind substitutes for federal rights; if anything, they are designed to pull in the opposite direction. This has important implications for the construction of

⁴¹ See *infra* Section IV.C (discussing the implications for federal rights jurisprudence).

federal rights. Stated plainly, narrowing federal rights leaves affected intrastate minorities without any equivalent protections under state constitutional law. My findings bring this structural reality into sharp relief. My findings also destabilize how many state courts interpret state bills of rights. State courts tend to borrow standards of review grounded in the federal Constitution's counter-majoritarian framework. My findings provide a sound basis for state courts to reconsider those standards.

This Article proceeds in four parts. Part I explores how conventional critiques of state bills of rights are incomplete and succeed only in showing that state bills of rights do not function like their federal cousin. Part II places early state bills of rights in their original historical and political context and argues that they were originally crafted as instruments of popular control over government. Part III presents evidence showing that the states have maintained and practiced this approach to constitutional rights. Part IV concludes by offering a more authentic and accurate assessment of contemporary state constitutional rights and exploring a few preliminary implications for state and federal rights jurisprudence.

I. MISUNDERSTANDING STATE CONSTITUTIONAL RIGHTS

In this Part, I argue that state constitutional rights are misunderstood because critics assess them through a narrow rights framework derived from our experience under the federal Constitution. I first define the parameters of that framework. I then argue that existing critiques are mostly correct in their descriptions of how state constitutional rights function, but they skip over the possibility that state constitutional rights serve a different purpose. I conclude with a brief account of how existing state constitutional rights scholarship has failed to respond to these critiques because it too tends to approach state constitutional rights through the federal framework.

A. *Rights as Bulwarks Against Popular Majorities*

Since at least *Brown v. Board of Education*,⁴² American constitutional consciousness has prioritized the idea that constitutional rights exist to erect much-needed constraints on popular majorities.⁴³ Indeed, Akhil Amar has argued that “in the shadow” of *Brown*,⁴⁴ the “dominant approach” to the

⁴² 347 U.S. 483 (1954).

⁴³ See Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L. J. 1049, 1060 (2009) (“[B]ecause *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself.”).

⁴⁴ AKHIL REED AMAR, *THE BILL OF RIGHTS* 3 (1998); see also *id.* at 3-4 (“Living in the shadow of *Brown v. Board of Education* and the second Reconstruction of the 1960s, many lawyers embrace a tradition

Federal Bill of Rights focusses “exclusively on . . . [the] protection of minority against majority.”⁴⁵ Supreme Court Justices have likewise asserted that the “salient purpose” of a bill of rights is to “protect minorities . . . from the passions or fears of political majorities.”⁴⁶ Leading legal theorists have observed that in American political culture fear of overbearing majorities is so endemic that “judicially patrolled constraints on legislative decisions has become more or less axiomatic.”⁴⁷ Most recently, Maggie Blackhawk has argued that *Brown* remains the “normative lodestar against which to evaluate constitutional theory, values, and design.”⁴⁸

Madison planted the seeds of this perspective at the founding. In Federalist 10 as well as his speech to the first Congress introducing the Federal Bill of Rights, Madison argued that the need for enumerated rights came primarily from the dangers posed by self-interested democratic majorities.⁴⁹ According to Madison,

The prescriptions in favor of liberty, ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power: But this [is] not found in either the executive or legislative departments of government, but in the body of the people, operating by the majority against the minority.⁵⁰

To be sure, Madison did not have a full appreciation for how the Fourteenth Amendment and judicial review might expand and actualize the counter-majoritarian function of federal rights.⁵¹ But he surely thought that constraining political majorities was a critical function of the Bill of Rights.

Jumping (far) ahead to the civil rights revolution of the twentieth century, American constitutional scholars had “a fixation on rights as the ideal solution

that views state governments as the quintessential threat to individual and minority rights, and federal officials—especially federal courts—as the special guardians of those rights.” (footnote omitted).

⁴⁵ AMAR, *supra* note 44, at xiii.

⁴⁶ William J. Brennan, Jr., *Why Have a Bill of Rights?*, 26 VALPARAISO U. L. REV. 1, 12 (1991).

⁴⁷ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1395 (2006).

⁴⁸ Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1792 (2019).

⁴⁹ See THE FEDERALIST NO. 10 (James Madison) (“By a faction I understand a number of citizens . . . who are . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”); see also Madison, *supra* note 28, at 207 (arguing it would be necessary to add a declaration of the rights of the people into the Constitution).

⁵⁰ Madison, *supra* note 28, at 204.

⁵¹ See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 499 (1997) (“While it is doubtful that the Framers entertained a very sophisticated conception of judicial review, had they appreciated the countermajoritarian possibilities inherent in the institution, they probably would have thought it a terrific idea.”) (citation omitted). *But see* Levinson, *supra* note 21, at 667 (“Madison drew the general lesson that countermajoritarian rights would be an exercise in futility.”).

to minority subordination.”⁵² The civil rights revolution, with *Brown* as its flagship, confirmed for constitutional theorists much of what Madison had prophesied at the founding.⁵³ Democratic majorities, especially intrastate majorities, were the greatest threat to political minorities and individual liberty. But even more importantly, the rights revolution brought federal courts to the fore as the guardians of individual rights.⁵⁴ With the incorporation of the Bill of Rights through the Fourteenth Amendment, the Warren Court greatly expanded federal judicial review to strike down state and local laws that targeted minorities or infringed core personal freedoms.⁵⁵ This “ushered in an era” where constitutional rights were expected to address a particular problem (overbearing majorities) in a particular way (judicial enforcement of rights as side-constraints on majoritarian politics).⁵⁶

The essential characteristics of this approach are important to note. First, it embraces courts as referees between political majorities and disfavored minorities and individuals. Courts are expected to independently ascertain the nature and scope of a right and decide whether popular policies impermissibly infringe it. Second, it assumes that constitutional rights and court rulings are supreme and entrenched beyond the immediate reach of majoritarian political processes. Court-enforced rights operate as “trumps” that invalidate otherwise legitimate actions by democratic majorities.⁵⁷ Third, this perspective on rights

⁵² Blackhawk, *supra* note 48, at 1846.

⁵³ Another factor that elevated the minority-protecting rationale to prominence was the Court’s *Lochner* jurisprudence, which ostensibly sought to enforce federal rights as constraints on state governments. See Arthur D. Hellman, *The Supreme Court’s Two Constitutions: A First Look at the “Reverse Polarity” Cases*, 82 U. PITT. L. REV. 273, 340-46 (discussing Footnote Four of *United States v. Carolene Products Co.*). As the Court undid *Lochner* but sought to expand protection for civil liberties, scholars needed a “theoretical rationale” for this transformation that could disentangle the Court’s civil liberties jurisprudence from *Lochner*. See Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 238 (2004) (arguing that judicial activism came before finding a rationale for it). The protection of “insular minorities” as described in *Carolene Products* provided the framework and accelerated the importance of framing rights as minority protections. See *id.* at 238 (“[I]t took a few years for *Carolene Products* to emerge as the clear symbol of the political process, minority protection argument.”).

⁵⁴ See MARY ANN GLENDON, RIGHTS TALK 4-5 (1991) (describing the history of the rights revolution).

⁵⁵ See JOHN HART ELY, DEMOCRACY AND DISTRUST 148 (1980) (“During the Warren era, the Supreme Court was quite adventurous in expanding the set of suspect classifications beyond the core case of race.”).

⁵⁶ Blackhawk, *supra* note 48, at 1846. Conventional accounts of rights in the United States mostly begin with Supreme Court cases from the twentieth century. See, e.g., Robert A. Rutland, *How the Constitution Protects Our Rights: A Look at the Seminal Years*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 1, 12 (Robert A. Goldwin & William A Schambra eds., 1985) (“Not until the Fourteenth Amendment spread its broad umbrella [through incorporation] did the Bill of Rights assume the guardianship role its authors intended.”).

⁵⁷ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977); see also *Gordon v. Lance*, 403 U.S. 1, 6 (1971) (“[T]he Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy.”).

is animated by the Madisonian belief that self-interested majorities (especially intrastate majorities) present the greatest danger to free government.⁵⁸ This fear is, of course, well founded based on the paradigm cases of slavery, Jim Crow, and their entrenched systemic effects.⁵⁹

This perspective still dominates constitutional theory, rights jurisprudence, and popular political discourse. Disputes about rights and the appropriate balance of government power continue to be framed by analogy to this paradigm. Even the Roberts Court, which has been critical of laws favoring racial minorities, has “set at naught the outcomes reached by majoritarian processes” in favor of rights asserted by groups seeking to evade democratic regulation.⁶⁰

To be sure, this perspective on rights has come with normative and empirical criticism. The most prominent normative critique is Alexander Bickel’s formulation of the tension between judicial review and democratic legitimacy.⁶¹ Bickel’s “countermajoritarian difficulty” spawned tomes of literature dedicated to harmonizing or explaining entrenched constitutional rights, judicial review, and democratic governance.⁶² In response, some theorists posit that rights should be understood as “precommit[ments]” designed to ensure that people remain true to their better judgment during periods of shortsightedness.⁶³ Other theorists argue that independent judicial review is essential to self-governance because it protects the equal participation and value of all citizens, the core of democratic ideals.⁶⁴ Still another branch of empirical literature contends that the Supreme Court does not actually perform a countermajoritarian role. The countermajoritarian critique is misplaced, they claim, because the Supreme Court tends to make decisions that approximate majoritarian preferences.⁶⁵

⁵⁸ See THE FEDERALIST NO. 51, at 321 (James Madison); see also TARR, *supra* note 17, at 78 n.73.

⁵⁹ See, e.g., K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. (forthcoming 2021) (expounding the systemic effects of slavery on contemporary property law); Avidit Acharya, Matthew Blackwell & Maya Sen, *The Political Legacy of American Slavery*, 78 J. POL. 621 (2016) (exploring how political attitudes and affiliations are systemically affected by the institution of slavery).

⁶⁰ Hellman, *supra* note 53, at 341-42, 346 (identifying *District of Columbia v. Heller* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* as examples).

⁶¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. 1962).

⁶² Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 341 (1998).

⁶³ JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 94 (rev. ed. 1984).

⁶⁴ See, e.g., RONALD DWORKIN, *FREEDOM’S LAW* 17 (1996) (positing a “constitutional conception of democracy” that considers all individuals equally).

⁶⁵ See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 282-83 (1957) (defending the Court as a democratic institution); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 70-72 (1993) (explaining the Court’s constitutional decisions generally track majority public sentiment).

Of course, the American constitutional tradition offers other ways to understand rights. Even Madison maintained that constitutional rights should not only protect against majority tyranny but also “guard the society against the oppression of its rulers.”⁶⁶ My point is not that this perspective on rights is entirely absent or unimportant; it is surely baked into even the Federal Bill of Rights.⁶⁷ Rather, my point is that contemporary rights theory and jurisprudence continues to brush past this perspective in favor of the idea that rights find their essential purpose in the fear that unchecked majorities will run amuck and exploit or target disfavored individuals and minorities.

B. “Amendomania” and the Dysfunction Critiques

It is through this framework that state constitutional rights are most often found wanting—and for good reason. State constitutional rights do not meet the framework’s criteria, especially when compared to their federal counterparts. Critiques take various forms, but they can be organized into three groups: the entrenchment critique, the direct-democracy critique, and the under-enforcement critique. As I explain below, all three critiques offer incomplete assessments of state constitutional rights because they fail to consider that states have designed and deployed constitutional rights to work differently.

1. The Entrenchment Critique

Entrenchment critics argue that state constitutional rights are dysfunctional because, as a normative matter, constitutionalism necessarily includes judicially enforceable legal constraints on majorities.⁶⁸ These constraints might reflect political morality or pre-commitments by the people themselves.⁶⁹ In either case, constitutional democracy requires some

⁶⁶ THE FEDERALIST NO. 51, *supra* note 58, at 321.

⁶⁷ See AMAR, *supra* note 44, at xiii (arguing that before Reconstruction and incorporation the Federal Bill of Rights was “more majoritarian than counter” and “centrally concerned with controlling the ‘agency costs’ created by the specialization of labor inherent in a representative government”).

⁶⁸ See Wilkinson, *supra* note 13, at 571 (describing the variety of subjects covered by majoritarian amendments); Chemerinsky, *supra* note 13, at 1701 (describing the use of state constitutional amendments to override state court decisions); Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 KAN. L. REV. 687, 690-91 (2011) (reciting this critique and exploring its limits); Michael G. Colantuono, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1475 (1987) (describing how majoritarian amendment processes problematize judicial protection of minorities); James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTING CONST. L. Q. 43, 47 (1983) (“It is the relative ease by which state constitutions can be amended by a temporary majority that poses a challenge to state constitutional jurisprudence . . .”).

⁶⁹ These critics build on constitutional theorists such as Ronald Dworkin and Jon Elster, who have offered normative justifications for entrenched constitutional rights that courts enforce as constraints on majorities. See DWORKIN, *supra* note 64, at 17 (arguing that counter-majoritarian

institution to monitor self-interested majoritarian politics. Scholars within this camp identify with the notion that state constitutional rights are dysfunctional because they are “one statewide initiative away from being changed by a majority vote.”⁷⁰ The main concern by this group is that state constitutional rights have failed the essential purpose of a constitutional right because they are insufficiently insulated from extant majorities.⁷¹

The obvious strength of this critique is its description of how state constitutional rights function. State constitutions are easy to amend, and amendment processes prioritize popular majoritarian decisionmaking.⁷² Moreover, state electorates actively amend their bills of rights.⁷³ State bills of rights have become increasingly fluid and detailed through an array of popular changes. Between 1968 and 2016, there were more than 330 rights amendments, causing state bills of rights to balloon in length, scope, and detail.⁷⁴ Using Virginia’s archetypal 1776 Declaration of Rights as a baseline, the number of words in state bills of rights has grown from 379 to an average of 1,216,⁷⁵ an increase of more than 220%. The average number of topics covered has increased by 43%, and the average level of detail per topic has increased by 116%.⁷⁶ Contemporary state bills of rights now include many statute-like

judicial review is essential for political equality, which is essential to democracy); DWORKIN, *supra* note 57, at xi (describing rights as judicially enforceable “trumps” that can—and should—lawfully invalidate democratic outputs because of their connection to political equality and democracy); ELSTER, *supra* note 63, at 94 (analogizing rights to pre-commitments).

⁷⁰ Sutton, *supra* note 68, at 690-91 (exploring this critique).

⁷¹ See Chemerinsky, *supra* note 13, at 1702 (describing state constitutions as more majoritarian).

⁷² Eighteen states allow amendments by citizen initiative to some degree, and most states allow legislatures to propose amendments subject to a simple-majority ratifying referendum. COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 8 tbl.1.4, 10 tbl.1.5 (2019 ed.).

⁷³ See Miller *supra* note 4, at 2063-64 (discussing amendments preempting or reacting to judicial decisions).

⁷⁴ From 1968 until 2017 the BOOK OF THE STATES reported annual amendment data by constitutional article, including amendments made to state “bills of rights.” This information was usually reported in Table B. To calculate this number (330), I tabulated these entries reported in Table B. The number is even greater (548) if I include amendments related to election and suffrage, which are rights issues under the Supreme Courts federal jurisprudence.

⁷⁵ To calculate this, I created an original database that includes Virginia’s 1776 Declaration of Rights as well the texts of all bills of rights from all fifty state constitutions as of August 13, 2020. As others have done, see Versteeg & Zackin, *supra* note 16, at 662 n.11, I used the “tm” package in R software to calculate word counts. To obtain a more appropriate count for comparison across constitutions, I eliminated common stop words and “stemmed” the corpus to limit double-counting derivatives. *Id.* at 662 n.12.

⁷⁶ To calculate topics, I follow Versteeg and Zackin and used R to calculate unique words as a proxy for topics. *Id.* at 622 n.12. To measure detail, I divided the total number of words by the number of unique words (topics). *Id.* at 662. These measures are imperfect, but they provide a recognized method for comparing texts.

provisions addressing economic equality,⁷⁷ the right to hunt and fish,⁷⁸ environmental rights,⁷⁹ privacy,⁸⁰ healthcare insurance,⁸¹ the rights of crime victims,⁸² public access to government records,⁸³ stem cell research and human cloning,⁸⁴ and, in Alabama and Tennessee, a right of public access to certain navigable waters.⁸⁵ Unlike the Federal Bill of Rights, where the text has remained relatively generic, stable, and insulated from popular interventions, state bills of rights are a “beehive” of popular political activity. Moreover, the states have no qualms about using constitutional amendment to undo or modify unpopular judicial decisions enforcing rights.⁸⁶ If the sine qua non of effective constitutional rights is their ability to sustain judicially enforceable constraints on majorities, state constitutional rights are surely a failure.

Perhaps most importantly for the entrenchment critics, impassioned popular majorities often amend bills of rights to target rather than protect political minorities.⁸⁷ The wave of pre-*Obergefell* marriage amendments is a recent example. Earlier examples include a wave of “English-only” amendments during the 1920s that were intended to “promote true Americanism,” followed by another wave beginning in the 1980s.⁸⁸ During segregation, state constitutions were amended to include literacy

⁷⁷ See, e.g., ILL. CONST. pmb. (seeking to “eliminate poverty and inequality” and pursue economic justice).

⁷⁸ See, e.g., WIS. CONST. art. I, § 26 (granting the right to hunt and trap fish and game “subject only to reasonable restrictions”).

⁷⁹ See, e.g., PA. CONST. art. I, § 27 (providing the rights to “clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment”).

⁸⁰ See, e.g., MONT. CONST. art. I, § 10 (noting the need to protect individual rights to privacy given its centrality to “the well-being of a free society”).

⁸¹ See, e.g., ALA. CONST. art. I, § 36.04 (creating a right for individuals, employers, or healthcare providers to decline participation in healthcare programs).

⁸² See, e.g., ALASKA CONST. art. I, § 24 (providing rights to crime victims, including the right to timely disposition of cases, the right to be heard, and protection from the accused).

⁸³ See, e.g., FLA. CONST. art. I, § 24(a) (providing the right to review or duplicate public records made in connection with any public body, officer, or employee’s official business).

⁸⁴ See, e.g., MICH. CONST. art. I, § 27 (outlining the state’s requirements for stem cell research and treatments).

⁸⁵ ALA. CONST. art I, § 24; TENN. CONST. art. I, § 29.

⁸⁶ See Dinan, *supra* note 16, at 984 (addressing the adoption of state amendments in response to a wide variety of court decisions).

⁸⁷ See KENNETH MILLER, *DIRECT DEMOCRACY AND THE COURTS* 154-55 (2009) (arguing that direct democracy’s most consequential impact has been to limit the expansion of rights in a number of states).

⁸⁸ See, e.g., NEB. CONST. art. I, § 27 (amended 1920) (“The English language is hereby declared to be the official language of this state . . .”); see also NEBRASKA CONSTITUTIONS OF 1866, 1871 & 1875 AND PROPOSED AMENDMENTS SUBMITTED TO THE PEOPLE SEPTEMBER 21, 1920, at 17 (1920) (explaining that the purpose of the amendment is to “promote true Americanism”).

requirements for voting,⁸⁹ prohibit interracial marriages,⁹⁰ and mandate segregated schools,⁹¹ among other things.⁹² Before the Civil War, state bills of rights were used to explicitly recognize the rights of slaveholders over enslaved people.⁹³ In other words, tyranny of the majority has been a real and explicit phenomenon under state bills of rights. If an essential attribute of constitutional rights is their ability to constrain or at least temper abusive majorities, state constitutional rights frequently fail.

2. The Direct-Democracy Critique

The direct democracy critics take a slightly different approach. They too recognize the need for rights to protect against majority tyranny, but they emphasize that state constitutional rights are flawed, not simply because they are subject to change by majoritarian institutions, but because initiatives and referenda are especially bad processes for deciding rights.⁹⁴ These critics argue that by reducing a constitutional right to each voter's secret ballot, direct democracy facilitates the aggregation of prejudice without any of the purifying benefits of deliberation and transparency that attend representative decisionmaking. Thus, state constitutional rights are defective because they exist in a poorly designed constitutional universe where voters secretly decide on their scope and application.⁹⁵

⁸⁹ See, e.g., MISS. CONST. of 1890, art. 12, § 244 (“[E]very elector shall . . . be able to read any section of the constitution of this State; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof.”). For a discussion of this provisions, see *Williams v. Mississippi*, 170 U.S. 213 (1898).

⁹⁰ See, e.g., MISS. CONST. of 1890, art. 14, § 263 (“The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void.”).

⁹¹ See, e.g., ALA. CONST. of 1901, art XIV, § 256 (“Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.”).

⁹² On the various changes made to southern state constitutions during segregation, see generally PAUL E. HERRON, *FRAMING THE SOLID SOUTH 189-225* (2017).

⁹³ See, e.g., KY. CONST. of 1850, art. XIII, § 3 (“The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever.”).

⁹⁴ See DANIEL C. LEWIS, *DIRECT DEMOCRACY AND MINORITY RIGHTS 1-2* (2013) (explaining that when the majority prefers the infringement of political rights, direct democracy initiatives limit such rights for minorities); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 245-46 (1997) (arguing that the majority uses direct democracy to deprive political minorities of civil rights); Hans A. Linde, *When Is Initiative Lawmaking Not “Republican Government”?*, 17 HASTINGS CONST. L.Q. 159, 165 (1989) (noting that the founders most supportive of democratic institutions relied on representative rather than direct democracy).

⁹⁵ Derrick A. Bell, *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 13-15 (1978) (arguing that referenda place racial minorities in unique danger because direct democracy is not mediated by public-regarding influences and instead is “carried out in the privacy of the voting booth” which makes the referendum the “most effective facilitator of that bias, discrimination, and prejudice which has marred American Democracy from its earliest day”); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1553 (1990) (“While public

This critique also has strength in its description of state constitutional rights practice. As noted above, state electorates amend their bills of rights regularly. Such amendments often target minorities or disfavored individuals. And, in every state except Delaware, all amendments must be ratified by a statewide referendum.⁹⁶ Moreover, at least sixteen states allow for constitutional amendment by initiative, which allows voters to place amendments on the ballot without any representative deliberation or discussion.⁹⁷ These processes seem ill-suited to mitigating bias and self-interest, and instead seem structured to empower instant majorities without any of the prophylactics that might accompany representative lawmaking. If tempering impassioned democratic majorities is an essential aspect of constitutional rights, state rights operate in a constitutional universe that undermines them.

3. The Under-Enforcement Critique

A final group of critics emphasize the historical underenforcement of state constitutional rights by state courts. Specifically, they note that prior to the twentieth century, state courts hardly entertained constitutional rights litigation and certainly did not expand constitutional protections.⁹⁸ These critics emphasize that this is especially troubling because after the Supreme Court's 1833 decision in *Barron v. Mayor of Baltimore*, which held that the Federal Bill of Rights did not apply to the states,⁹⁹ state constitutional rights were the only source of constitutional protection for individuals and

proclamations of racist attitudes have lost their respectability, prejudice continues to receive an airing in the privacy of the voting booth.”).

⁹⁶ See COUNCIL OF STATE GOV'TS, *supra* note 72, at 8 tbl.1.4, 10 tbl.1.5, 11 tbl.1.6.

⁹⁷ *Id.*; see also Jonathan L. Marshfield, *Improving Amendment*, 69 ARK. L. REV. 477, 480 n.15 (2016) (explaining that although Illinois and Massachusetts have the constitutional initiative, they both impose significant limitations on the initiative, which in Massachusetts includes the legislature's authority to review and amend proposed initiatives).

⁹⁸ See Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 132, 133, 150 (1977); Donald S. Lutz, *Political Participation in Eighteenth Century America*, in TOWARD A USEABLE PAST 31 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (“[C]ourts did not actively protect these rights in any substantive sense.”); Ronald K. L. Collins, Peter J. Galie & John Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS: J. FEDERALISM 141, 142 (1986) (tallying the increase in rights-affirming state court decisions through the mid-twentieth century); John Kincaid, *State Court Protections of Individual Rights Under State Constitutions: The New Judicial Federalism*, 61 J. ST. GOV'T. 163, 167 (1988); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63, 69 (1994) (“[S]tate supreme courts did not develop a body of civil liberties law prior to the 1930s. The new judicial federalism thus represents not a return to the past but an unprecedented exercise of state judicial power.”).

⁹⁹ 32 (7 Pet.) U.S. 243, 250–51 (1833).

minorities.¹⁰⁰ While some state courts sought to vindicate state constitutional rights during the 1970s and 80s, state courts generally exhibit little interest in acting as guardians of rights.¹⁰¹ Such critics infer from the lack of judicial enforcement that state constitutional rights are fundamentally dysfunctional.¹⁰²

Here again the strength of this critique is its description of how state constitutional rights have performed. State courts do not usually offer much independent solicitude for parties invoking state constitutional rights.¹⁰³ Despite tomes of academic literature urging state courts to develop independent state rights jurisprudence, most state courts simply “lockstep” their analysis with whatever the Supreme Court has said about the relevant issue. This occurs most frequently regarding state constitutional rights with direct federal analogs, but state courts have also tied unique state provisions to seemingly unrelated federal rights jurisprudence.¹⁰⁴ There are some important outliers, to be sure.¹⁰⁵ And there have been periods when state courts worked to create space for independent state constitutional rights, but state courts have generally resigned themselves to acting as surrogates for federal law without much interest in imposing independent constraints on state majorities through constitutional rights.¹⁰⁶ If judicial solicitude for rights litigation and the expansion of rights is an essential criterion of constitutional rights, state bills of rights fail again.

C. Existing Responses

Legal scholarship has done very little to address these critiques. In fact, its framing of state constitutional rights has generally contributed to their

¹⁰⁰ See Rutland, *supra* note 56, at 12 (arguing that before incorporation of the Fourteenth Amendment “almost all the civil liberties of individuals were denied to citizens”).

¹⁰¹ See Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 783 (2010) (independent state court enforcement of state rights is “today more an aspiration than a practice”).

¹⁰² See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766, 780-81 (1992) (criticizing state constitutions as dysfunctional because there is “a lack of language in which participants in the legal system can debate the meaning of the state constitution” in part because of the absence of meaningful state constitutional precedent over time—“the lack of decisions alone retards the development of state constitutional law and discourse”).

¹⁰³ See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 102 (2006) (arguing that state courts have been inconsistent in affirming constitutional rights and are likely to remain so).

¹⁰⁴ Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 41 (2014) (lamenting that courts tie state constitutional provisions prohibiting special legislation to equal protection analysis).

¹⁰⁵ See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 119-27 (2009) (surveying cases where state courts developed independent state rights jurisprudence to expand constitutional protections in areas such as criminal procedure, education equality, free speech).

¹⁰⁶ See *id.* at 113-19 (discussing the New Judicial Federalism movement, which died down by the 1990s).

vitality. To appreciate this, it is necessary to understand how this field of scholarship has developed.

Most state constitutional rights scholarship has its roots in the late 1970s when civil rights advocates feared that the Burger Court would roll back federal rights.¹⁰⁷ Responding to this concern, Justice Brennan wrote a series of dissents and law review articles prodding state supreme courts to rely on their own constitutions to continue expanding rights.¹⁰⁸ Framed in this way, state constitutional rights were viewed as a like-kind substitute for federal constitutional rights: they offered an alternative legal basis for courts to invalidate the outputs of majoritarian political processes.¹⁰⁹

Energized by Justice Brennan's conception of "judicial federalism," scholars explored legal arguments, theories, and evidence that might support independent state court expansion of rights.¹¹⁰ A variety of approaches and criticisms emerged from this endeavor.¹¹¹ State constitutional positivists, for example, focused on how state courts might rely on "unique state sources" of text, history, and structure to justify divergence from federal precedent.¹¹² Pragmatists focused on empowering state courts to interpret rights as best to solve state-specific problems.¹¹³ Even constitutional universalists emphasized that state courts should engage in independent normative analysis to enrich a shared judicial discourse regarding liberty.¹¹⁴

This movement had early success; especially in criminal procedure and the death penalty.¹¹⁵ Various state courts eagerly departed from rights-limiting federal precedent and expanded protections for inmates and criminal defendants.¹¹⁶ This was celebrated by the legal academy as an important development and an advancement for rights.¹¹⁷ But that was not the end of

¹⁰⁷ See *id.* at 115 (discussing how the Burger Court's anticipated retraction from the Warren Court's activism led litigants to look elsewhere than federal court).

¹⁰⁸ *Id.* at 121.

¹⁰⁹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

¹¹⁰ See WILLIAMS, *supra* note 105, at 121-27 (surveying various movements by scholars like Justice Linde after Brennan's article).

¹¹¹ See Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 750-59 (2012) (summarizing various approaches state courts might take to expand rights and the critiques of each approach).

¹¹² *Id.* at 751-52; see also Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1147 (1993) (describing "the central premise" of this movement as identifying "unique state sources" to legitimate independent state constitutional interpretation).

¹¹³ Long, *supra* note 111, at 758-59.

¹¹⁴ *Id.* at 752-56.

¹¹⁵ WILLIAMS, *supra* note 105, at 119-20.

¹¹⁶ See Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 227 n.14 (1984) (providing examples of state court cases that created broader protections for criminal defendants).

¹¹⁷ WILLIAMS, *supra* note 105, at 125.

the story. There was a subsequent wave of responsive state constitutional amendments.¹¹⁸ From Massachusetts and Connecticut to California and Florida, state electorates quickly rolled back judicially enhanced criminal procedure protections and reinstated the death penalty.¹¹⁹

Remarkably, although this phenomenon is now endemic, legal scholars have not seriously engaged with its jurisprudential significance.¹²⁰ Indeed, because this scholarship was born from the hope that state constitutions might provide an alternative corpus of counter-majoritarian protections, most of it either implicitly adopts some version of the critiques described above,¹²¹ or begrudgingly acknowledges that state constitutional rights are vulnerable to flexible amendment rules.¹²² And state judges, who have been trained to assume that a bill of rights must operate as an entrenched constraint on

¹¹⁸ Wilkes, *supra* note 116, at 233.

¹¹⁹ *Id.* at 234.

¹²⁰ There are exceptions. *See, e.g.*, Conor O'Mahony, *If a Constitution Is Easy to Amend, Can Judges Be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 192 (2014) (engaging with the idea that state constitutional rights might be interpreted differently under state constitutions because state constitutions are easier to amend); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 358 (2011) (discussing public views of state constitutions which may contribute to such developments); Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1453 (1999) (examining conditions contributing to "robust interpretations of constitutional rights").

¹²¹ *See, e.g.*, Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 957-58 (2001) (arguing that state constitutions should be understood as constrained by principles of "republican" government, which might include a prohibition on "putting the rights of a distinctive minority to the vote of a popular majority").

¹²² *See* Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 7, 11 (G. Alan Tarr & Robert F. Williams eds., 2006) (observing that a state constitutional amendment can be ratified or a new constitution adopted by "a mere majority vote of the electorate," which is a feature that is fundamental to state constitution making). To be fair, a few functional theories of state constitutions imply a unique jurisprudential approach to state amendment practice. James Gardner, for example, has offered a complex theory explaining how state constitutions contribute to promoting liberty within the federal system. *See generally* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 98-100 (2005) [hereinafter GARDNER, INTERPRETING STATE CONSTITUTIONS]. For Gardner, the protection of "rights is not something that the architecture of federalism assigns exclusively to the national level; it is, on the contrary, a shared function, to be pursued simultaneously at both levels through the identification and active policing of such rights." James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 380 (2016). Gardner has emphasized that states use frequent amendment to reflect the people's degree of trust in state and federal government over time. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra*, at 27-28, 178-79. Because many of these amendments have addressed state constitutional rights, Gardner seems to implicitly describe state constitutional rights amendments as part of popular efforts to constrain state government. *Id.* at 27-28. However, Gardner discounts these amendments for purposes of rights jurisprudence. *See id.* at 179 (describing the interpretation of state constitutions as making sense of "a kind of palimpsest, bearing witness in its many tangled and possibly self-contradictory provisions to the course by which the people's constitutional thought has evolved"). Instead, he views state courts as commissioned to engage in their own parallel assessment of rights by reference to other polestars. *Id.* at 180-82.

majorities, continue to relay myths about their bills of rights.¹²³ The existing perspective seems to be that if rights are too easy to amend, that is an “amendment problem” with negative consequences for rights, but it does not indicate anything about the nature of constitutional rights. As I argue below, this assumption reflects a fundamental misunderstanding of state constitutional rights, which prize above all else direct popular intervention in government.¹²⁴ Frequent amendment is not a free-standing feature of state constitutions with no textual or normative connection to state bills of rights. To the contrary, it is the product of the text and explicit normative commitments of state bills of rights.

To be sure, a few political scientists have focused on unique attributes of state bills of rights.¹²⁵ Alan Tarr has argued that early state bills of rights reflected a deep trust in republican theories of government such that they did not portend to enumerate legally enforceable rights.¹²⁶ Building on this point, John Dinan argues that states initially looked to legislatures to protect rights rather than courts.¹²⁷ On this view, state constitutional rights sit in the background as guiding principles for the electorate to use when evaluating officials and the legislature.¹²⁸ Dinan’s account is surely correct, but not necessarily exclusive. It leaves open the possibility that state electorates also took certain issues into their own hands through constitutional amendment. Indeed, Marc Kruman has argued that the earliest state constitutionalists deeply distrusted republican government regarding religious freedom and establishment.¹²⁹ Rather than leave those issues to legislative regulation, they went to great lengths to regulate them directly through state bills of rights.

¹²³ See *State v. Santiago*, 122 A.3d 1, 54 (Conn. 2015) (citing federal precedent for the proposition that “the very purpose of a [b]ill of [r]ights was to withdraw certain subjects from the vicissitudes of political controversy”). State courts have sometimes come close to piecing together the deep structure of state constitutional rights. See *Gondelman v. Commonwealth*, 554 A.2d 896, 904 (Pa. 1989) (rejecting argument that constitutional provision was unconstitutional because it violated bill of rights because “[i]t is absurd to suggest that the rights enumerated in Article I were intended to restrain the power of the people themselves”).

¹²⁴ Part of this misunderstanding might be blamed on what Akhil Amar has called “clausebound” myopia in studying constitutional rights. AMAR, *supra* note 44, at xi-xii, xv. Amar has argued that this has limited our understanding of the Federal Bill of Rights. See *id.* It has likely done the same (or worse) for state bills of rights, which only make sense when viewed holistically across their text and time.

¹²⁵ Key works include TARR, *supra* note, 17, at 17-18; JOHN J. DINAN, KEEPING THE PEOPLE’S LIBERTIES 1 (1998); MARC W. KRUMAN, BETWEEN AUTHORITY & LIBERTY 41-49 (1997); and EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES 2-3 (2013).

¹²⁶ See, e.g., TARR, *supra* note 17, at 76-82 (exploring how state bills of rights are tied to an alternative conception of constitutional democracy).

¹²⁷ DINAN, *supra* note 125, at 1-2.

¹²⁸ *Id.* at 2-6.

¹²⁹ See KRUMAN, *supra* note 125, at 41-49.

Finally, in an important recent book, Emily Zackin has explored how state constitutional rights provide a tool for “frustrated outsiders” to circumvent existing power structures and advance change in the areas of education, labor, and environmental rights.¹³⁰ Zackin’s book is an important advancement in this area because she specifically engages with the idea that constitutional rights may serve an important purpose even if they are not deeply entrenched.¹³¹ However, Zackin is mostly concerned with demonstrating that the dominant political science explanation for constitutional entrenchment, which cynically posits that rights exist to entrench the status quo in favor of elites, is an incomplete explanation for how and why state constitutions change.¹³² Zackin does not explore state constitutional rights from a jurisprudential perspective.¹³³

This work by political scientists has shed new and important light on state constitutional rights and laid the groundwork for understanding state constitutional rights on their own terms rather than through the existing federal frames. My project here adds to this emerging perspective on state constitutions. What has been generally missing is a dedicated and systematic study of how state constitution makers have conceptualized and operationalized bills of rights over time with an eye towards implications for constitutional rights jurisprudence. This is especially unfortunate because records from state constitutional conventions capture regular deliberations about state constitutional rights from almost every state and from every decade for the period 1818–1984.

This is my focus here. I offer the first dedicated assessment of the 105 state constitutional conventions where state bills of rights were forged and reformed from 1818–1984. There have been 233 state constitutional

¹³⁰ ZACKIN, *supra* note 125, at 55, 59.

¹³¹ *Id.* at 65.

¹³² *Id.*

¹³³ In other work, Zackin has argued that state constitutional design more generally (not just rights, and perhaps at the expense of rights) represents a model that prizes flexibility and popular responsiveness as a means for allowing political outsiders to overcome elites and undo the status quo. See Versteeg & Zackin, *supra* note 16, at 660 (“While specific and flexible constitutions reduce some of the agency costs associated with highly entrenched constitutions, they introduce others. Perhaps most troublingly, they are vulnerable to the very actors they purport to control. . . . Where constitutional systems respond readily to majoritarian pressures minority rights can be easily violated.” (citation omitted)). For a helpful and insightful discussion of Zackin’s important theory, see G. Alan Tarr, *Explaining State Constitutional Changes*, 3 REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS [J. CONST. INVESTIGATIONS] 9, May/Aug. 2016, at 16, explaining that “[a]n alternative understanding . . . views constitutional change as originating with groups that find themselves stymied by the ordinary political processes in the states and therefore execute an ‘end run’ around those processes by appealing directly to the people.”

conventions from 1776–2020.¹³⁴ Of those, records exist for 114 conventions.¹³⁵ With the help of the Marvin & Virginia Schmid Law Library at the University of Nebraska College of Law, I collected and reviewed those debates. My review revealed 9 conventions that did not meaningfully address state bills of rights. Thus, the dataset includes 105 state conventions.¹³⁶ The temporal and geographical distributions of the dataset are illustrated in Appendices B and C.¹³⁷

II. CONCEPTUAL ORIGINS OF STATE CONSTITUTIONAL RIGHTS

State bills of rights do not look like the Federal Bill of Rights. They contain many structural maxims, and they tend to blend vague statements of political principle with hyper-specific rights guarantees.¹³⁸ And, of course, they are amended frequently. Thus, it is easy to deride them as dysfunctional. However, if we approach them on their own terms and in context, they reflect a coherent and alternative approach to constitutional rights that explains their distinctive qualities. Specifically, state bills of rights were designed to facilitate popular control over wayward government officials and policy. This forgotten conception of state bills of rights is apparent from their historical context, the plain language of early texts, and the convention debates where early texts were forged.

¹³⁴ JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 7, 8-9 tbl.1-1 (2006).

¹³⁵ *Id.* at 27 tbl.1-2, 28. My collection and review relies on Dinan's authoritative lists of known conventions and convention debates.

¹³⁶ See sources cited *infra* Appendix A (cataloguing the dataset of state constitutional convention debates).

¹³⁷ See sources cited *infra* Appendices B and C. Although these debates provide important insight into how the states have conceptualized and operationalized constitutional rights over time, they surely have limitations. I address some of those in Section IV.A, *infra*, but a critical concern relates to formal and informal restrictions on enfranchisement for election of delegates. Although some states have a history of expanding the electorate for purposes of constitutional reform, and recent scholarship has celebrated state constitutional conventions for being more politically inclusive than ordinary political institutions, most conventions have excluded large segments of society from participating as electors and/or delegates. See KRUMAN, *supra* note 125, at 27 ("Conference delegates also sought to make the convention more representative by making it much larger than the assembly."); ZACKIN, *supra* note 125, at 59 (celebrating state conventions as process for including political outsiders). The details and significance of this have been underexplored by scholars; it is a theme I intend to pursue in future work. For present purposes, however, it is important to acknowledge that the convention debates are surely limited by significant deficits in representation and voice. Moreover, these limitations create an internal tension for the state conception of rights that I advance here. While I argue that state constitutional rights are best understood as prioritizing majoritarian decisionmaking to reduce agency costs, states have not historically embraced meaningful political equality in the processes they use to define and monitor rights.

¹³⁸ See, e.g., CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights."); *id.* art. I, § 28 (providing a detailed scheme of rights for crime victims that regulates exactly how and when crime victims may gain access to information regarding criminal prosecution that is more than 2,000 words).

A. Historical Context

State Bills of Rights were inextricably linked to the revolution.¹³⁹ As Gordon Wood has observed, the revolutionary movement was concerned not only with winning independence from Great Britain, but with establishing new governments in the colonies that would be “fixed on genuine principles” of popular sovereignty.¹⁴⁰ This was, of course, a complicated endeavor. Revolutionary Americans had a clear commitment to popular sovereignty, but they had no useful precedent for how to operationalize a government where all power was “vested in and derived from the people.”¹⁴¹ On the one hand, it was quickly obvious to early state constitutionalists that the people could not govern themselves en masse.¹⁴² They would have to select representatives and appoint leaders. On the other hand, by 1776, state constitutionalists were deeply suspicious of government officials because of the belief that the attainment of power by a few political elites was likely to lead to the oppression of the majority of society.¹⁴³

The fear of tyranny by elites came from lived experience under British government and Whig political theory. English Whigs were deeply suspicious of the Crown and executive authorities. They believed that King George III had slowly manipulated and circumvented popular representation in Parliament by using various forms of “borough-mongering” and royal “patronage” to manipulate members of parliament.¹⁴⁴ Thus, by the middle of the eighteenth century, Whigs understood the Crown to be “tearing up the [British] constitution by the roots” and “bribing its way into tyranny.”¹⁴⁵ For Whigs, this confirmed their general belief that the greatest danger to liberty came from rulers who were “separated from the rest of the community.”¹⁴⁶

¹³⁹ See TARR, *supra* note 17, at 60 (“Prior to independence, some colonies viewed the framing of constitutions as a mechanism for promoting a dissolution of ties with Great Britain.”). My historical account here in Section II.A draws primarily from these authoritative works: WOOD, *supra* note 18; WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* (1980); KRUMAN, *BETWEEN AUTHORITY AND LIBERTY*, *supra* note 125; LUTZ, *supra* note 18; CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS* (2008). For an important and insightful review of Kruman’s work, see generally G. Alan Tarr, *Between Authority and Liberty: State Constitution Making in Revolutionary America*, by Mark W. Kruman, 28 RUTGERS L.J. 865 (1997) (book review).

¹⁴⁰ WOOD, *supra* note 18, at 128-29.

¹⁴¹ TARR, *supra* note 17, at 69.

¹⁴² See WOOD, *supra* note 18, at 164 (noting that increasing state populations made it more difficult for all of the inhabitants to meet in only one assembly).

¹⁴³ See *id.* at 144-48; *id.* at 148 (“Americans in 1776 were resolved to destroy the capacity of their rulers ever again to put together such structures of domination or to determine the ranks of the social order.”).

¹⁴⁴ *Id.* at 33.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 22.

The structure of power in the American colonies further reinforced Whig ideas. By 1776, Americans “knew only too well how society was organized by intricate and personal ties to men of power.”¹⁴⁷ British governors built “webs of influence that could match those in effect in England.”¹⁴⁸ Empowered and inspired by the Crown, governors appointed loyalists to important positions and leverage provincial power for their own benefit.¹⁴⁹ To be sure, not all governors were alike, but by 1776, Americans generally perceived them as corrupt, “coarse and brutal.”¹⁵⁰

Americans were especially troubled by the governors’ effectiveness in subverting the entire community for their own benefit.¹⁵¹ Governors were deft at circumventing and capturing legislative assemblies, which ostensibly represented local community interests.¹⁵² Governors used various tactics, but it was common to manipulate representatives by appointing them (or close family members) to well-paid positions.¹⁵³ Governors would also grant lucrative licenses or government contracts in exchange for favorable votes.¹⁵⁴

¹⁴⁷ *Id.* at 146.

¹⁴⁸ *Id.* at 145. On the patronage and appointment powers of governors, see EVARTS BOUTELL GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 113-17 (N.Y., Longmans, Green, & Co. 1898). These tactics were especially effective in the colonies where social hierarchy was weak but ambition strong. It was easy for governors to prey on the “smallest and most insignificant Americans” by offering “any little distinction in title or name.” WOOD, *supra* note 18, at 147.

¹⁴⁹ WOOD, *supra* note 18, at 157. See also GREENE, *supra* note 148, at 114 (noting that “traffic in offices” was how governors used their appointment powers).

¹⁵⁰ See Louis E. Lambert, *The Executive Article*, in *MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION* 185 (W. Brooke Graves ed., 1960); *id.* at 185-86 (describing how state governors operated in 1776); WOOD, *supra* note 18, at 146 (explaining how Massachusetts Governor Thomas Hutchinson “grasped the most important offices into his own hands . . . [in] a gigantic pattern of conspiracy”); Jere R. Daniell, *Politics in New Hampshire Under Governor Benning Wentworth, 1741-1767*, 23 *WM. & MARY Q.* 76, 105 (1966) (discussing interference by Governor Wentworth and his friends in local elections in an attempt to “prevent the weakening of their authority”). See generally James S. Leamon, *Governor Fletcher’s Recall*, 20 *WM. & MARY Q.* 527, 528 (1963) (detailing citizens’ resentment of Governor Fletcher and their attempts to stymie his efforts for government reorganization).

¹⁵¹ See WOOD, *supra* note 18, at 146 (“Americans had watched ‘with amazement, a numerous and powerful party, formed under the direction of a Governor . . .’”); *id.* at 157-58 (“[S]o infecting and so incompatible with the public liberty or the representation of the people was magisterial power believed to be that the Americans felt compelled to isolate their legislatures from any sort of executive interference or impingement . . .”).

¹⁵² See Lambert, *supra* note 150, at 186 (noting that the governor attempted to coax colonial assemblies to authorize expenses for “projects devised in England for imperial purposes”); GREENE, *supra* note 148, at 157-59 (detailing the governor’s ability to exert the “power of dispensing patronage” over the assembly).

¹⁵³ GREENE, *supra* note 148, at 158 (describing how the governor appointed allies as sheriffs, law enforcement, or mayors).

¹⁵⁴ See *id.* at 158 (explaining how the Maryland assembly checked the abuse of power by the governor by banning individuals who received government contracts from serving in the assembly); WOOD, *supra* note 18, at 157 (“The chief magistracy . . . offer[ed] them opportunities for profits

And, because governors controlled the timing and frequency of legislative elections, they would postpone elections while the assembly suited their interests, or call elections when it did not.¹⁵⁵

Consequently, early constitutionalists had a growing distrust of even their own elected legislative representatives.¹⁵⁶ If governors were dangerous because of their power to corrupt, legislators were dangerous because of their susceptibility to corruption.¹⁵⁷ This fueled apprehension regarding representative democracy. Although representation was the most practical way for the people to “express their voice in the making of law and the management of government,”¹⁵⁸ representation necessarily separated the people from their rulers, produced a cohort of political elites, and thereby increased the likelihood that “government might escape the control of its creators.”¹⁵⁹ Ultimately, early state constitutionalists concluded that representation “was a necessary evil” to be handled with great caution.¹⁶⁰ It had to be carefully structured and monitored. Most importantly, it had to be subject to frequent and direct popular participation.¹⁶¹

It is important to recognize that this perspective on representation stood in stark contrast to the ideas that eventually dominated federal constitutional design. Madison, for example, insisted that “majority faction” was the greatest danger to republican government and that direct democracy was too easily

through the dispensing of government contracts and public money, thereby buying their support for the government.”); ELLEN E. BRENNAN, PLURAL OFFICE-HOLDING IN MASSACHUSETTS, 1760–1780, at 86–87 (1945) (explaining how allies of the governor, who were installed to allow the governor to exercise control of the legislature, were dismissed); *Intelligence Extraordinary*, BOS. GAZETTE, May 4, 1767, at 3 (“Commissions are shamefully prostituted to obtain an Assembly that shall be subservient to [the governor’s] Designs.”).

¹⁵⁵ GREENE, *supra* note 148, at 154 (“Governor Reynolds of Georgia was charged with having dissolved an assembly . . . in order to prevent an inconvenient inquiry into the conduct of one of his favorites.”).

¹⁵⁶ WOOD, *supra* note 18, at 165 (“In constituting their representative bodies, Americans urged themselves, they must ‘view well the defects in other governments, . . . and learn by these examples.’”); *see also id.* at 328 (“Out of just such exhortations to civil disobedience and such pervasive mistrust of the representational process was the conception of the constituent convention essentially formed.”).

¹⁵⁷ *Id.* at 147 (noting Americans’ realization that tyrants need not exert control over everyone—instead, they needed only to corrupt a select few with sufficient power to influence others).

¹⁵⁸ *Id.* at 164.

¹⁵⁹ KRUMAN, *supra* note 125, at 41.

¹⁶⁰ WOOD, *supra* note 18, at 363.

¹⁶¹ *Id.* at 164–73 (describing various institutional safeguards in early state constitutions designed to ensure that representation in legislatures was “in miniature an exact portrait” of their constituents). Safeguards included various early forms of direct democracy such as annual elections, *id.* at 166, greatly expanded lower houses, *id.* at 167, and strict controls on legislative process, *id.* at 169–70. *But see id.* at 173–81 (describing the parallel concept of “virtual representation” that complicated early American understandings of democracy and popular sovereignty).

manipulated by self-interested majorities.¹⁶² Representative democracy, according to Madison, harmonized popular sovereignty with necessary limitations on majority rule by ensuring that popular preferences would be mediated through wise and discerning representatives who would consider a plurality of public interests and priorities.¹⁶³

In contrast, state constitutionalists believed the greatest danger came from the opportunities and incentives for corruption created by representation.¹⁶⁴ Moreover, state constitutionalists viewed democratic majorities as the ultimate bulwark against this tyranny.¹⁶⁵ The core idea was that “the multitude collectively always are true in intention to the interest of the public, because it is their own. They are the public.”¹⁶⁶ Thus, where Madison hoped that popular preferences would be filtered through representation, state constitutionalists hoped that government would “be in miniature an exact portrait of the people at large.”¹⁶⁷ Government “should think, feel, reason, and act like” the people.¹⁶⁸ To be sure, state constitutionalists knew the dangers of mob rule and the failures of ancient direct democracies. They were convinced, however, that the risks created by distancing representatives from the people were greater than the risks posed by facilitating direct popular involvement in government.¹⁶⁹

¹⁶² See THE FEDERALIST NOS. 10, 49, 51, 53, 63 (James Madison).

¹⁶³ See THE FEDERALIST NO. 57 (possibly authored by Alexander Hamilton rather than James Madison) (Isaac Kramnick ed., 1987) (“The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society . . .”); see also MILLER, *supra* note 87, at 19-21.

¹⁶⁴ To be sure, early state constitutionalists celebrated representation compared to heredity right, and they were committed to strong legislative authority to protect liberty. WOOD, *supra* note 18, at 162-64. But this was not because of a Madisonian faith in the purifying effects of representative democracy. To the contrary, “[t]he real importance of legislatures came from their being the constitutional repository of the democratic element of the society, in other words, the people themselves.” *Id.* at 163.

¹⁶⁵ *Id.* at 164 (describing early state constitutionalists’ beliefs that popular democracy was necessary to protect from oppressive government).

¹⁶⁶ *Id.* (quoting John Witherspoon).

¹⁶⁷ *Id.* at 165.

¹⁶⁸ *Id.* State constitutionalists recognized that their theory could not work if individuals acted solely in their own self-interest. *Id.* at 22. By liberty, they did not mean absolute individual liberty; they just meant living under a government that was truly subject to the people—as a collective pursuing the commonweal. *Id.* at 23.

¹⁶⁹ The size of legislative bodies is a good example of contrasting perspectives on representation. Where Madison disliked large legislative bodies because they were prone towards mob-like rule, state constitutionalists preferred larger assemblies because they made corruption by elites more difficult. THE FEDERALIST NO. 55 (James Madison); WOOD, *supra* note 18, at 167 (“An ample Representation in every Republic . . . constitutes the most powerful Protection of Freedom, the strongest Bulwark against the Attacks of Despotism . . .” (quoting an unnamed South Carolina resident from 1778)).

It was within this context that the first state constitutions and bills of rights were created.¹⁷⁰ They were part of a broader project to establish new governments based on popular sovereignty and were responsive to the lived abuses of executive power and a growing clarity about the dangers of representative government. Early state constitutionalists were guided by the idea that tyranny came mostly from well-connected elites who were masterful at wielding power to capture government.¹⁷¹ They were also firmly committed to direct popular involvement in government as the best antidote.¹⁷² This context is crucial for understanding state bills of rights, which can read like a jumbled compilation of vague political principles, statutory-like regulation, and obscure constitutional limitations. In truth, they represent the product of popular efforts over more than two centuries to control, guide, and correct government.

B. *Earliest Texts*

Virginia's Declaration of Rights, which was adopted on June 12, 1776, was the first state constitution to separately enumerate rights.¹⁷³ During the remainder of the eighteenth century, the states collectively adopted sixteen bills of rights, and virtually all state constitutions since then have included bills of rights.¹⁷⁴ When read on their own terms rather than through the lens of modern Fourteenth Amendment Supreme Court jurisprudence, these texts suggest an alternative approach to constitutional rights that views them as an active and dynamic instrument for maintaining popular control over government. This alternative approach is evident from three pervasive themes in early state bills of rights, and it explains why state bills of rights emphasize vague political principles alongside specific and obscure rights guarantees.

First, early state bills of rights were dominated by provisions that emphasized the strict agency of government officials. Indeed, almost every state bill of rights adopted before 1800 includes some explicit declaration that

¹⁷⁰ Political scientists and historians debate when Americans first appreciated the legal significance of written constitutions and enumerated rights as higher law enforceable against government (especially legislatures). KRUMAN, *supra* note 125, at 40-49 (describing the debate). This debate is largely inconsequential for my purposes because all agree that early state bills of rights capture the core commitments of state constitutional design and, at the very least, forecast where state constitutional theory arrived. *See, e.g.*, KY. CONST. of 1792, art. XII, § 28 ("To guard against transgressions of the high powers which we have delegated, we declare, that . . . all laws . . . contrary to this Constitution, shall be void."); *see also* LUTZ, *supra* note 18, at 66-68 (arguing that although early state bills of rights were not understood as higher law, they were recognized as such after 1789).

¹⁷¹ *See supra* notes 139-161 and accompanying text.

¹⁷² *See supra* note 161 and accompanying text.

¹⁷³ TARR, *supra* note 17, at 75.

¹⁷⁴ *Id.* at 75 n.57.

government officials are mere “servants” or “trustees” of the people.¹⁷⁵ The Massachusetts Declaration of Rights, for example, provides that “[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.”¹⁷⁶ To realize this commitment, many states also constitutionalized the right to “petition the Legislature[] for the redress of grievances,”¹⁷⁷ and several states even constitutionalized the right of the people to “instruct” representatives.¹⁷⁸ If there is one clear theme that pervades early state bills of rights, it is the constant affirmation that all political power resides in the people and that officials must be “amendable” to popular preferences.¹⁷⁹

Second, state bills of rights emphasized that self-interested officials are a primary threat to liberty. They captured the Whig belief that officials are prone to thwart democratic outputs when their personal interests do not align with the people’s interests. Thus, the Massachusetts Declaration states that “[i]n order to prevent those who are vested with authority from becoming oppressors, the people have a right . . . to cause their public officers to return to private life”¹⁸⁰ The Virginia Declaration of Rights states that representatives should “be restrained from oppression, by feeling and participating the burdens of the people.”¹⁸¹ And the Maryland Declaration similarly provided that “a long continuance in the first executive departments . . . is dangerous to liberty” and therefore “a rotation . . . in those departments[] is one of the best securities of permanent freedom.”¹⁸² Early bills of rights also reveal a sophisticated understanding of how destructive political power might become gradually entrenched. Various bills

¹⁷⁵ See, e.g., DEL. DECLARATION OF RTS. Of 1776, §§ 1, 5, 6; DEL. CONST. of 1792, art. I, § 16; KY. CONST. of 1792, art. XII, § 2; KY. CONST. of 1799, art. X, § 2; MD. CONST. of 1776, §§ I, IV; MASS. CONST. of 1780, ch. 1, art. V; N.H. CONST. of 1784, pt. 1, art. I, § VIII; N.C. CONST. of 1776, § 1; PA. CONST. of 1776, § IV; TENN. CONST. of 1796, art. I, § 1; VT. CONST. of 1777, pt. 1, art. V; VT. CONST. of 1786 ch. 1, § VI; VT. CONST. of 1793, ch. 1, § 6; VA. DECLARATION OF RTS. of 1776, § II.

¹⁷⁶ MASS. CONST. of 1780, ch. 1, art. V.

¹⁷⁷ MD. CONST. of 1776, § XI.

¹⁷⁸ VT. CONST. of 1777, pt. 1, art. XVIII; MASS. CONST. of 1780, ch. 1, art. XIX; N.H. CONST. of 1784, pt. 1, art. I, § XXXII; N.C. CONST. of 1776, § XVIII.

¹⁷⁹ VA. DECLARATION OF RTS. of 1776, § 2 (“[A]ll power is . . . derived from[] the people [and] Magistrates are their trustees and servants, and [are] at all times amendable to them.”).

¹⁸⁰ MASS. CONST. of 1780, ch. I, art. VIII. The Vermont Declaration similarly states that “[t]hose who are employed in the legislative and executive Business of the State may be restrained from Oppression, the People have a right . . . to reduce their public Officers to a Private Station” VT. CONST. of 1777, ch. 1, art. 7 (1786).

¹⁸¹ VA. DECLARATION OF RTS. of 1776, § V.

¹⁸² MD. CONST. Of 1776, § XXXI. Similarly, the Maryland Declaration provided that “no person ought to hold, at the same time, more than one office.” *Id.* § XXXII.

of rights declare that “[a] frequent recurrence to the fundamental principles of the constitution” is “absolutely necessary to preserve the advantages of liberty, and to maintain a free government.”¹⁸³ It is clear from the plain language of these early texts that recalcitrant government officials were core objects of their regulation.

Third, and most importantly, state bills of rights emphasize that popular involvement in government is the best protector of liberty and the best antidote to wayward government officials. This idea is pervasive in early state bills of rights, which constitutionalize various guarantees that empower the people to directly monitor, control, and even re-create government as necessary to protect against recalcitrant officials.¹⁸⁴ To a large extent, these provisions reflect the traditional republican belief that the key to preserving and perpetuating liberty was free, rigorous, and open electoral and legislative processes. What is often missed, however, is that early state bills of rights went beyond the traditional institutions associated with republican theory when describing the people’s role in protecting rights from recalcitrant government.

At the core of early bills of rights was a near universal provision declaring that the people have an inherent right (indeed, an obligation) to go beyond existing institutions and make their own corrections to government.¹⁸⁵ The Virginia Declaration, for example, provided that “when any government shall be found inadequate or contrary” to “the common benefit, protection and security[] of the people . . . a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it[] in such manner as shall be judged most conducive to the public weal.”¹⁸⁶ The Delaware Declaration similarly stated that “whenever the ends of government

¹⁸³ MASS. CONST. of 1780, ch. I, art. XVIII; *see also* VT. CONST. of 1777, pt. 1, art. XVIII (including a similar provision).

¹⁸⁴ *See* MD. CONST. of 1776, § V (“[T]he right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government; for this purpose, elections ought to be free”); DEL. DECLARATION OF RTS. of 1776, § 6 (same); MD. CONST. of 1776, § IX (constitutionalizing legislative meeting as open and published public meetings with the implication being that it allows public monitoring); N.C. CONST. of 1776, § 6 (same); VT. CONST. of 1777, pt. 1, arts. VII, VIII (same). Some constitutions also included provisions for legislative immunity, including N.H. CONST. of 1784, pt. 1 art. I, § XXX; and MD. CONST. of 1776, § VIII; VT. CONST. of 1793, ch. 1, § 14. Finally, many states included provisions for free examination of public officials in the press, evidenced in PA. CONST. of 1790, art. IX, § 7; DEL. CONST. of 1792, art. I, § 5, which provides that citizens shall be able to freely examine public officials in the press; KY. CONST. of 1792, art. XII, §§ 7, 8; TENN. CONST. of 1796, art. XI, § 19, same; and PA. CONST. of 1790, art. IX, § 7, same.

¹⁸⁵ These provisions—the first of which was drafted for the Virginia Declaration of Rights and then incorporated by Jefferson into the Declaration of Independence—institutionalized the Lockean right to revolution. JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 60 (1992).

¹⁸⁶ VA. DECLARATION OF RTS. of 1776, § III.

are perverted, and public liberty manifestly endangered . . . the people may, and of right ought to establish, a new, or reform the old government.”¹⁸⁷

These provisions overtly expanded popular oversight to include not only active participation in existing government, but also the reform and even recreation of government itself.¹⁸⁸ Indeed, several bills of rights asserted that “the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive to the good and happiness of mankind.”¹⁸⁹ Instead, because “all power is inherent in the people” and government was “instituted for their peace, safety and happiness,” the people had “at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper.”¹⁹⁰ Most importantly, these provisions found concrete application as Americans formalized procedures for popular amendment of constitutional text.¹⁹¹ As this happened, it quickly became clear that popular involvement in constitutional reform (especially reform of the bill of rights) was a potent and venerable strategy for controlling and guiding government.¹⁹²

Indeed, the notion that the people could use the text of their bill of rights to constrain and guide government on issues of popular concern was not lost on even the earliest drafters of state rights. After sketching general principles,

¹⁸⁷ DEL. DECLARATION OF RTS. of 1776, § 5.

¹⁸⁸ For discussions of the revolutionary nature of these provisions, see JOURNAL OF THE CONVENTION ASSEMBLED TO FRAME A CONSTITUTION FOR THE STATE OF RHODE ISLAND, 29-30 (Providence, Knowles, Anthony & Co., 1859) [hereinafter R.I. 1842], and PROCEEDINGS OF THE VIRGINIA STATE CONVENTION OF 1861, at 710 (George H. Reese ed., Va. State Libr. 1965) [hereinafter VA. 1861] (secession convention) (describing these provisions as a distinctly “American principle” that “overthrew . . . ideas of divine right of legitimacy”).

¹⁸⁹ TENN. CONST. of 1796, art. XI, § 2; see also N.H. CONST. of 1784, pt. 1, art. I, § X (including a similar provision); MD. CONST. of 1776, § IV (same).

¹⁹⁰ KY. CONST. of 1792, art. XII, § 2.

¹⁹¹ Rhode Islands’ 1842 bill of rights makes this understanding explicit: “[T]he basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.” R.I. CONST. of 1842, art. I, § 1 (incorporating a quote from George Washington); see also R.I. 1842, *supra* note 188, at 41; PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 53-55 (2011). On Jefferson’s connection between the alter-and-abolish provisions and formal amendment, see VILE, *supra* note 185, at 60.

¹⁹² As I explain below, this point surfaced early in conventions. See *Conn. 1818*, *supra* note 27, at 10-12 (“The people have the right to . . . form a Constitution” to “confine the powers of the legislature within certain limits,” and “it is a just and wise principle, that the majority shall rule the minority . . .”); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO 1850-51, at 334 (Columbus, S. Medary 1851) [hereinafter OHIO 1850-51] (“[W]hy is it that in practice a majority can make a government and law to bind a minority?”); 9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA [1837], at 12-25 (Harrisburg, Packer, Barrett & Park 1838) [hereinafter 9 PA. 1837] (emphasizing that the Bill of Rights represented the people’s limitations on government and thus it was proper location for specific proposals to limit legislative power, such as provisions addressing divorce).

all eighteenth-century bills of rights went on to articulate detailed limitations on government regarding issues of contemporary interest. These included highly specific limitations on executive authority regarding criminal prosecution and imprisonment, prohibitions on commercial monopolies,¹⁹³ the elimination of “title[s] of nobility, or hereditary honours,”¹⁹⁴ and Tennessee’s unique guarantee that all citizens have an “inherent right[]” to “an equal participation of the free navigation of the Mississippi” River.¹⁹⁵

Perhaps the best example is how early bills of rights addressed freedom of religion and church–state issues. Scarred by a variety of different entanglements between church and state, revolutionary Americans were extremely sensitive to these issues.¹⁹⁶ This is not to say there was agreement on how to resolve these issues. But there seems to have been growing consensus that government should not be left to its own devices.¹⁹⁷ Thus, Marc Kruman has observed that “when framers dealt with what they regarded as the most important of rights, they defined carefully the limits of government authority.”¹⁹⁸ These provisions take a variety of different and sometimes conflicting substantive approaches.¹⁹⁹ What they have in common, however, is a sophisticated understanding of how the text of the bill of rights could be used to control distrusted government officials by providing clear and detailed limitations.²⁰⁰

C. Early Convention Debates

Although the states quickly solidified the norm of enumerating constitutional rights, early convention debates included serious discussion of whether a bill of rights was proper and how it should function.²⁰¹ These

¹⁹³ MD. CONST. of 1776, § XXXIX; N.C. CONST. of 1776, § XXIII.

¹⁹⁴ MD. CONST. of 1776, § XL.

¹⁹⁵ TENN. CONST. of 1796, art. XI, § 29.

¹⁹⁶ See *Conn. 1818*, *supra* note 27, 30 (“Look at Massachusetts, where the legislature has interfered, and you find nothing but constant *petitioning*—the same is the case in England, where they have an established religion . . .”).

¹⁹⁷ See, e.g., *id.* at 18 (delegate arguing that it might be imprudent to address various issues in the bill of rights but “[a]s to religion, he would decide that question”).

¹⁹⁸ KRUMAN, *supra* note 125, at 49.

¹⁹⁹ See *id.* at 41–49 (describing the various constitutional approaches states took in protecting religious liberty).

²⁰⁰ See THE DEBATES AND JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MAINE 1819–20, at 108 (Augusta, Maine Farmers’ Almanac Press 1894) [hereinafter ME. 1819–20] (suggesting that the legislature cannot be trusted with power to regulate religion); cf. DINAN, *supra* note 134, at 191 (suggesting that eighteenth-century religion clauses came from fear of “popular majorities”).

²⁰¹ See, e.g., N.J. 1844, *supra* note 32, at 139, 168–70 (depicting a discussion between delegates about the principles declared in the bill of rights); 3 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 374 (Boston, White & Potter 1853) [hereinafter 3

debates have been largely neglected in the study of American constitutional rights, but they provide important evidence regarding the states' own conception of constitutional rights.²⁰² In this Section, I argue that state bills of rights were designed to enhance majoritarian control over government rather than protect against abusive majorities. I first consider the debates addressing the propriety of including a bill of rights and then the debates discussing the proper function of a bill of rights.

1. "Declaratory Acts of the People"—Enumerating Rights to Protect Popular Majorities

Early conventions included robust discussions of whether a constitution should include enumerated rights. Those debates varied, but they most often centered on rebutting the traditional republican belief that explicit rights were unnecessary because the people were fully represented in the legislature, which had replaced the hegemonic monarch and thereby alleviated the people's need for a bill of rights.²⁰³ They also addressed the natural rights objection that enumerating rights implies that the constitution is the source of rights.²⁰⁴ In answering these arguments, proponents made several

MASS. 1853] (noting that delegates entertained serious discussion of need for a bill of rights as late as 1821 but also noting that by 1851 it was "above question" that state constitutions should contain bills of rights). Even later, new states often addressed the issue when framing inaugural constitutions. *See* THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 101 (Charles Henry Carey ed., 1926) [hereinafter OR. 1857] (discussing adding a committee on a bill of rights); THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 758-60 (John S. Goff ed., 1991) [hereinafter ARIZ. 1910].

²⁰² They occurred decades after Madison's 1789 congressional speech criticizing state constitutional rights and casting the Federal Bill of Rights as an important check on majority tyranny. *See supra* note 49 and accompanying text (describing Madison's 1789 speech). The earliest recorded state debate is from Connecticut in 1818. *See infra* Appendix A.

²⁰³ Drawing on the English origins of bills of rights, republican objectors argued that enumerated rights were inconsistent with popular sovereignty and democratic representation. Under English law, the people relied on bills of rights to formalize concessions from the sovereign monarch. N.Y. 1821, *supra* note 34, at 172. According to republican thought, this conception of enumerated rights was anathema to the states because the people alone were sovereign, and they were embodied by regularly elected legislatures. *Conn. 1818, supra* note 27, at 19. This meant that, unlike a monarch, state legislatures would inherently guard the people's rights, and it would be improper and unnecessary for a constitution to purport limits on the people themselves by limiting the legislature. *See id.* at 18-19 ("[T]he legislature can[']t destroy the liberties of the people; that can[']t be, they are elected by them . . . this is the great means by which the people hold their rights . . . ?"); ME. 1819-20, *supra* note 200, at 106 ("While the frequency and purity of elections continues, I feel no apprehension for the security of the liberties of our county.").

²⁰⁴ *See, e.g.,* N.Y. 1821, *supra* note 34, at 171-72 ("[A] bill of rights is the mere repetition of the fundamental rights of this people . . ."). For a representative discussion of other objections, see N.J. 1844, *supra* note 32, at 139-40, which raises objections such as abstract propositions which "will only serve to confuse the minds of the members."

important clarifications regarding the design and purpose of state constitutional rights.

First, proponents emphasized that the republican faith in representation was naïve. Enumerated rights were important even in a republic, they argued, because government officials were likely to thwart majorities and abuse power for their own gain.²⁰⁵ They emphasized that representation was not a panacea for institutionalizing popular sovereignty, but rather came with its own risks and threats.²⁰⁶ Proponents of state constitutional rights emphasized that they were intended to counteract inevitable government recalcitrance and corruption.²⁰⁷ Thus, a delegate to New York's 1821 convention colorfully analogized state constitutional rights to placing "a bridle in the mouths of those agents who would overleap their duties."²⁰⁸

Relatedly, proponents emphasized that enumerated rights were proper even in a republic because state constitutional rights were wholly different from their English cousins. Where English declarations reflected self-imposed concessions from the sovereign monarch to its subjects,²⁰⁹ state bills of rights reflected an affirmative act of sovereign power by the people to

²⁰⁵ See N.J. 1844, *supra* note 32, at 170 ("How dark are the evils that unbridled legislation has inflicted upon the community."); N.Y. 1821, *supra* note 34, at 59 ("If it is taken for granted, that the representatives of the people are always immaculate—if their hearts are always pure, and their judgments unerring, whence does it happen that we are now assembled? Why have we appointed a committee to establish a bill of rights to stand as landmarks to them and our rulers, and to guard against usurpation and encroachment upon the liberties of the people?").

²⁰⁶ See OHIO 1850–51, *supra* note 192, at 333 (explaining that the provision requiring recurrence to "first principles" reflected the notion that government invariably grew towards corruption and away from people).

²⁰⁷ See N.J. 1844, *supra* note 32, at 170 (describing the duty to "guard all the avenues by which the people's rights may be invaded"); N.Y. 1821, *supra* note 34, at 171 ("What are your bills of rights? They are declaratory acts of the people, that the legislature shall not encroach upon their rights . . .").

²⁰⁸ N.Y. 1821, *supra* note 34, at 60. See also N.J. 1844, *supra* note 32, at 171 (rights are "landmarks . . . to prevent the Legislature from" overstepping). The Kentucky Convention opined that "[w]hatever [the bill of rights] proclaims as the popular will—that constitutes the terms of the association—that sets out, limits, defines the powers which the people propose to delegate in their political association, and defines the various restraints against the abuse of delegated power." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION THE STATE OF KENTUCKY 1849, at 811 (Frankfort, Kentucky, A.G. Hodges & Co. 1849) [hereinafter KY. 1849]; see also *id.* at 812 ("I am disposed to place . . . every . . . right which I hold dear, upon the justice of the people . . ."). This position was later rejected in favor of an obscure and anomalous provision stating that rights to slaves are not subject to majority rule. See *id.* at 814 (recounting votes in favor of the provision and noting "[s]o the section was adopted"); KY. CONST. of 1850, art. XIII, § 2 ("[A]bsolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic, not even in the largest majority."); *id.* § 3 ("The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any Property whatever.").

²⁰⁹ See N.J. 1844, *supra* note 32, at 170 ("Despots grant only bills of *privileges*, not declarations of rights. Such is the magna charta. *There*, power resides in the despot: *here*, in the people.").

subordinate and control government.²¹⁰ In other words, proponents agreed that a bill of rights was unnecessary in a republic if its purpose was to constrain the sovereign.²¹¹ They argued instead that a bill of rights was critically important if the people were to realize and perpetuate their sovereignty over government.

In view of this understanding of constitutional rights, it is not surprising that the debates reflect minimal support for Madison's notion that enumerated rights are primarily to protect against abuses by the "body of the people."²¹² To the contrary, proponents mostly described bills of rights as "declaratory acts of the people" designed to control nonresponsive government.²¹³ Indeed, the debates reaffirm trust in popular majorities while emphasizing the need to protect against officials who invariably thwart majorities for their own gain.²¹⁴ Popular majorities were the solution to, not the source of, tyranny. They were the active subject of constitutional enforcement, not the object of regulation. As one delegate explained: "It is not . . . because I am afraid of the people, that I would provide these checks. It is because I fear that the representatives

²¹⁰ *Id.* at 170-71 (displaying the view that the power resides in the people). This was also the response to natural rights objections. Proponents emphasized that a bill of rights was a non-exclusive list of rights crafted in response to concerns about recalcitrant government and not for the purpose of enumerating all powers and protections held by the people themselves. 9 PA. 1837, *supra* note 192, at 6.

²¹¹ N.Y. 1821, *supra* note 34, at 59 ("It is not . . . because I am afraid of the people, that I would provide these checks.").

²¹² See THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 51-52 (Washington, John T. Towers 1850) [hereinafter CAL. 1849] (noting that a constitution is important for "protection of minorities and the well-being of the mass—majorities can protect themselves"); *id.* at 53 ("This Convention is not called upon to tell the people what they shall do, but what they shall not do. By the adoption of the Constitution, formed by their delegates, imposing certain restrictions upon them, they make it there act."); N.Y. 1821, *supra* note 34, at 172 (describing the bill of rights as "restricting the power of the legislature"); FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 37 (Benjamin F. Shambaugh ed., 1900) [hereinafter IOWA 1844] ("A constitution was intended to be binding upon a majority as well as a minority."); *Conn. 1818*, *supra* note 27, at 57 (discussing the ways in which the judiciary can prevent the majority from exerting undue influence).

²¹³ N.Y. 1821, *supra* note 34, at 171.

²¹⁴ PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION, OF 1829-30, at 28 (Richmond, Samuel Shepherd & Co. 1830) (statement by nondelegate representing nonpropertied citizens who were unrepresented: "[A]ll history demonstrates that the many have oftener been the victims than the oppressors. Cunning has proved an over-match for strength."); N.Y. 1821, *supra* note 34, at 60 ("[H]ere I would recur to the primary principle of a republican government, that the will of the majority should govern . . ."); *Conn. 1818*, *supra* note 27, at 12 ("[I]t is a just and wise principle, that the majority shall rule the minority . . ."). For an extreme debate regarding the extent to which majorities provide unassailable political legitimacy, see KY. 1849, *supra* note 208, at 812 (argument of pro-slavery delegate that the institution of slavery is subject to the will of popular majorities: "I am disposed to place that institution, as well as every other right which I hold dear, upon the justice of the people; I am willing to rest it there; for whenever the people cease to be just, whenever they cease to be virtuous, all our rights and liberties must cease to exist.").

of the people will not be faithful to their trust.”²¹⁵ Various delegates at different conventions similarly described the bill of rights as providing “landmarks” to “our rulers” that “guard against usurpation and encroachment.”²¹⁶ The core concern that motivated state bills of rights was not the fear of inappropriate action by democratic majorities, but the fear that government might thwart those majorities.²¹⁷

To be sure, the debates include orations to natural and “inalienable” rights. It cannot be denied that many delegates (especially in the eighteenth century) presumed that certain rights were extra-legal and beyond the reach of any just government. But the debates reflect the pragmatic understanding that those rights are ultimately dependent on democratic majorities for their preservation and enforcement.²¹⁸ Indeed, delegates repeatedly argued that if the people lost sight of liberty or abandoned virtue, republican government was necessarily

²¹⁵ N.Y. 1821, *supra* note 34, at 59.

²¹⁶ *Id.* at 59; *see also* N.J. 1844, *supra* note 32, at 139; *Conn. 1818*, *supra* note 27, at 22; CAL. 1849, *supra* note 212, at 52 (noting that bill of rights is “the message of the people to their servants” and that “government is subservient to the Constitution, and the ministers of that government are the servants of the people”); OHIO 1850–51, *supra* note 192, at 326 (arguing that including right of people to “petition” legislatures was “absurd” because legislators were the people’s “servants”); *id.* at 466 (suggesting that the bill of rights should be explicit about the people’s right to abolish government); MICH. 1835–36, *supra* note 35, at 287 (stating that purpose of bill of rights was to “explicitly . . . state . . . that these powers are inherent in the people, and to say emphatically to the Legislature that they are simply the agents of the people”).

²¹⁷ I VA. 1901–02, *supra* note 33, at 63 (“I do not believe that the people of any generation have the right to fetter the hands of their posterity. It is against common right; it is against the essential principles of free government; it is against all modern ideas of civilization; and it is against the express letter of our Bill of Rights, which says that the people have the inalienable and indefeasible right at any time to alter or change their Constitution.”). For a contrary assessment, *see ADAMS*, *supra* note 139, at 145, stating that “[t]he state bills of rights were based on the conviction that in cases of conflicting interest, the life, liberty, and property of the individual should have precedence over the will of the majority.” As support for this position, Adams’s references delegates from an eighteenth-century town in Massachusetts, who understood the bill of rights to reflect the terms of a social contract between citizens and government that included certain “inalienable” rights. *Id.* Adams’s account is surely correct in that eighteenth-century Americans believed certain rights to be natural and beyond the reach of any just government, but the convention debates reveal much more nuisance and pragmatism regarding the relationship between the bill of rights, natural law, and popular sovereignty. *See, e.g.,* K.Y. 1849, *supra* note 208, at 812 (responding to a claim that certain rights are extra-legal and cannot be infringed even by a majority that “whenever the people cease to be just, whenever they cease to be virtuous, all our rights and liberties must cease to exist”) (statement by pro-slavery delegate in opposition to proposal that would enshrine slavery as an inalienable property right). Specifically, they reveal that state constitutionalists chose to empower democratic majorities rather than government or political minorities as the ultimate guardians of rights. *See, e.g., Conn. 1818*, *supra* note 27, at 18.

²¹⁸ *See Conn. 1818*, *supra* note 27, at 18 (arguing that it was impossible for “a committee to make a Constitution which would stand for a moment with a people either corrupted or who had not intelligence to discern, or preserve their freedom”).

doomed.²¹⁹ While this might seem hyperbolic and fatalistic, it reflects a deep faith in majoritarianism and a deep distrust of government as the enforcer of rights (even natural rights) against genuine and lawful majorities.²²⁰

2. “An Ordinance of the People”—Implementing Popular Oversight through the Bill of Rights

The early debates also reveal a sophisticated understanding of how a bill of rights might operate as a popular accountability device. Delegates quickly recognized and confronted the implications of using the bill of rights in this way. Two themes from the debates are important.

First, a recurring issue in the debates was the concern that the bill of rights might balloon into a code of statutes if it was the locus of popular efforts to control government.²²¹ This concern took various forms, but the dominant idea was that it would be impractical and unwise for the people to micromanage government through detailed constitutional text.²²² This idea was often dovetailed with the notion that the bill of rights should be limited to an expression of fundamental liberties.²²³

Whatever the merits of this position, it generally lost out to the notion that the bill of rights should include sufficient details necessary to effectuate popular preferences and control government on behalf of the people.²²⁴ As a New Jersey delegate explained, “We are called upon . . . to guard all the avenues by which the people’s rights may be invaded. By adopting the declaration of rights, we will circumscribe the action of the legislature . . . as well as proclaim those great and fundamental truths which lie at the foundation of civil liberty.”²²⁵ Indeed, delegates in many early conventions proposed various detailed (and sometimes

²¹⁹ VA. CONST. of 1870, art. I, § 17 (“That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance,[] and virtue, and by a frequent recurrence to fundamental principles.”).

²²⁰ *Conn. 1818*, *supra* note 27, at 12 (“The people have the right to [create a constitution], and if they have, no man will prevent them: They can form a Constitution *legitimately*; it is a just and wise principle, that the majority shall rule the minority.”).

²²¹ *Id.* at 17-19. *See also* JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO REVISE THE CONSTITUTION OF MASSACHUSETTS 470 (Boston, Daily Advertiser 1853) (“[W]e cannot undertake to limit every exercise of its discretion.”); *CAL. 1849*, *supra* note 212, at 33 (objecting that bill of rights contained “legislative enactments”); *id.* at 41 (showing a majority of the convention rejected this objection).

²²² *See, e.g., Conn. 1818*, *supra* note 27, at 19 (“[T]he legislature must act agreeably to circumstances, which are very liable to change; instructions or fixed regulations, would serve only to embarrass the legislature.”).

²²³ *Id.*

²²⁴ *See, e.g., N.J. 1844*, *supra* note 32, at 170 (demonstrating the desire to protect individual liberties through the adoption of a declaration of rights that includes the detail necessary to constrain government).

²²⁵ *Id.*

unusual) provisions in response to perceived government failures.²²⁶ Delegates also understood that vague constitutional language may be less effective because government could “ignorantly or corruptly” construe that language in its favor.²²⁷ Thus, there was an early understanding that a state bill of rights could properly function as a detailed “ordinance of the people” designed to “regulate” and “confine” government.²²⁸

Second, by at least 1842, delegates expressed a clear understanding that formal amendment of constitutional text was an important mechanism by which popular majorities might realize the bill of rights’ core commitment to controlling government officials. Indeed, the debates reveal that the Dorr Rebellion in Rhode Island sent shockwaves through state conventions and forced delegates to look for ways to institutionalize the people’s right to alter or abolish government.²²⁹ In 1842, Rhode Island delegates debated the near-

²²⁶ *E.g.*, N.Y. 1867–68, *supra* note 31, at 3264 (“The theory of our action so far, has been that we cannot trust the Legislature, because from various causes the Legislature would often disregard what was required . . . and therefore, it is necessary to provide for this in the organic law.”); R.I. 1842, *supra* note 188, at 35 (discussing fishing rights); COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY: THE CONSTITUTIONAL DEBATES OF 1847, at 869–70 (Arthur Charles Cole ed., 1919) [hereinafter ILL. 1847] (prohibition on dueling); *id.* at 871 (prohibition on interracial marriage). The 1853 Massachusetts convention includes a good example. Delegates debated changes to the writ of habeas corpus. One delegate recounted the courts’ failure to strictly apply the statute setting grounds for habeas relief as a basis for including a more detailed habeas provision in the bill of rights that would force courts to comply. The delegate opined: “I . . . wish to have the matter definitely stated in our Bill of Rights, so that there may be no doubt or difficulty in regard to it hereafter.” 3 MASS. 1853, *supra* note 201, at 378–79. Underlying this was a concern for due process for fugitive enslaved people. *Id.*

²²⁷ OHIO 1850–51, *supra* note 192, at 556; *see also id.* (opposing a vague provision because “[i]t gives too great a license to the judiciary. . . . The judges can mould it and apply it as they see proper. . . . They become in effect a council of censors.”).

²²⁸ *Conn. 1818*, *supra* note 27, at 17–18. This is not to say that academics and elites endorsed this position. Justice Story famously criticized state bills of rights for containing too much detail. *See* JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, ch. 44, § 1854, at 715 (Boston, Hilliard, Gray & Co. 1833) (preferring the high-level preambulatory language of the Constitution to “volumes of . . . aphorisms”); *see also* Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 121 (1892) (observing disapprovingly that “the theory underlying [state constitutions is] that the agents of the people, whether legislative, executive, or judicial, are not to be trusted; so that it is necessary to enter into the most minute particulars as to what they shall not do”).

²²⁹ *See, e.g.*, IOWA 1844, *supra* note 212, at 34–37 (linking the Dorr Rebellion to inadequate formal amendment rules); ILL. 1847, *supra* note 226, at 846–53 (discussing the Dorr Rebellion, the bill of rights, and amendment rules); OHIO 1850–51, *supra* note 192, at 479 (discussing amendment and abolition); DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 97–99 (1923) [hereinafter MD. 1867] (discussing the Dorr Rebellion and the right-to-abolish provision as reflecting the majority’s inalienable right to formal amendment); 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 143 (Annapolis, William M’Neir 1851) (debating the provision); *see also* JOHN ALEXANDER JAMESON, A TREATISE ON CONSTITUTIONAL CONVENTIONS 548 (Chicago, Callaghan & Co., 4th ed. 1887) (connecting Shays’ Rebellion and formal amendment).

universal provision guaranteeing the people the right to “alter, reform or totally change [government], whenever their safety or happiness requires.”²³⁰ Delegates were concerned that this provision might sanction similar violent uprisings in the future and formalize a disregard for the rule of law.²³¹ There was, however, a recognition that the principle of popular sovereignty empowered the people to conform government to popular preferences.²³² To reconcile these concerns, the Rhode Island convention adopted a bill-of-rights provision that declared: “the basis of our political systems is the right of the people to make and alter their Constitutions of government; but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all.”²³³ This language, originally penned by George Washington, masterfully captured how state bills of rights are connected to formal amendment procedures and popular sovereignty.²³⁴

III. STATE BILLS OF RIGHTS IN CONTEXT

As explained above, conventional accounts of constitutional rights tend to begin with groundbreaking Supreme Court decisions in the early twentieth century that first applied the Federal Bill of Rights against the states. These accounts usually suggest that constitutional rights were inconsequential before the Supreme Court developed them as meaningful constraints on majoritarian abuses. By focusing primarily on federal court opinions and a particular conception of constitutional rights, these accounts have missed an important alternative narrative. In this Section, I present findings from my review of all known state constitutional convention debates regarding state bills of rights. This largely neglected evidence presents a striking alternative account. Far from lying dormant and ineffectual, state bills of rights have long been at the epicenter of efforts to realign government with popular preferences. Indeed, the debates are littered with rigorous discussion about how to amend bills of rights to correct for recalcitrant officials and institutions.²³⁵

²³⁰ R.I. 1842, *supra* note 188, at 28.

²³¹ *See id.* at 29-31 (debating the potential repercussions of including the provision).

²³² *Id.* at 29.

²³³ *Id.* at 41; R.I. CONST. of 1842, art. I, § 1.

²³⁴ *See* R.I. 1842, *supra* note 188, at 41 (suggesting Washington's attribution).

²³⁵ *See, e.g.,* IOWA 1844, *supra* note 212, at 159-62 (discussing various unusual rights provisions).

For a high-level discussion of how state constitutions (not rights per se) have evolved to function as “instruments of government rather than merely frameworks for government,” see WILLIAMS, *supra* note 105, at 20-25 which describes important work in this regard by Christian G. Fritz, John Dinan, Stephen M. Griffin, and G. Alan Tarr.

Of course, this picture is not always pretty. In some instances, these efforts reflect admirable popular campaigns to undo an oppressive status quo.²³⁶ In other instances, they illustrate the repressive power of popular majorities. I explore these important normative and interpretive implications in the next Section. Here, I focus on demonstrating that the states have actively maintained an alternative approach to constitutional rights that celebrates them as a mechanism for enhancing popular control over government.²³⁷

A. *Antebellum Rights Issues*

Scholars frequently describe the antebellum period as void of meaningful state constitutional rights because state courts rarely expounded or enforced them.²³⁸ But court opinions are an inherently incomplete source of state constitutional rights activity. State constitutional rights were built around popular mechanisms of accountability and enforcement. Constitutional conventions present a more likely and appropriate forum for evidence of rights engagement. Indeed, there were ninety conventions before 1861,²³⁹ and all conventions for which records have survived include serious discussion of state bills of rights.²⁴⁰ Those debates challenge traditional critiques and reveal a distinctive and long-standing approach to constitutional rights as instruments of popular control over government. I focus on three especially common issues that illustrate how the states engaged with constitutional rights.

1. Corporate Privilege and State Bills of Rights

The rise of private corporations was one of the most significant issues during the antebellum period.²⁴¹ The issue had many strands, but it manifested most significantly in early state infrastructure projects (such as canals, turnpikes, and railroads). Although those projects were ostensibly

²³⁶ See, e.g., *infra* subsection III.A.2 (discussing imprisonment for debt); ZACKIN, *supra* note 125, at 55 (common-school movement); DINAN, *supra* note 134, at 67-68, 321 n.23 (suffrage).

²³⁷ These are by no means the only examples. Because popular discontent with government was often the basis for reform to rights, the debates reflect an eclectic array of proposals responsive to idiosyncratic government failures.

²³⁸ Kincaid, *supra* note 98, at 167. The power of judicial review was well established in state constitutional law by at least 1837. See DINAN, *supra* note 125, at 15 (“[J]udicial review was well entrenched.”). There are a few discredited studies suggesting that state courts have a tradition of independently enforcing state constitutional rights. See Tarr, *supra* note 18, at 162-63 (listing studies and explaining errors). The authoritative study of state supreme court caseloads from 1870 to 1970 found that almost all cases before 1935 involved “ordinary commercial disputes.” Kagan et al., *supra* note 98, at 132-33, 150.

²³⁹ See DINAN, *supra* note 134, at 8, tbl.1-1.

²⁴⁰ There are thirty-two conventions in my dataset from before 1861.

²⁴¹ See Tarr, *supra* note 18, at 109-13 (reviewing debates over the roles of the public and private sectors in nineteenth century economic growth).

intended to boost economic development by encouraging construction, it was common for private corporations to lobby state legislatures for a variety of special privileges in exchange for construction.²⁴² State legislatures generally succumbed, adopting schemes that “blurred public and private lines.”²⁴³ States would, for example, finance private corporations by issuing large amounts of public debt and using the proceeds to buy stock in corporations.²⁴⁴ Although some of these schemes produced beneficial outcomes, this period was marked by corruption in favor of private firms and self-serving officials.²⁴⁵ When the financial crisis of 1839 left many states with exorbitant debts and unrealized development, voters were incensed.²⁴⁶

Much has been written about how voters subsequently adopted detailed structural reforms that limited public finance, instituted general incorporation, and required uniform taxation.²⁴⁷ What has been largely missed, however, is that state electorates understood these issues to be at the core of their bills of rights.²⁴⁸ The capture of government by an elite group of private firms at the expense of the public was anathema to the state conception of constitutional rights.²⁴⁹ Indeed, antebellum conventions considered various constitutional rights amendments designed to better align government with popular preferences and interests regarding corporations.²⁵⁰

The so-called “Jacksonian Equality Provisions” are a good example. Many early state constitutions included provisions declaring that “all men . . . are equal, and that no man or set of men are entitled to exclusive separate public

²⁴² *Id.*

²⁴³ Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911 (2003); see also John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 241-42 (2005) (expanding on the intertwined nature of nineteenth-century states and businesses).

²⁴⁴ See Jonathan L. Marshfield, *Popular Regulation? State Constitutional Amendment and the Administrate State*, 8 BELMONT L. REV. 342, 353-54 (2021). Legislatures also used special-incorporation statutes to reduce competition for privileged corporations and ensure favorable regulatory and tax treatment. TARR, *supra* note 17, at 112; see also Wallis, *supra* note 243, at 232-33, 245-47.

²⁴⁵ See Briffault, *supra* note 243, at 911 (“[T]his era of state-supported infrastructure finance was marked by waste, overbuilding, and mismanagement.”).

²⁴⁶ See *id.* (detailing the “disastrous consequences of the states’ extensive investments in and assistance to private firms in the 1820s and 1830s”).

²⁴⁷ See, e.g., *id.* at 910-11 (describing “public purpose” requirements that constrain state investment in private works).

²⁴⁸ See, e.g., REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW-YORK, 1846, 541 (Albany, Evening Atlas 1846) [hereinafter N.Y. 1846] (complaining that the legislature was “omnipotent”).

²⁴⁹ See, e.g., OHIO 1850-51, *supra* note 192, at 335 (criticizing the bill-of-rights committee because it “failed to secure us against that system of perpetual succession, now growing up under our acts of incorporation”); N.Y. 1846, *supra* note 248, at 541 (debating the power afforded to corporations by the legislature).

²⁵⁰ See, e.g., 3 MASS. 1853, *supra* note 201, at 465 (rights amendment to allow wrongful death actions against common carriers).

emoluments or privileges from the community”²⁵¹ Although these provisions were initially crafted in response to royal favoritism, delegates repurposed them following the financial crisis of 1837 to address concerns about corporate privilege and influence.²⁵² Specifically, delegates redesigned the provisions to prevent legislatures from granting monopolies or limited-licenses to private parties.²⁵³ The idea was to prevent the legislature from privileging a select few with state-created advantages over competitors. Delegates in Indiana (1851) and Iowa (1857) succeeded in amending their bills of rights in this way.²⁵⁴ Several other states amended existing provisions to adapt them to concerns regarding corporations,²⁵⁵ and various new states included these provisions in their bills of rights for similar reasons.²⁵⁶

Many contemporary courts and commentators have equated these provisions with the Fourteenth Amendment’s minority-oriented equal protection provision.²⁵⁷ However, the debates reveal that these provisions are better understood as the “antithesis” of the Fourteenth Amendment’s Equal protection clause.²⁵⁸ To be sure, the provisions include notions of equality,²⁵⁹ but they were not concerned with protecting individuals or “disfavored

²⁵¹ KY. CONST. of 1792, art. XII, §1; *see also* VA. DECLARATION OF RTS. of 1776, § 4.

²⁵² OHIO 1850–51, *supra* note 192, at 335; Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1207 (1985).

²⁵³ TARR, *supra* note 17, at 111 n.76.

²⁵⁴ IND. 1850, *supra* note 22, at 1385–86, 1391–93; 1 THE DEBATES OF THE CONSTITUTIONAL CONVENTION; OF THE STATE OF IOWA 101, 200 (Davenport, Luse, Lane & Co. 1857) [hereinafter 1 IOWA 1857].

²⁵⁵ TENN. CONST. of 1834, art. I, § 22 (monopoly provision); OHIO CONST. of 1851, art. XIII, §§ 1–5.

²⁵⁶ *See* OR. 1857, *supra* note 201, at 317 (including provision, eliminating reference to nobility, and prohibiting “exclusive privileges”); KAN. CONST. of 1859, art. 12, § 236. Various conventions considered but rejected these provisions. *E.g.*, N.J. 1844, *supra* note 32, 159–60; THE [WISCONSIN] CONVENTION OF 1846, 372–76 (Milo M. Quaife ed., 1919). Delegates debated these clauses again after the financial crisis of 1873. A STENOGRAPHIC REPORT OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION HELD IN ATLANTA, GEORGIA, 1877, at 95 (Atlanta, Const. Publ’g Co. 1877) [hereinafter GA. 1877]; OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER, 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 470–71 (Frankfort, Kentucky, E. Polk Johnson, 1890) [hereinafter KY. 1890].

²⁵⁷ *See* Williams, *supra* note 252, at 1208 n.94 (listing cases); *Hewitt v. State Accident Ins. Fund Corp.*, 653 P.2d 970, 972 (Or. 1982) (expressing what the standard should be for statutes that classify on the basis of gender in the context of Oregon’s provision in its bill of rights declaring: “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens”).

²⁵⁸ *Hewitt*, 653 P.2d at 975.

²⁵⁹ IND. 1850, *supra* note 22, at 1394 (describing provision as relating to “equal rights” in the sense that “there shall be no exclusive monopolies—no privileges granted to one man which shall not, *under the same circumstances*, belong to all men”).

groups” from discrimination by abusive majorities.²⁶⁰ Rather, they were concerned with ensuring that democratic majorities were not thwarted by corrupt state government and powerful elites.²⁶¹ The provisions were about enhancing democratic accountability by limiting capture and removing incentives for corruption.²⁶² They were intended to protect democratic majorities from recalcitrant government; not to protect disfavored groups or individuals from regulation by the majority.²⁶³

Eminent domain reform provides another compelling example. Most antebellum bills of rights included a general protection against the taking of private property for public use without just compensation. But these vague provisions were often ineffective in protecting citizens from powerful private firms.²⁶⁴ Through legislation and judicial complicity, state government deeply eroded property protections in favor of corporations.²⁶⁵ In many instances, corporations were able to take private property without providing any compensation or obtaining any pre-approval. After the 1837 economic crisis, eminent domain became a popular issue, and many delegates sought to reform state bills of rights to provide better protection from the “corrupt” use of eminent domain.²⁶⁶

Central to reform efforts was the concern that state government had strayed from the public interest in favor of private corporations. Delegates

²⁶⁰ *Id.*; see also Williams, *supra* note 252, at 1208; Hewitt, 653 P.2d at 975 (describing how a constitutional provision was adopted with the concern of special privileges for the select few).

²⁶¹ The main concern was the granting of exclusive or limited licenses that benefited a select few without regard for the whole community. See IND. 1850, *supra* note 22, at 1393 (describing provision as “destroy[ing] the monopoly principle”); *id.* at 1395 (describing state-grated monopolies as “anti-republican”); *id.* (describing special legislation granting exclusive licenses for ferries as “bur[d]ens to be imposed upon the many for the benefit of the few”); N.J. 1844, *supra* note 32, at 311 (describing “prerogative rights or exclusive privileges” as “contrary to all ideas of a republican government”); ILL. 1847, *supra* note 226, at 300 (“[I]ncorporations, clothed with exclusive powers and privileges, are contrary to the spirit . . . of republican institutions; oppressive to the best interests of the people at large . . .”).

²⁶² OHIO 1850–51, *supra* note 192, at 335 (“There are special privileges, special honors, special emoluments, enjoyed in the State of Ohio, that are in violation of the great and fundamental principles that lay at the foundation of our government.”). On corporations, special privileges, and capture/corruption during this period, see L. RAY GUNN, *THE DECLINE OF AUTHORITY* 112–14 (1988).

²⁶³ OHIO 1850–51, *supra* note 192, at 335.

²⁶⁴ IND. 1850, *supra* note 22, at 353–60.

²⁶⁵ Many states extended eminent domain to private firms. *E.g.*, N.J. 1844, *supra* note 32, at 159–60; IND. 1850, *supra* note 22, at 355. States also allowed private firms to take property without upfront compensation. Errol E. Meidinger, *The “Public Uses” of Eminent Domain: History and Policy*, 11 ENV’T L. 1, 26–27 (1980). Property owners were then required to petition a state-managed fund or seek redress in court. N.J. 1844, *supra* note 32, at 160, 416. States also required property valuations be offset by any increase in value created by the new infrastructure, which enabled firms to take property and provide “no compensation whatever.” IND. 1850, *supra* note 22, at 358.

²⁶⁶ N.J. 1844, *supra* note 32, at 160–61; see also N.Y. 1846, *supra* note 248, at 541 (eminent domain is “robbery”); IND. 1850, *supra* note 22, at 353 (eminent domain is “oppression”).

believed that corporations, with the assistance of state legislatures and courts, had hijacked the power of eminent domain for their own profits.²⁶⁷ They portrayed this abuse of eminent domain as a form of despotism because it subordinated the people to corporations and self-serving officials.²⁶⁸ This, of course, struck at the core of state bills of rights.

Tellingly, reform proposals sought to redeem eminent domain by formalizing direct popular oversight and correcting specific government failures through detailed constitutional language. In California and New York, for example, delegates proposed that property evaluations be determined by a jury or an independent commission, and that a jury of freeholders preside over attempts to convert private roads to public use.²⁶⁹ In Indiana, delegates proposed up-front evaluations by a jury of fellow property owners before any taking could occur.²⁷⁰ These proposals aimed to return the power of eminent domain to the public by subjecting eminent domain to popular oversight through juries and other bodies that were presumably more independent of corporations than existing state government.²⁷¹

Opposition to these proposals is perhaps even more revealing of how delegates understood state bills of rights. The core objection to reform was that the bills of rights should not be amended to allow a minority to stop improvements that would benefit the aggregate community.²⁷² The idea was that the bill of rights would be inverted if it were used to thwart popular majorities in favor of a few property owners.²⁷³ Thus, a New Jersey delegate opposed eminent domain reform because “manifest injury might accrue to the public” if the bill of rights thwarted popular infrastructure projects.²⁷⁴ An Indiana delegate similarly argued that eminent domain reform would be “anti-democratic” because it would allow a small group of “troublesome

²⁶⁷ 12 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA [1837], at 201 (Harrisburg, Packer, Barrett & Park 1839) (“The legislature are now habitually giving to these companies, power to take real estate for *their* purposes.”); IND. 1850, *supra* note 22, at 423 (“[C]orporate bodies ought to be placed upon precisely the same footing . . . as an individual . . .”).

²⁶⁸ N.Y. 1846, *supra* note 248, at 541-42.

²⁶⁹ CAL. 1849, *supra* note 212, at 41; N.Y. 1846, *supra* note 248, at 7, 538.

²⁷⁰ IND. 1850, *supra* note 22, at 353. New Jersey delegates likewise proposed upfront payment valued by an independent commission. N.J. 1844, *supra* note 32, at 416.

²⁷¹ N.Y. 1867-68, *supra* note 31, at 3248 (noting that commissions were captured by railroads making it necessary to ensure valuations by local jury). There were references to natural law principles. OHIO 1850-51, *supra* note 192, at 194. But natural law was not the focus of the argument. The debates were about the practical workings of government and corporate influence.

²⁷² N.J. 1844, *supra* note 32, at 415-16.

²⁷³ IND. 1850, *supra* note 22, at 353-59.

²⁷⁴ N.J. 1844, *supra* note 32, at 416.

customers[] demanding an exorbitant price for their land” to halt popular “works of public improvement.”²⁷⁵

The structure of these debates show that delegates viewed bills of rights as mechanisms for enhancing popular control over government. Those who favored reform viewed existing government as corrupt and they sought to amend the bill of rights to bypass existing officials and shift the power of eminent domain back to popular control. Opponents contested the conclusion that government was corrupt and insisted that the bill of rights would be inverted if a small group of property owners could thwart popular infrastructure projects. In either case, the core issue was how to best mold the bill of rights to realize and protect majoritarian preferences.

2. Imprisonment for Debt

Another pressing issue during the antebellum period was the ongoing practice in many states of allowing creditors to maintain actions for imprisonment of defaulting debtors.²⁷⁶ Imprisonment for debt was an English common law writ adopted by the colonies.²⁷⁷ In its most basic form, a creditor could obtain a writ for the arrest of a debtor based solely on the creditor’s sworn statement.²⁷⁸ The sheriff would then arrest the debtor, and if the court upheld the creditor’s claim, the debtor remained in prison until the debt was paid.²⁷⁹ While in prison, the debtor was traditionally responsible for providing his own food and clothing.²⁸⁰

During the initial stage of colonization, legislatures were sympathetic to debtors and adopted a variety of measures designed to entice newcomers and limit imprisonment.²⁸¹ However, as local capital grew and local lenders expanded in influence, creditors increasingly pursued imprisonment.²⁸² Historians have sparred over the true scope and nature of debtors’ prisons in the early 1800s, but a few themes are clear.

²⁷⁵ IND. 1850, *supra* note 22, at 353-54.

²⁷⁶ See PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA 3-5 (1974); BRUCE H. MANN, REPUBLIC OF DEBTORS 18 (2002). This was an important issue in the states notwithstanding ongoing national efforts to institute a bankruptcy system. Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 18-22 (2016).

²⁷⁷ COLEMAN, *supra* note 276, at 3-4, 249.

²⁷⁸ Technically, this was an attachment, where the debtor’s body was attached and held until the debt was paid (the writ of *capias ad respondendum*). *Id.* at 4-5.

²⁷⁹ *Id.* at 5.

²⁸⁰ Hampson, *supra* note 276, at 17-18. These conditions varied, including between lower-class, upper-class, and wealthy debtors. *See id.* at 17.

²⁸¹ COLEMAN, *supra* note 276, at 249.

²⁸² See Hampson, *supra* note 276, at 15-16 (explaining incentive structures that made imprisonment attractive to creditors).

First, by the 1830s there was a broad popular campaign against imprisonment for debt, especially for petty debts.²⁸³ The movement was buoyed by prison reform societies that monitored and reported on circumstances and conditions in debtors' prisons.²⁸⁴ Those organizations often highlighted dismal conditions and barbaric circumstances surrounding some arrests.²⁸⁵ One illustrative account from 1822 reported that a Boston woman was arrested at her home and taken from her two children (who were under the age of three) for a debt of \$3.60.²⁸⁶ These stories garnered popular outcry and facilitated an abolitionist movement that was based on "humanitarian, practical, and moral considerations."²⁸⁷

Second, the travesties of debtor's prison disproportionately affected the poor and vulnerable.²⁸⁸ As Peter Coleman explained, "Beyond family and friends, most of whom were in like impoverished circumstances, no community of interests protected [poor debtors] from the creditor, sheriff, or bailiff."²⁸⁹ To be sure, the wealthy and influential were pursued by creditors, but they were often able to dodge service and secure preferential treatment (like house arrest).²⁹⁰ Most imprisoned debtors were working class tradesman who served out their debt in abhorrent conditions.

Third, state legislatures were "fickle" or even obstructionist regarding reform.²⁹¹ Despite growing popular pressure, many legislatures moved slowly and some even regressed.²⁹² The revolutionary constitutions of Pennsylvania and North Carolina, for example, included general provisions (not in a bill of rights) against imprisonment for debt, but government in both states continued to imprison debtors.²⁹³ In 1815, the South Carolina legislature banned imprisonment for debt, but then reinstated it in 1823.²⁹⁴ Rhode Island's legislature resisted reform for decades despite frequent popular

²⁸³ COLEMAN, *supra* note 276, at 255-56.

²⁸⁴ Hampson, *supra* note 276, at 18.

²⁸⁵ See JOHN BACH MCMASTER, THE ACQUISITION OF POLITICAL SOCIAL AND INDUSTRIAL RIGHTS 63-64 (1903) (describing an 1816 report to New York legislature that counted 729 prisoners owing less than \$25 who would have starved to death but for Humane Society and a report from Society for Relief of the Distressed on imprisoned debtors in Boston).

²⁸⁶ *Id.* at 64.

²⁸⁷ COLEMAN, *supra* note 276, at 255; see also *id.* at 255-56 ("Whether real or supposed, these humanitarian, practical, and moral considerations gradually made the debtors' prison a political issue . . . [that] developed in two fairly well-defined stages."); *id.* at 249-68 (providing an account of how these factors drove the movement toward abolition).

²⁸⁸ *Id.* at 266.

²⁸⁹ *Id.* at 267.

²⁹⁰ Hampson, *supra* note 276, at 16-17.

²⁹¹ *Id.* at 21-22.

²⁹² See *id.*; COLEMAN, *supra* note 276, at 25; MCMASTER, *supra* note 285, at 64 (describing New York legislature's response to popular opposition as reluctant).

²⁹³ COLEMAN, *supra* note 276, at 256.

²⁹⁴ Hampson, *supra* note 276, at 22 n.157.

appeals, only to abolish and then reinstate imprisonment for petty debts.²⁹⁵ In New Jersey, the practice survived into the 1840s in part because sheriffs and constables received significant ransoms for arresting debtors.²⁹⁶

In view of these circumstances, it should be no surprise that imprisonment for debt was an important issue in several antebellum conventions. Delegates in several states were eager to finally align government with popular sentiment and protect against any further slippage or capture that might reinstate imprisonment for debt. Moreover, the debates emphasize that a principal basis for abolition was popular concern about mistreatment of the poor by government and creditors.²⁹⁷

Nowhere was this more apparent than in New Jersey's 1844 convention.²⁹⁸ Two years before the convention, the legislature adopted a statute abolishing imprisonment for debt, but there was an almost immediate repeal attempt.²⁹⁹ Public sentiment, however, remained strongly in favor of abolition.³⁰⁰ Thus, an amendment to the bill of rights was proposed that prohibited imprisonment for debt with only a few narrow exceptions.³⁰¹

The principal objection to the proposal was that the issue should be left to the legislature and not included in the bill of rights.³⁰² This position was soundly rebutted by various delegates who emphasized the legislature's unreliable commitment to strong and clear popular support for abolition.³⁰³ Indeed, one delegate explained that the provision should be "engrafted on the Constitution" precisely because "Legislative bodies sometimes disregard the popular will, and very frequently mistake it."³⁰⁴ He also explained that "when

²⁹⁵ COLEMAN, *supra* note 276, at 89-90.

²⁹⁶ *See id.* at 138 (noting that this practice continued even to the detriment of the state economy).

²⁹⁷ *See* N.J. 1844, *supra* note 32, at 165 ("[T]he spirit of humanity . . . protects honest poverty from the felon's doom."); DEBATES OF THE TEXAS CONVENTION [1845], at 97 (Austin, Texas, J.W. Cruger 1846) [hereinafter TEX. 1845] ("[T]he experience of the present age has clearly decided the impolicy and barbarity of imprisonment for debt."); OHIO 1850-51, *supra* note 192, at 470 (describing abolition as the "voice of humanity" and "humane" treatment for "unfortunate debtor"); 3 MASS. 1853, *supra* note 201, at 405 ("The humanity of the age is against imprisonment for debt . . ."); *id.* ("It would be slander on the aborigines of this country to call [imprisonment for debt] a savage custom . . ."); *id.* at 408-09 (referring to imprisonment for debt as "barbarism" and advocating support for abolition).

²⁹⁸ N.J. 1844, *supra* note 32, at 162-68, 418-21.

²⁹⁹ COLEMAN, *supra* note 276, at 139.

³⁰⁰ N.J. 1844, *supra* note 32, at 164-65, 420-21; *see also* TEX. 1845, *supra* note 297, at 97 (noting agreement on abolition); OHIO 1850-51, *supra* note 192, at 469 (noting a large majority supported abolition because of force of public opinion).

³⁰¹ N.J. 1844, *supra* note 32, at 163-68 (introducing and discussing the merits of the amendment).

³⁰² *Id.* at 418-19.

³⁰³ *Id.* at 164. Ohio and South Carolina both adopted bill-of-rights provisions abolishing imprisonment notwithstanding that their legislatures had already adopted similar statutes. Hampson, *supra* note 276, at 22 n.156.

³⁰⁴ N.J. 1844, *supra* note 32, at 165.

the voice of New Jersey [is] heard on this subject . . . [l]et us not leave [it] to the caprice of legislation . . .”³⁰⁵ The amendment was ultimately approved by eighty-eight percent of the voting delegates and ratified by voters.³⁰⁶

Ultimately, the use of state bills of rights to abolish imprisonment for debt is an important example of how state constitutional rights are designed to function. Through constitutional conventions, popular majorities demanded reform to their bills of rights to realign government with majoritarian preferences. This issue also illustrates how state bills of rights can institutionalize minority protections even though they are designed to enable majorities. Poor debtors were a small minority at the time,³⁰⁷ but popular majorities took up their cause and used the bill of rights to ensure that government and creditors conformed to popular morality regarding treatment of the poor. Indeed, contrary to an oft-repeated falsehood, there was no federal ban on imprisonment for debt at any time during the nineteenth century.³⁰⁸ Instead, state bills of rights carried the weight on this progressive reform, and they did so largely because of their responsiveness to popular opinion and their design as a bypass around state government.

3. Racial Exclusion Provisions and Colonization Programs

Much has been written about how antebellum state constitutions institutionalized slavery and disfranchised African Americans.³⁰⁹ There is another horrific but lesser-known chapter in state constitutional history that illustrates the state approach to constitutional rights. Beginning in the 1820s, convention delegates in several “free” states proposed provisions prohibiting African Americans from entering or settling.³¹⁰ At the same time, delegates at certain conventions sought to constitutionalize authority for a program to “colonize” free African Americans to Africa because they were “dangerous to

³⁰⁵ *Id.* at 164.

³⁰⁶ *Id.* at 421 (final vote 40–5).

³⁰⁷ Statistics on this issue vary. Edwin T. Randall, *Imprisonment for Debt in America: Fact and Fiction*, 39 *MISS. VALLEY HIST. REV.* 89, 100 (1952) (describing previous writers’ failures to accurately analyze the material and data in the Boston Prison Discipline Society).

³⁰⁸ Hampson, *supra* note 276, at 19.

³⁰⁹ *See, e.g.*, HERRON, *supra* note 92 (contrasting antebellum Southern state constitutions with their post-war counterparts); DANA ELIZABETH WEINER, *RACE AND RIGHTS* (2013) (recounting antebellum anti-slavery efforts by activists in Illinois, Indiana, Michigan, and Ohio).

³¹⁰ Conventions that debated antebellum racial exclusion provisions include 9 PA. 1837, *supra* note 192, at 199–202; IOWA 1844, *supra* note 212, at 155–56; 1 IOWA 1857, *supra* note 254, at 129–39; ILL. 1847, *supra* note 226, at 201–02; CAL. 1849, *supra* note 212, at 48–50; IND. 1850, *supra* note 22, at 438–62; OHIO 1850–51, *supra* note 192, at 598–604; and OR. 1857, *supra* note 201, at 361–62. *See generally* Jac C. Heckelman & John Dinan, *Don’t You Be My Neighbor: Support for Racial-Exclusion Constitutional Provisions in Mid-19th Century Indiana and Illinois*, 49 *AM. POL. RSCH.* 504 (2021) (analyzing antebellum racial exclusion provisions in Indiana and Illinois).

the peace and safety of the country.”³¹¹ Delegates advanced myriad prejudice-laced reasons in support of these provisions.³¹² For present purposes, the debates reveal three critical factors that drove consideration of these provisions.

First, delegates understood popular support for outlawing slavery to be inseparable from popular support for racial exclusion and colonization. Delegates were hideously clear that although they opposed slavery, they also opposed the mere presence of African Americans.³¹³ The two positions were connected because outlawing slavery would create incentives for free slaves to migrate to the state and for out-of-state slaveholders to release unwanted slaves there.³¹⁴ Thus, in states with a constitutional provision outlawing slavery, there was a special urgency to likewise constitutionalize racial exclusion. Delegates feared that in the absence of an exclusion provision, the constitution would outlaw slavery, but the legislature would separately evaluate the exclusion issue. This was problematic because a slavery ban without exclusion was the least desirable scenario.³¹⁵ Delegates therefore sought to constitutionalize exclusion to ensure that the government did not unbundle the issues.

Second, and relatedly, strong regional differences in several states created a distrust of legislative process regarding exclusion policy. In Indiana, Ohio, and Illinois, southern counties emphasized that although northern counties generally supported exclusion, those counties were removed from the effects of African American migration and did not have the same immediate interests at stake as their southern counterparts.³¹⁶ This created concern that the legislature might fail to pass exclusion laws even though a strong majority believed that exclusion was best for the state. As a delegate in Illinois explained,

³¹¹ EMMA LOU THORNBROUGH, *THE NEGRO IN INDIANA* 73-75 (1957); *see also* OHIO 1850-51, *supra* note 192, at 337 (considering a colonization proposal).

³¹² *See, e.g.*, OHIO 1850-51, *supra* note 192, at 337 (“Ohio [is] a state for white men.”).

³¹³ CAL. 1849, *supra* note 212, at 48 (“If the people of this Territory are to be free against the curse of slavery, let them also be free from the herds of slaves who are to be set at liberty within its borders.”); *id.* at 140 (“I voted in favor of the clause [outlawing slavery]. I think it equally important that we should exclude the African race”); *id.* at 137 (“No population that could be brought within the limits of our Territory could be more repugnant to the feelings of the people, or injurious to prosperity of the community, than free negroes.”); *id.* at 138 (“I found no man in my district who did not approve of [the exclusion provision]”).

³¹⁴ *See id.* at 138 (“I have been informed by gentlemen that they have received letters from the States, stating that in a short time from this hundreds of negroes would be brought here for the purpose of being liberated after they have worked a short time in the gold mines.”).

³¹⁵ *See id.* at 138 (“The evil [of allowing in free blacks] would be greater than that of slavery itself.”).

³¹⁶ IND. 1850, *supra* note 22, at 438-62; OHIO 1850-51, *supra* note 192, at 337 (describing how “[t]he presence of the blacks was a nuisance” and how “the people of [southern Ohio] would submit to no tax more cheerfully than that by which they might get rid of this nuisance”); ILL. 1847, *supra* note 226, at 231.

If the question should be left to the legislature, it would become the subject of barter and exchange in adjusting the various interests of the State. Gentlemen representing counties where the evil did not exist, would readily exchange their votes for or against the black laws . . . for the purpose of securing some favorite measure of his [sic] constituents. It would at once hoist the flood-gates of corruption, and from the fountain of power would our country be overwhelmed.³¹⁷

Thus, delegates sought to constitutionalize exclusion to bypass the legislative process and ensure a tighter alignment between majoritarian preferences and policy.

Third, the debates are clear that racial exclusion provisions were protectionist acts of “power and prejudice” by popular majorities.³¹⁸ White majorities believed that their own preservation and well-being would be best served by excluding African Americans.³¹⁹ It is important to recognize, however, that these provisions were also perfectly consistent with state conceptions of constitutional rights. Delegates rightly perceived that the electorate favored exclusion and that government was at risk of not realizing that preference. This triggered the use of state constitutional text to better align government with popular preferences. Antebellum racial exclusion provisions are a jarring example of how state constitutional design can be used to target rather than protect political minorities (or, more properly in this case, disenfranchised citizens).

B. *Secession, Reconstruction, and Disfranchisement*

The Civil War period is not associated with meaningful state constitutional rights protection—especially in the South. But the convention debates from this era reveal that state bills of rights were often at the core of arguments justifying and rejecting secession. They were also at the center of post-Civil War power struggles between the federal government and southern states regarding the rights of African Americans. By framing secession, Reconstruction, and disfranchisement through the lens of state bills of rights, the debates provide an important and unique perspective on state constitutional

³¹⁷ ILL. 1847, *supra* note 226, at 231. The ability of state legislators to negotiate in this way might alternately be viewed as a virtue of representative lawmaking, but such an ability only further confirms state constitutionalism’s commitment to more direct popular control.

³¹⁸ Jerome B. Meites, *The 1847 Illinois Constitutional Convention and Persons of Color*, 108 J. ILL. STATE HIST. SOC’Y 266, 284 (2015).

³¹⁹ CAL. 1849, *supra* note 212, at 138 (“Do you suppose the white population of this country will permit these negroes to compete with them in working the [gold] mines? Sir, you will see the most fearful collisions that have ever been presented in any country. . . . It is [our] duty . . . to provide against these collisions.”).

rights.³²⁰ In short, they demonstrate in dramatic fashion that state constitutional rights are structured around popular control over government.

1. State Bills of Rights as the Epicenter of Efforts to Control State Government

During the lead up to the Civil War, eleven states held conventions related to secession.³²¹ In those conventions, delegates frequently referenced provisions in state bills of rights that memorialized popular sovereignty and the right of the people to reform, alter, or abolish government.³²² In seceding states, delegates used these provisions to argue that the people of each state had a right to withdraw from the union and reconstitute themselves.³²³ They described the federal government's anticipated abolition of slavery as subverting popular sovereignty, and as just grounds for reforming government.³²⁴ The people, they argued, had never given the federal government authority to determine the slavery issue, and, therefore, the federal government was attempting to commandeer sovereignty from the people in violation of the state constitution's core commitment to popular control.³²⁵

But delegates also used state bills of rights to justify remaining in the Union. Missouri's experience is illustrative. In February of 1861, Missourians elected a large majority of pro-Union delegates to a convention.³²⁶ The

³²⁰ Much scholarship looks at these issues in the opposite direction: studying convention arguments to assess the legality and nature of secession itself. Roman J. Hoyos, *Peaceful Revolution and Popular Sovereignty*, in SIGNPOSTS 241 (Sally E. Hadden & Patricia Hagler Minter eds., 2013). That literature is vast, nuanced, and significant. My focus here is more limited and modest. I'm interested in understanding why state bills of rights were so frequently invoked in debates regarding secession, and what this reveals about the deep structure of state constitutional rights.

³²¹ See John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the 19th and 20th Centuries*, J. POL'Y HIST. (forthcoming) (manuscript tbl.3) (on file with author) (listing the following secession conventions: Alabama 1861, Arkansas 1861, Florida 1861, Georgia 1861, Louisiana 1861, Mississippi 1861, Missouri 1861–1863, North Carolina 1861–1862, South Carolina 1860–1861, Texas 1861, Virginia 1861).

³²² See, e.g., VA. 1861, *supra* note 188, at 711 (referencing provision in Virginia Declaration of Rights).

³²³ See THE HISTORY AND DEBATES OF THE CONVENTION OF THE PEOPLE OF ALABAMA [1861], at 283 (Montgomery, White, Peister & Co. 1861) [hereinafter ALA. 1861]; VA. 1861, *supra* note 188, at 711; I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF SOUTH CAROLINA [1868], at 270 (Charleston, S.C., Denny & Perry 1868) [hereinafter I S.C. 1868] (describing how members of the 1861 convention relied on a clause in the state bill of rights guaranteeing the people “the right, at all times, to modify their form of government” to justify secession).

³²⁴ VA. 1861, *supra* note 188, at 711–13.

³²⁵ See ALA. 1861, *supra* note 323, at 286 (“We are sent to protect, not so much property, as white supremacy . . . against . . . the danger of Abolition rule.”); VA. 1861, *supra* note 188, at 712 (describing Lincoln's attempt to block secession as “a usurpation of authority not granted [the federal government] by the Constitution”).

³²⁶ SWITZLER'S ILLUSTRATED HISTORY OF MISSOURI, FROM 1541 TO 1877, at 323 (Saint Louis, C.R. Barnes 1879) [hereinafter MISSOURI HISTORY] (reporting the context and results of

convention quickly adopted a resolution against secession.³²⁷ It then adjourned with plans to reconvene in December.³²⁸ However, after it adjourned, the governor and legislature took aggressive steps towards secession.³²⁹ This prompted the convention to reconvene and declare that “in opposition to the known wishes of the people,” the “Governor and other high officers of State” had “formed a conspiracy to dissolve the connexion of Missouri with the Federal Government” and attempted “to establish a military despotism over the people.”³³⁰ The convention then adopted a resolution that immediately vacated the legislature and governorship and voided statutes adopted in furtherance of secession.³³¹

As authority for these measures, the convention relied exclusively on the state bill of rights, specifically the provisions stating that “all political power is vested in and derived from the people” and that the people “have the inherent, sole, and exclusive right of regulating the internal government . . . and of altering and abolishing their Constitution and form of Government, whenever it may be necessary to their safety and happiness.”³³² The convention concluded that the bill of rights warranted the vacation of existing government officials on behalf of the people in order to restore control to the people through the convention.³³³

State bills of rights were also at the center of Reconstruction conventions.³³⁴ After the war, confederate states held conventions to undo

the election). JOURNAL AND PROCEEDINGS OF THE MISSOURI STATE CONVENTION, HELD AT JEFFERSON CITY AND ST. LOUIS, MARCH, 1861, at 15 (St. Louis, George Knapp & Co. 1861) [hereinafter MO. MAR. 1861] (“[T]he people that elected us have given . . . a majority of 80,000 [against secession].”).

³²⁷ MISSOURI HISTORY, *supra* note 326, at 327; *see also* MO. Mar. 1861, *supra* note 326, at 15 (describing a delegate’s reluctance to entertain a pro-Confederacy envoy from Georgia because “the people that have elected us” already voted by a majority of 80,000 against secession).

³²⁸ MISSOURI HISTORY, *supra* note 326, at 324.

³²⁹ *Id.* at 314-15, 332.

³³⁰ JOURNAL OF THE MISSOURI STATE CONVENTION, HELD AT JEFFERSON CITY, JULY 1861, at 10 (St. Louis, George Knapp & Co. 1861) [hereinafter MO. JULY 1861].

³³¹ *Id.* at 10-11, 20.

³³² *Id.* at 10.

³³³ *Id.* at 30.

³³⁴ There were at least twenty-three Reconstruction conventions. *See* Dinan, *supra* note 321, tbl.3. The Reconstruction conventions in my dataset are DEBATES AND PROCEEDINGS OF THE CONVENTION WHICH ASSEMBLED AT LITTLE ROCK JANUARY 7TH, 1868 (Little Rock, J.G. Price 1868); DEBATES IN THE CONVENTION FOR THE REVISION AND AMENDMENT OF THE CONSTITUTION OF THE STATE OF LOUISIANA [1864] (New Orleans, W.R. Fish 1864); THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND [1864] (Annapolis, Richard P Bayly 1864); JOURNAL OF THE PROCEEDINGS AND DEBATES IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI, AUGUST 1865 (Jackson, Miss., W.M. Yerger 1865); THE DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF VIRGINIA [1867] (Richmond, Off. of the New Nation 1868) [hereinafter VA. 1867]; I S.C. 1868, *supra* note 323.

secession and regain admission into the union.³³⁵ These conventions ostensibly embodied the people of each state, but they were really the work of Congressional agents who “brought the South into compliance with the nation.”³³⁶ In doing this, Reconstruction delegates in all states except Tennessee amended state bills of rights to include “federal supremacy” provisions. These provisions conspicuously qualified existing rights by declaring the supremacy of the federal government and stating that the people could not “alter or abolish” state government in any manner that would violate federal law.³³⁷ The new provisions were intended to clarify that although state government was responsible to its people, “the machinery of state government must conform to [a] superior power and move in harmony with the General Government.”³³⁸

Subsequently, southern democrats regained control of state governments across the south and held conventions to disfranchise African Americans and undo the work of the Reconstruction conventions. These conventions almost universally removed federal supremacy provisions so that southern bills of rights sounded only in popular sovereignty without mention of federal constraints.³³⁹ They also reinstated an unqualified right of the people to alter or abolish government.³⁴⁰ Those changes were intended to reassert that the people of each state “have the sole and exclusive right to govern [themselves] in everything which affects [them] as a state, and which is not delegated in the constitution of the United States to the federal government.”³⁴¹

The reform of state bills of rights through these seismic transitions illustrates that their deep structure is to operate as instruments of popular control over government. During secession, bills of rights were leveraged by delegates in seceding states as a basis for realizing the people’s desire to leave the union. And, in Missouri at the beginning of the Civil War, delegates used the same bill-of-rights provisions as a basis for vacating rogue, secessionist

³³⁵ See HERRON, *supra* note 92, at 121-23 (describing how these Reconstruction conventions served to formally reunite the southern states with the Union as well as to ally southern states with one another in alliance against the federal government).

³³⁶ *Id.* at 123; JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA [1901], at 1755 (1901) [hereinafter ALA. 1901] (explaining that the first Reconstruction constitution was “framed by aliens” and the second Reconstruction constitution was framed under the fear that “Congress would interfere”).

³³⁷ Some were separate provisions immediately after the traditional Lockean popular sovereignty provisions. Others were incorporated into existing popular sovereignty provisions. ARK. CONST. of 1968, art. 1, § 1; GA. CONST. of 1868, art. I, § 33; I S.C. 1868, *supra* note 323, at 270.

³³⁸ VA. 1867, *supra* note 334, at 266; *see also* I VA. 1901-02, *supra* note 33, at 313 (commenting on 1867 provision).

³³⁹ HERRON, *supra* note 92, app. B.

³⁴⁰ *Id.*

³⁴¹ GA. 1877, *supra* note 256, at 98; *see also* I VA. 1901-02, *supra* note 33, at 313 (discussing the importance of states’ rights).

government officials.³⁴² Similarly, during Reconstruction, federal supremacy provisions were intended to emphasize the boundaries of popular control over state government. The removal of federal supremacy provisions during disenfranchisement served only to confirm and illustrate that state bills of rights remained oriented around popular control of government to whatever extent permissible under federal law.

2. Rights Reform During Reconstruction and Disenfranchisement

It might be argued that the above debates about federal supremacy were not about constitutional rights per se but were about the general idea of popular sovereignty within a federal system. On the one hand, this is precisely the point. The debates reveal that state bills of rights are fundamentally oriented around popular control over government and not the lasting entrenchment of any particular right. On the other hand, it is also true that delegates liberally revised specific constitutional rights during these transitions, and the whipsaw nature of these reforms illustrate the fluidity of state constitutional rights and their responsiveness to popular preferences.³⁴³

Reforms regarding equal protection offer a compelling example. Most state constitutions do not contain an equal protection clause like the Fourteenth Amendment (even today).³⁴⁴ However, during the latter part of Reconstruction (1867–1870), several southern conventions added language to their bills of rights that effectively incorporated the Fourteenth Amendment’s equality guarantee.³⁴⁵ Those provisions coincided with the adoption of the Fourteenth Amendment and were intended to “establish the civil and political equality and capacity of the races.”³⁴⁶ Moreover, there was a clear understanding by delegates that these provisions were championed by national leaders to assert influence over state constitutional development.³⁴⁷

³⁴² See MO. JULY 1861, *supra* note 330, at 10.

³⁴³ There were sixteen Redemption and Disenfranchisement conventions. See Dinan, *supra* note 321, tbl.3. My dataset includes the following: ALA. 1901, *supra* note 336; GA. 1877, *supra* note 256; MD. 1867, *supra* note 229; DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 (Isidor Loeb & Floyd C. Shoemaker eds., 1938); DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 (Seth Shepard McKay ed., 1930) [hereinafter TEX. 1875]; VA. 1901–02, *supra* note 33.

³⁴⁴ Williams, *supra* note 252, at 1208.

³⁴⁵ See TEX. CONST. of 1869, art. I, § 21; GA. CONST. of 1868, art. I, § 2 (“[N]o laws shall . . . deny to any person . . . the equal protection of its law.”); LA. CONST. of 1868, tit. I, art. 13; ALA. CONST. of 1868, art. I, § 2; VA. CONST. of 1870, art. I, § 20.

³⁴⁶ VA. 1867, *supra* note 334, at 227.

³⁴⁷ *Id.* at 227. Virginia’s 1867 convention is the only Reconstruction convention adopting an equal-protection clause for which we have debates.

During disfranchisement, every southern state except Arkansas removed Reconstruction-era equal protection provisions.³⁴⁸ These changes were part of the broader project to eliminate federal influence on state constitutional design and disenfranchise African Americans.³⁴⁹ Because Reconstruction conventions had directed state constitutions away from popular preferences in favor of national policy regarding race, delegates were eager to restore state constitutions to “the people” as much as possible.³⁵⁰ In many southern states this meant removing provisions designed to protect racial minorities so that white majorities could deploy various strategies to subvert African American voting rights.³⁵¹

The result of these popular (and to be clear, white supremacist) movements was the elimination of minority-oriented equal protection guarantees and the corresponding introduction of various measures that segregated and disfranchised African Americans.³⁵² For example, states adopted rights provisions allowing for a poll tax and provisions that reintroduced the crime of treason against the state.³⁵³ Southern states also removed provisions explicitly abolishing slavery.³⁵⁴ While these reforms capture a disturbing period in America’s history, they also illustrate the deep structure of state bills of rights, which elevates popular control over government above entrenched legal rights. For better and worse, state constitutional rights are structured to be tightly aligned with popular preferences.

C. *Progressive Era Rights Issues*

The Progressive movement arose in the late nineteenth century as America experienced dramatic industrialization and urbanization.³⁵⁵ The politics of this period were complex, but a dominant theme was popular frustration with

³⁴⁸ Removal occurred in: TEX. CONST. of 1875, GA. CONST. of 1877, ALA. CONST. of 1901, VA. CONST. of 1902, LA. CONST. of 1879. My dataset includes debates for Texas, Georgia, Alabama, and Virginia.

³⁴⁹ See, e.g., ALA. 1901, *supra* note 336, at 1755-56 (illustrating an effort at the convention to regain state control).

³⁵⁰ See, e.g., II REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA 3050 (1906) [hereinafter II VA. 1901-02] (describing white majorities as rejecting national race policy).

³⁵¹ See, e.g., I VA. 1901-02, *supra* note 33, at 149-51; see also *id.* at 160 (“The greatest crime that ever was perpetrated was the enactment of the Fifteenth Amendment.”); *id.* at 3050 (connecting language of equal protection provision to right of suffrage for African Americans). States sometimes formalized these rights in articles outside the bill of rights. But they were debated as rights issues and often assigned to the committee on the bill of rights.

³⁵² HERRON, *supra* note 92, at 194.

³⁵³ *Id.* at 164-65 (treason); TEX. 1875, *supra* note 343, at 177 (suggesting the poll tax “had been intended as a blow at the negroes”).

³⁵⁴ See, e.g., AL. 1901, *supra* note 336, at 1755-56.

³⁵⁵ TARR, *supra* note 17, at 150; see also RICHARD HOFSTADTER, *THE AGE OF REFORM* (1960).

existing democratic institutions.³⁵⁶ Many Americans believed that government was unresponsive (or even hostile) to the people and that corporations and political elites had captured government.³⁵⁷ Progressives sought to restore government to popular control and address economic inequality for the white working class.³⁵⁸ Progressives pursued various structural reforms, but they also gravitated towards state bills of rights to undermine special interests and realign government with popular preferences.³⁵⁹

Here, I focus on debates regarding worker-protection rights and the rights of workers to unionize. I focus on these issues because they powerfully illustrate the state conception of constitutional rights and because they introduce an important development. In many instances, delegates pursued these rights not only to correct legislative and executive failures but also because courts had extended traditional constitutional rights (especially property rights and due process) to block popular reforms. Delegates sought to realign government with majoritarian preferences by constitutionalizing new rights that would undo judicial roadblocks. They were, quite explicitly, reasserting popular control over constitutional rights while subordinating judicial review.³⁶⁰

1. Workers' Rights

Between 1870 and 1890, America's industrial production and labor force grew dramatically.³⁶¹ This growth was often unregulated and produced many

³⁵⁶ MILLER, *supra* note 87, at 23.

³⁵⁷ *Id.* at 28.

³⁵⁸ TARR, *supra* note 17, at 150.

³⁵⁹ See, e.g., KY. 1890, *supra* note 256, at 452 ("Railroads and other corporations have forgotten their duty to the people, and need the restraining hand of the law upon them."); *id.* at 443-554 (detailing 100+ pages of rigorous debate regarding myriad rights proposals). Some reforms began earlier but were reinvigorated by Progressives. Various states, for example, debated and adopted provisions banning imprisonment for debt. ARIZ. 1910, *supra* note 201, at 664-67. States also targeted corporations by prohibiting special privileges or monopolies. *Id.* at 659-60; KY. 1890, *supra* note 256, at 452. Eminent domain was also debated. ARIZ. 1910 *supra* note 201, at 661-64, 894-95; I DAKOTA CONSTITUTIONAL CONVENTION [1885] 291 (1907). The Progressive Era also involved idiosyncratic rights responsive to particular government failures. In 1910, for example, California constitutionalized a right to hunt-and-fish on public lands and prohibited the sale of public lands without reserving public-use rights. CAL. CONST. art I, § 25. The amendment was triggered by government's complicity in corporate plundering of public lands for private development—especially the sale and closure of public fishing streams. DINAN, *supra* note 5, at 104.

³⁶⁰ These reforms remained meaningful notwithstanding *Lochner v. New York*, 198 U.S. 45 (1905). See ZACKIN, *supra* note 125, at 134-38 (discussing how these reforms remained meaningful notwithstanding *Lochner*); *id.* at 123-33 (describing how these reforms represented assertions of popular control over constitutional rights).

³⁶¹ See generally Joseph H. Davis, *An Annual Index of U.S. Industrial Production, 1790-1915*, 119 Q.J. ECON. 1177 (2004) (detailing industrial production growth during this period); Joshua L.

new concerns regarding worker safety and exploitation.³⁶² It also spawned a large class of wealthy and influential corporations and industrialists who resisted regulation. Thus, by 1890, there was growing popular concern about workers' rights as well as elite capture of state government.³⁶³

In this context, reformers looked to state bills of rights to help align state policy with popular demands for regulation and equity. Reforms included the right to a "mechanic's lien," maximum-hour and minimum-wage provisions, various worker-safety requirements, and worker-compensation guarantees, among others. Several states also included provisions in their bills of rights declaring a general commitment to workers' rights.³⁶⁴

The convention debates where these rights were forged are striking because proponents of these reforms were explicit in their use of state constitutional rights to realign government with popular preferences. These provisions were unabashedly *not* about limiting majoritarian politics. To the contrary, they were defiant efforts to realize majoritarian preferences in the face of powerful special interests and elites who had rendered state government non-responsive. These debates are especially revealing because they make clear that in crafting these new rights, some delegates were reacting to non-responsive legislatures,³⁶⁵ but many were explicitly overriding judicial decisions construing existing constitutional rights to prohibit popular legislative reforms.³⁶⁶ In this way, delegates were bulldozing through existing state government institutions, including judicial review, to reassert popular control over government policy. These debates and reforms thus reflect the

Rosenbloom, *The Extent of the Labor Market in the United States, 1870–1914*, 22 SOC. SCI. HIST. 287 (1998) (exploring the nature and scope of the labor market in the United States during this period).

³⁶² See TARR, *supra* note 17, at 115 (describing regulatory challenges that accompanied economic growth at end of nineteenth century); *Achievements in Public Health, 1900–1999*, CDC (June 11, 1999), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm4822a1.htm> [<https://perma.cc/Y3E6-MDG3>] (in Allegheny County 526 workers died of "work accidents" in one year). Working conditions were notoriously poor and dangerous. STEVEN PINKER, ENLIGHTENMENT NOW 167 (2018) (estimating 61 workers per 100,000 employees died in work-related accidents).

³⁶³ See TARR, *supra* note 17, at 115–17 (discussing concerns about corporate capture—especially by railroads—and worker safety issues during the period after the Civil War); *id.* at 150–52 (discussing similar themes in context of progressive era); *see, e.g.*, David R. Berman, *State Legislators and Their Constituents: Regulating Arizona Railroads in the Progressive Era*, 71 SOC. SCI. Q. 812, 814 (1990) (describing these issues in Arizona and the west).

³⁶⁴ Reconstruction conventions in North Carolina and Maryland modified their bills of rights to include a right for "all men" to "the enjoyment of the proceeds of their own labor" (Maryland) and the "fruits of their own labor" (North Carolina). MD. DECLARATION OF RTS. of 1864, art. I; N.C. CONST. of 1868, art. I, § 1. During the Progressive Era, Wyoming and Utah added similar provisions. WY. CONST. of 1889 art. I, § 22; UTAH CONST. of 1895, art. XVI, § 1 ("The rights of labor shall have just protection through laws calculated to promote the industrial welfare of the State.").

³⁶⁵ *E.g.*, I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS [1869] 269–71 (Springfield, E.L. Merritt & Brother 1870) [hereinafter I ILL. 1869].

³⁶⁶ *See, e.g.*, II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO [1912] 1412–13, 1417 (1913) [hereinafter II OHIO 1912].

full embodiment of state constitutional rights as a mechanism for enhancing popular control over government.

The debates regarding the right to a mechanic's lien and compensation for work-related injuries are illustrative. The push for a right to a mechanic's lien was fundamentally about equity and bargaining power for low-level workers.³⁶⁷ By the 1880s, construction dealings had evolved to include subcontractors for delivery of materials and labor.³⁶⁸ Under existing lien law, unpaid workers and suppliers could obtain a lien on improved property only if the property owner had not paid the contractor.³⁶⁹ As a result, many subcontractors (mostly low-level workers and suppliers) were the victims of fraud and "collusion" by "thieving contractors and scoundrelly owners, who connive to swindle the workman out of his wages."³⁷⁰

Despite the clear need for reform, state government failed to meet popular demands for change. The 1889 Idaho debates, for example, reveal that delegates were unwilling to leave this issue to legislative discretion.³⁷¹ Instead, the convention adopted a provision declaring that the legislature "shall provide" laborers with liens "on the subject matter of their labor."³⁷² In California, proponents were frustrated by both legislative inaction and judicial roadblocks.³⁷³ Delegates complained that the legislature had repeatedly failed to fix the existing lien law despite constant pleas from the public.³⁷⁴ Delegates also noted that "on account of the construction put upon

³⁶⁷ Mechanic's lien debates include I DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 84, 104, 220 (Sacramento, J.D. Young 1880); III DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1393-94, 1417-19 (Sacramento, J.D. Young 1881) [hereinafter III CAL. 1878]; II PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO 1889, at 1389-91 (1912) [hereinafter II Idaho 1889]; and II OHIO 1912, *supra* note 366, at 1412. On equity and bargaining power, see III CAL. 1878, *supra*, at 1417; II OHIO 1912, *supra* note 366, at 1413-14.

³⁶⁸ See, e.g., *Dore v. Sellers*, 27 Cal. 588, 591 (1865) (describing the typical arrangement).

³⁶⁹ See *McAlpin v. Duncan*, 16 Cal. 126, 127-28 (1860); *Palmer v. Tingle*, 45 N.E. 313, 314 (Ohio 1896).

³⁷⁰ III CAL. 1878, *supra* note 367, at 1394; *id.* at 1393 ("[T]wo-thirds of the contracts in the City of San Francisco for the erection of buildings have been taken by the contractor with the intention of defrauding the workmen who do the work."); II OHIO 1912, *supra* note 366, at 1413 ("I doubt if there is a delegate in the Convention who does not fully appreciate the injury that is done to material men and mechanics . . . because of unscrupulous and oftentimes dishonest contractors."). Once a property owner claimed to have paid the general contractor, a lien on the property was no longer available and unpaid subcontractors were left to sue the general contractor based on breach of contract. This was inefficient compared to a lien. Thus, many subcontractors "preferred to lose their debts rather than endeavor to enforce the law." III CAL. 1878, *supra* note 367, at 1393.

³⁷¹ II IDAHO 1889, *supra* note 367, at 1389 (constitutional right was important to "make it obligatory" on legislature).

³⁷² *Id.* at 1389.

³⁷³ III CAL. 1878, *supra* note 367, at 1418.

³⁷⁴ See *id.* at 1418 (legislature failed to fix existing lien law even though it was "of no practical benefit whatever" and tradesman lobbied reform); *id.* at 1394.

[the statute] by the Courts, it is not worth the paper it is written on.”³⁷⁵ Importantly, California delegates frequently drew attention to popular support for reform on this issue and emphasized that resistance came from wealthy property owners and corporations.³⁷⁶ The convention therefore adopted a robust lien provision that could “not be overturned . . . by the decision of any Court in this state.”³⁷⁷

Ohio’s experience with the mechanic’s lien is especially illustrative. In 1896, the Ohio Supreme Court ruled in *Palmer v. Tingle* that Ohio’s recently updated mechanic’s lien law was unconstitutional.³⁷⁸ The new statutory provisions were designed to protect subcontractors from non-paying general contractors by directly granting liens on any property for which someone performed labor or furnished materials.³⁷⁹ The court held that the statute violated the state bill of rights because it was an unlawful taking of the owner’s property to pay the contractor’s debts.³⁸⁰ Delegates at Ohio’s 1912 convention targeted *Palmer*.³⁸¹ They emphasized that the court’s ruling resulted in “millions” in losses to hardworking “material men [and] laborers” and that the only beneficiaries of the ruling were those who “deliberately set out to defeat justice.”³⁸² Because the court’s ruling was a “bulwark in opposition to” correcting these unpopular evils, the convention adopted a mechanic’s lien provision for the explicit purpose of “correct[ing]” the court’s ruling in *Palmer*.³⁸³

The debates regarding rights to compensation for workplace injuries provide another example. By the mid-1870s, work-related injuries were a major

³⁷⁵ *Id.* at 1418.

³⁷⁶ *See id.* at 1394 (stating that the adoption of a right to a mechanic’s lien “will be one of the best arguments in favor of the adoption of this Constitution” by the people); *id.* at 1417 (“[I]t must be remembered that wealthy men always have the means of protecting themselves. It is an easy matter for them to require and obtain security”); *id.* at 1394 (noting that the spirit of the convention was “restriction of corporations,” and the lien proposal would “protect the laboring man and mechanic from thieving contractors and scoundrelly owners, who connive to swindle the workman out of his wages. This is the most important provision that has been before the Convention.”).

³⁷⁷ *See id.* The right adopted by the convention granted workers a lien on any property they improved. *Id.* at 1520. The idea was to shift collection costs to the property owner and contractor, who were “wealthy men [with] the means [to] protect[] themselves.” *Id.* at 1417; *id.* at 1394 (“If we place this responsibility upon the owner, he will take it upon himself to know that the contractors are responsible parties, and he will see that the mechanics and laboring men are paid as they go along.”); *Hampton v. Christensen*, 84 P. 200, 203 (Cal. 1906) (amendment had desired affect).

³⁷⁸ 45 N.E. 313, 315-16 (Ohio 1896).

³⁷⁹ *Id.* at 314.

³⁸⁰ *Id.* at 315-16.

³⁸¹ II OHIO 1912, *supra* note 366, at 1412-13, 1417.

³⁸² *Id.* at 1413-14.

³⁸³ *Id.* at 1414-18. The provision provided that the legislature could adopt laws ensuring that workers obtained “their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished materials.” OHIO CONST. of 1851, art. II, § 33 (adopted 1912). Similar provisions were adopted in response to a court ruling in Minnesota. *See* DINAN, *supra* note 5, at 192.

problem. However, courts continued to apply various outmoded common law doctrines that shielded employers from liability for their injured workers.³⁸⁴

Legislatures could, of course, adjust those rules to assist workers, but they generally succumbed to pressure from railroads and corporations.³⁸⁵ Legislatures were especially fickle and resistant to change.³⁸⁶ In Virginia, for example, delegates complained that “at every [legislative] session we have been met by the attorneys for the railroads insisting that these people should not be protected in their lives and limbs; holding that the property of the railroad should be protected in preference to the lives and limbs of our fellow-citizens.”³⁸⁷ Thus, delegates in various states advocated for constitutionalizing workers’ compensation rights as an end-run around corporate influence on legislatures.³⁸⁸

However, even when legislatures did act, state courts posed an existential threat to those reforms.³⁸⁹ A watershed case was *Ives v. South Buffalo Ry. Co.*, in which the New York Court of Appeals held that New York’s 1910 workers’ compensation statute was unconstitutional.³⁹⁰ The Court held that the statute was an unconstitutional taking because it imposed liability without requiring

³⁸⁴ DINAN, *supra* note 5, at 194 (arguing that amendments modifying contributory negligence, fellow-servant doctrine, and assumption-of-the-risk doctrine added to the constitution to protect workers).

³⁸⁵ *Id.* at 195.

³⁸⁶ In Wisconsin, for example, the legislature abolished the fellow-servant doctrine as a bar to railroad liability, but it revived the doctrine just a few years later. *Id.* at 195.

³⁸⁷ See II VA. 1901–02, *supra* note 350, at 2839, 2841 (equating the right to workers’ compensation with traditional property and due process rights); ARIZ. 1910, *supra* note 201, at 545 (“For twenty-five years labor has been knocking at the doors of the legislature for an employers’ liability act, and has not gotten it . . .”); II JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION [1919], at 1687 (1919) (advocating for reform because of corruption in how “the compensation law is administered” and encouraging “something be put in the Constitution that would hold it as a club over these fellows”).

³⁸⁸ II VA. 1901–02, *supra* note 350, at 2839; ARIZ. 1910, *supra* note 201, at 545 (“[T]his is one method of impressing it upon [the legislature] that we want [labor protections].”); I ILL. 1869, *supra* note 365, at 266 (advocating for new rights to protect injured miners and asserting that existing constitutional rights were “incomplete” because they “throw[] around the property of the rich a protection which no Legislature or executive or judiciary can disregard” but “failed to afford to the operative miner protection in his life [and] limbs”); IV OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES IN THE CONVENTION ASSEMBLED AT FRANKFORT, ON THE EIGHTH DAY OF SEPTEMBER 1890, TO ADOPT, AMEND OR CHANGE THE CONSTITUTION OF THE STATE OF KENTUCKY 4763–64 (Frankfort, Kentucky, E. Polk Johnson 1890) (recounting how the legislature had failed to address consistent pressure for reform regarding mine conditions and thus constitutional rights were necessary to address legislative failure); II NEB. 1919, *supra* note 387, at 1673 (existing statutory scheme is “wrong and insufficient as far as protecting the workman is concerned” and constitutional rights should be adopted to remedy legislative failure); *id.* at 1657, 1687 (noting the popularity of labor reforms).

³⁸⁹ DINAN, *supra* note 5, at 191 (listing state cases striking down workers protection statutes).

³⁹⁰ 94 N.E. 431, 448 (N.Y. 1911); see also Thomas Reed Powell, *The Workmen’s Compensation Cases*, 32 POL. SCI. Q. 542, 542 (1917) (describing the case’s significance).

a demonstration of fault.³⁹¹ Popular outcry against the opinion was swift.³⁹² The judge who authored the opinion lost an election in 1913, voters quickly approved a constitutional amendment to the state bill of rights overturning the opinion, and the legislature immediately re-enacted a workers' compensation scheme.³⁹³

Ives crystallized broader concerns that state courts might invalidate workers' compensation schemes.³⁹⁴ Delegates in Arizona, Ohio, and Nebraska, for example, advocated for constitutionalizing workers' compensation rights for the express purpose of controlling and preempting judicial review. In Arizona, delegates were clear that workers' compensation rights should be constitutionalized so that "courts cannot declare [legislative relief] unconstitutional."³⁹⁵ In Ohio, delegates wanted to eliminate "any further fear of a constitutional question being raised again on this matter."³⁹⁶ And, in Nebraska, delegates argued for constitutionalizing workers' rights to preempt the "flowery talks" of "trash [corporate] lawyers," who "will be sure and say it is not constitutional."³⁹⁷

In short, constitutionalizing workers' rights during the Progressive Era is a powerful example of how state constitutional rights are designed to operate as a mechanism for popular control over government.

2. Labor Rights

The Progressive Era also ushered in new state constitutional rights related to collective bargaining and the so-called "right to work."³⁹⁸ At first, these provisions were enacted in response to concerns about corporate influence on legislatures and voter intimidation.³⁹⁹ In North Dakota, Utah, and Arizona, for

³⁹¹ *Ives*, 94 N.E. at 448.

³⁹² See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC 175-77* (2004) (describing the critiques of *Ives*).

³⁹³ DINAN, *supra* note 5, at 196-97; see also N.Y. CONST. of 1938, art. I, § 17 (stating that laborers have the right to organize and bargain collectively, no laborer performing public work may work more than eight hours a day or five days per week, and no laborer may be paid less than the prevailing wage in the same trade).

³⁹⁴ DINAN, *supra* note 5, at 196.

³⁹⁵ ARIZ. 1910, *supra* note 201, at 545.

³⁹⁶ II OHIO 1912, *supra* note 366, at 1346.

³⁹⁷ II NEB. 1919, *supra* note 387, at 1688.

³⁹⁸ Reforms began in the Progressive Era but extended into later portions of the twentieth century. I address them here because of their temporal, conceptual, and political connection to Progressive workers' reforms.

³⁹⁹ See OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE FIRST CONSTITUTIONAL CONVENTION OF NORTH DAKOTA [1889], at 371 (Bismarck, N.D., Tribune 1889) [hereinafter N.D. 1889] (recounting how corporations implicitly threatened employees for not voting for corporate candidates); II OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO

example, conventions adopted provisions prohibiting employers from exchanging lists of “troublesome” employees.⁴⁰⁰ An important reason for those provisions was to stop the practice of “blacklisting” employees who did not vote for an employer’s chosen candidate.⁴⁰¹ Delegates sought to limit this practice by crafting new constitutional rights for workers that would restore democratic processes and undermine the improper influence of special interests.⁴⁰²

These early provisions eventually gave way to new provisions in state bills of rights protecting the rights of workers to unionize.⁴⁰³ The convention debates reveal that delegates sought to constitutionalize union rights for three main reasons. First, there was concern that legislatures might succumb to corporate influence and undermine collective bargaining.⁴⁰⁴ These new rights were intended to ensure that state government aligned with popular preferences. Second, delegates again worried that courts might invalidate collective bargaining legislation as violating existing constitutional rights. By making collective bargaining rights coordinate with other traditional constitution rights, delegates intended to preempt hostile court decisions.⁴⁰⁵

ADOPT A CONSTITUTION FOR THE STATE OF UTAH 1047 (Salt Lake City, Star Printing Co. 1898) [hereinafter II UTAH 1895] (noting that a provision prohibiting blacklisting protects against the “political and commercial control” of employers); ARIZ. 1910, *supra* note 201, at 832-35.

⁴⁰⁰ See ARIZ. 1910, *supra* note 201, at 832-33 (“The blacklist is a list exchange between corporations especially . . . listing a man for violating certain ethics of corporations. . . . It is done for the purpose of preventing their employment.”); N.D. 1889, *supra* note 399, at 365-71, 532-37, 626; *id.* at 367 (blacklists are a “means of punishing men who have banded themselves together for mutual protection”).

⁴⁰¹ N.D. 1889, *supra* note 399, at 371 (stating that corporations implied employees would be eliminated from the industry by blacklisting if the employee did not vote for the corporation’s candidate).

⁴⁰² II UTAH 1895, *supra* note 399, at 1047 (explaining the “great power” of corporations to pervert democracy).

⁴⁰³ See N.Y. CONST. of 1938, art. I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”); FLA. CONST. of 1885, art. I, § 12 (1944 amended, now § 6, to include: “The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.”); MO. CONST. of 1945, art. I, § 29 (“[E]mployees shall have the right to organize and to bargain collectively”); N.J. CONST. of 1947, art. I, ¶ 19 (granting workers in the private sector the right to organize and bargain and allowing public sector employees to organize and present their grievances to the government); HAW. CONST. of 1959, art. XII, §§ 1-2 (amended 1968) (same); WYO. CONST. of 1889, art. I, § 22 (granting laborers the right to secure compensation and promote their industrial welfare to the state).

⁴⁰⁴ II REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK [1938], at 1246 (1938) [hereinafter II N.Y. 1838] (describing the “small minority” of corporate employers “mobilizing a movement”).

⁴⁰⁵ IV CONSTITUTIONAL CONVENTION OF 1967 DEBATES [MARYLAND] 2307 (1968) [hereinafter IV MD. 1967] (arguing the importance of having this right in the constitution because courts are conservative in regards to labor rights); II N.Y. 1938, *supra* note 404, at 1218 (stating that without a right in the Constitution, courts do not have a standard). On the general history of these provisions, see Robert F. Williams, *Can State Constitutions Block the Workers’ Compensation Race to the Bottom?*, 69 RUTGERS U. L. REV. 1081, 1086-1111 (2017).

Finally, a few delegates argued that modern economic realities meant that the right to unionize had become “deep seated,” “inalienable,” and “fundamental” in the same way as traditional constitutional rights.⁴⁰⁶ It was therefore proper, they argued, to place it beyond the reach of temporary reactionary politics.⁴⁰⁷ The idea was that unions might be unpopular from time to time, but the right to organize should be secured from temporary passions.⁴⁰⁸ This conception of workers’ rights hints at a counter-majoritarian justification. And, to be sure, placing these rights in state constitutions likely provides a higher degree of permanence than ordinary legislation (although not always).⁴⁰⁹

However, it is probably a stretch to understand the right to unionize as a counter-majoritarian measure. For one thing, these amendments have remained subject to ordinary amendment processes. In at least four states with these provisions, amendment rules allow for repeal by simple majorities.⁴¹⁰ In Florida, it could be repealed by initiative.⁴¹¹ Although these states have made multiple adjustments and changes to their bills of rights, including changes to traditional rights, the right to unionize remains unchanged. Moreover, while five states adopted the right to unionize, nine states have adopted competing right-to-work provisions that limit a union’s ability to require employees to join or pay union dues.⁴¹² The debates show that a principal reason for supporting the right to work (and opposing a right to unionize) was popular concern about the growing influence of unions on state legislators.⁴¹³ Thus, the persistence of these rights seems grounded in

⁴⁰⁶ I STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 323, 327 (1947) [hereinafter I N.J. 1947] (“deep-seated” and “inalienable”); II N.Y. 1938, *supra* note 404, at 1246 (“fundamental”).

⁴⁰⁷ I N.J. 1947, *supra* note 406, at 325 (arguing in support of the labor amendment because it would guarantee labor rights even if public opinion shifted).

⁴⁰⁸ The NLRA of 1935 offers some national protections under federal statute. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169).

⁴⁰⁹ See DINAN, *supra* note 5, at 203–04 (explaining that the 2013 New Jersey minimum wage constitutional amendment was easier to achieve than ordinary legislation when the legislature was controlled by Democrats and the governor was Republican).

⁴¹⁰ For an overview of current amendment rules in all fifty states, see COUNCIL OF STATE GOV’TS, *supra* note 72, at 8 tbl.1.4, 10 tbl.1.5; See also *id.* (listing New Jersey (simple majorities with successive session); Missouri (simple majority); Hawaii (simple majority with successive session); New York (simple majority with successive session)).

⁴¹¹ See *id.* at 10, tbl.1.5; FLA. CONST. art. XI, § 3 (amendment by initiative).

⁴¹² See DINAN, *supra* note 5, at 248 (discussing the developmental history of right-to-work policies); *id.* at 204–05 (discussing collective bargaining rights over time).

⁴¹³ See STATE OF MICHIGAN CONSTITUTIONAL CONVENTION 1961 OFFICIAL RECORD 2871 (Austin C. Knapp & Lynn M. Nethaway eds., 1961) [hereinafter MICH. 1961] (discussing the fear that compulsory unionization removes workers’ choices and exerts disproportionate influence on lawmakers); II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 1950, at 678–79 (1961) [hereinafter II HAW. 1950] (labor might “become[] [so] harmful to the public as the public has decreed such monopolies to be harmful when held entirely by industry”).

popular perceptions (which vary between states) about which special interest poses the greatest concern to the political process at any particular time. This, of course, is perfectly consistent with the state approach to constitutional rights as mechanisms of popular control over government.

D. *Twentieth Century Rights Issues*

Conventional accounts of American constitutional rights point to the twentieth century as the period when constitutional rights came to fruition because only then did the Supreme Court begin to apply the Federal Bill of Rights to the states and expand individual protections.⁴¹⁴ I have argued above that notwithstanding those accounts, the states remained actively engaged in rights development since Founding through popular political processes. Here, I show that this continued into the twentieth century as state bills of rights were at the center of evolving popular demands from government. Two trends in the debates are especially illustrative. First, states adopted various positive rights as a strategy for prodding government toward a more activist approach to regulation. Second, some states used their bills of rights to formalize equality and anti-discrimination norms and push government to realize those norms. In both instances, states continued to use their bills of rights to realign government with popular expectations and preferences.⁴¹⁵

1. Positive Economic and Environmental Rights

The Supreme Court has been clear that the Fourteenth Amendment and the Bill of Rights “confer no affirmative right” to governmental aid or intervention “even where such aid may be necessary to secure life, liberty, or property.”⁴¹⁶ Federal rights are solely a “limitation on the State’s power to

⁴¹⁴ See Rutland, *supra* note 56, at 12 (offering this account and referencing *Near v. Minnesota*, 283 U.S. 697 (1931), as emblematic of the beginning of the Supreme Court’s incorporation of the bill of rights against the states).

⁴¹⁵ An anecdotal illustration of this theme is New Jersey’s 1947 Bill of Rights, which was celebrated for including several updates such as an Equal Rights Amendment prohibiting gender discrimination, a collective bargaining right, and a ban on segregation in public schools. See generally Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267 (2004) (describing the anti-segregation provision); Richard A. Goldberg & Robert F. Williams, *Farmworkers’ Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 18 RUTGERS L.J. 729 (1987) (describing the union right for farmworkers); Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 n.6 (2005) (describing New Jersey’s groundbreaking gender-discrimination provision). Commenting on those rights provisions, Governor Driscoll described the new bill of rights as expressing the “social, political, and economic ideals of the present day.” ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION 47 (1997).

⁴¹⁶ *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989).

act.”⁴¹⁷ Thus, the Supreme Court has rejected a federal due process or equal protection right to minimum levels of affirmative financial assistance⁴¹⁸ and a fundamental right to adequately funded public education.⁴¹⁹

State electorates have taken a very different approach.⁴²⁰ During the twentieth century, states debated and adopted various positive rights, including rights to minimal economic security (including healthcare) and rights to a clean and healthful environment.⁴²¹ The conventions where these rights were forged reveal that they are more than a novelty; the debates reflect a nuanced understanding that popular expectations for government had evolved because of new economic and social conditions.⁴²² Delegates were concerned that government was failing to address contemporary realities and drifting further from the people.⁴²³ Thus, delegates looked to state bills of rights to memorialize those expectations and re-direct officials towards more active governance.⁴²⁴

The debates regarding positive economic rights illustrate this. A principal argument in favor of new economic security rights was that negative rights were no longer sufficient to provide citizens with real opportunities to enjoy “life, liberty, and the pursuit of happiness.”⁴²⁵ Delegates argued that in prior

⁴¹⁷ *Id.* at 195.

⁴¹⁸ See *Danridge v. Williams*, 397 U.S. 471, 479-80 (1970) (holding that setting family caps on financial aid did not violate larger families’ Due Process or Equal Protection rights under the federal Constitution).

⁴¹⁹ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973) (holding that differences in school funding across districts based on different property taxes did not violate the Due Process or Equal Protection rights of students in worse-funded districts in part because students did not have a federal right to a funded-public education).

⁴²⁰ See ZACKIN, *supra* note 125; DINAN, *supra* note 134, at 184-221 (describing various historical efforts to secure social, political, and economic rights on both federal and state levels).

⁴²¹ See DINAN, *supra* note 134, at 220 (broadly describing the passing of and differences between various state environmental rights provisions).

⁴²² See also IV MD. 1967, *supra* note 405, at 2434 (noting that a “constitution is an instrument of government” and it should include expressions of the people’s social aspirations in addition to legal conditions); II HAW. 1950, *supra* note 413, at 549 (claiming that American constitutions have historically captured “the philosophy and thinking of the people” in that time and place).

⁴²³ The 1950 Hawaii debate is a powerful example. See II HAW. 1950, *supra* note 413, at 549. A delegate argued that the legislature was non-responsive to popular support for greater government intervention regarding healthcare because that would require the legislature to act in a manner that was fundamentally different from how it understood its restrained role under prior constitutions. *Id.* According to the delegate, the legislature had failed to deliver on the people’s demands because “there was no path of philosophy along which the legislature could provide legislation.” *Id.* The idea seems to be that the people wanted government to reconstitute itself around a new set of expectations and functions, but this gigantic shift required an affirmative declaration from the people of the rights that they expected from government.

⁴²⁴ See, e.g., II CONSTITUTIONAL CONVENTION OF 1967 DEBATES [MARYLAND] 1206 (1967) [hereinafter II MD. 1967].

⁴²⁵ See II PROCEEDS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 41 (1972) [hereinafter II HAW. 1968] (referring to positive economic rights as part of the “enjoyment

eras, where economies and commodity production were simpler, citizens could flourish so long as the constitution provided for political freedom.⁴²⁶ But in a complex industrial society, most citizens needed both the absence of despotism and the affirmative help of the community to succeed.⁴²⁷ Thus, delegates emphasized that real opportunities for liberty required government to provide some minimal financial entitlements.⁴²⁸

Importantly, delegates also emphasized that the people wanted and needed this type of government.⁴²⁹ A 1967 Maryland delegate argued that the people wanted government to provide financial security because “[t]here is no freedom without economic freedom[; t]here is no liberty without economic freedom, and there is no life, real life, without economic security.”⁴³⁰ Another delegate at the same convention argued that positive economic rights were critical because “people throughout the State of Maryland” want rights that “they can see and . . . can really put their teeth into.”⁴³¹ At Hawaii’s 1968 convention, a delegate argued that it was important to include economic rights as “a strong expression of the people of Hawaii as to the kind of economic right we believe that each and every one of us in the State of Hawaii is entitled to.”⁴³² And a delegate at an earlier Hawaii convention explained that the responsibility of the state was to conform to the “philosophy and thinking of the people,” which now demanded certain affirmative protections.⁴³³

Relatedly, delegates also anticipated that courts might strike down legislation seeking to deliver economic entitlements. Thus, they were clear that a pragmatic reason for adopting strong economic rights was to prevent courts from undoing progressive economic legislation.⁴³⁴ A 1938 New York delegate asserted, for example, that economic rights were important to “set

of life, liberty, and the pursuit of happiness”); II MD. 1967, *supra* note 424, at 1206 (“[O]ur times and those ahead of us require us to establish economic securities. If man cannot be free economically from want, of what avail is the ballot?”).

⁴²⁶ See II MD. 1967, *supra* note 424, at 1206 (describing the historical shift in priorities from political freedom to vote and partake in government to economic freedom and protection of individuals and the economy at large through regulation).

⁴²⁷ *Id.*

⁴²⁸ See IV MD. 1967, *supra* note 405, at 2908 (failure to include economic rights “gut[ted]” the constitution because “people cannot eat political rights”).

⁴²⁹ See II HAW. 1950, *supra* note 413, at 549; II HAW. 1968, *supra* note 425, at 41.

⁴³⁰ IV MD. 1967, *supra* note 405, at 2439.

⁴³¹ *Id.* at 2908.

⁴³² II HAW. 1968, *supra* note 425, at 41.

⁴³³ II HAW. 1950, *supra* note 413, at 549.

⁴³⁴ See II N.Y. 1938, *supra* note 404, at 2144 (recounting the unanimous decision to adopt social welfare policies); *id.* at 2126 (expressing the desire to maintain New York’s good reputation for helping its neediest citizens); *id.* at 2155 (discussing measures taken to ensure that future medical insurance measures would be constitutional).

forth a definite policy of government, a concrete social obligation which no court may ever misread.”⁴³⁵ Ultimately, economic rights were about aligning government with new popular expectations by reconstituting legislative polestars to secure more interventionist policies.⁴³⁶

The debates regarding environmental rights are also illustrative. Proponents of environment rights argued that the industrial revolution created new popular concerns about the environment at the very core of individual liberty.⁴³⁷ Delegates emphasized that a healthy environment is a pre-condition to traditional rights, and, therefore, government would fail at its most basic obligations if it did not expand its regulatory horizon to include environmental issues.⁴³⁸

Here again, delegates were aware that a shift to more activists and interventionist policies would likely require affirmative guidance and declarations from the people.⁴³⁹ This was especially true because environmental policy presented unique externalities and collective action problems and had the potential to restructure property rights.⁴⁴⁰ Thus, delegates emphasized that clear, bold environmental rights were important for reorganizing government around new popular values and expectations.⁴⁴¹ A 1969 Illinois delegate emphasized that environmental rights were important

⁴³⁵ *Id.* at 2126.

⁴³⁶ Illinois's provisions guaranteeing a right to state pension and retirement benefits is another example. *See* ILL. CONST. art. XIII, § 5 (“Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.”). That provision was debated by the 1969 convention and the debates reveal that it was intended to ensure that legislatures did not treat state retirement funds as “bounties which could be changed or even recalled as a matter of complete legislative discretion.” RECORD OF PROCEEDINGS SIXTH ILLINOIS CONSTITUTIONAL CONVENTION [1969], at 2925 (1970) [hereinafter ILL. 1969]. The provision was also intended to ensure that courts did not allow legislatures to undermine retirement systems. *Id.* The provision was about responding to a particular government failure.

⁴³⁷ *See* VI RECORDS OF THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973, at 1253-55 (1977) [hereinafter VI LA. 1973] (discussing concerns about the impact of polluting industries on statewide health); V MONTANA CONSTITUTIONAL CONVENTION 1971-1972, at 1258-59 (1981) [hereinafter V MONT. 1971] (highlighting a debate among delegates about whether liberty requires safeguarding the environment and avoiding pollution); *id.* at 1260 (equating environment with traditional liberty).

⁴³⁸ *See* II PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK [1967], at 941 (1967) (stating the imperative to preserve the environment since key parts of New York State are islands and subject to coastal erosion and other environmental issues); ILL. 1969, *supra* note 436, at 2991 (discussing the belief in the fundamental right to a “healthful environment”).

⁴³⁹ *See* V MONT. 1971, *supra* note 437, at 1257-58 (outlining that the constitutional convention is tasked with voicing citizens’ concerns).

⁴⁴⁰ *See id.* at 1260-62 (discussing the legal complexities of enforcing environmental regulations with negative externalities over private property rights).

⁴⁴¹ *See* MICH. 1961, *supra* note 413, at 2611 (emphasizing that clear language addressing the convergence of health and environmental concerns is essential in crafting effective policy).

because they expressed “hopes and aspirations of the people.”⁴⁴² Similarly, a 1961 Michigan delegate argued that constitutional rights reveal “an ordering of values” and it was therefore important to add new environmental rights to “proclaim by this constitution a high value on these matters.”⁴⁴³

2. Equal Protection and Antidiscrimination Norms

A striking feature of contemporary state constitutions is that only fifteen states have an equal protection guarantee and eleven of those were added after 1960.⁴⁴⁴ Indeed, before 1900, most activity regarding equal protection involved the removal of provisions during disfranchisement in protest of Fourteenth Amendment anti-discrimination norms.⁴⁴⁵ To be sure, state constitutions contain other long-standing provisions that touch on equality,⁴⁴⁶ but those provisions have very different origins. Jacksonian Equality provisions, for example, targeted government corruption by prohibiting favoritism for corporations and elites.⁴⁴⁷ And Lockean equality provisions were a rejection of parliamentary sovereignty and hereditary right in favor of popular sovereignty and majority rule.⁴⁴⁸ Nor were courts any help in this

⁴⁴² ILL. 1969, *supra* note 436, at 3020 (statements of Delegate Orlando Tomei).

⁴⁴³ MICH. 1961, *supra* note 413, at 2611. For a discussion of the non-convention history of other environmental rights provisions in state constitutions, see Erin Daly & James R. May, *Robinson Township v. Pennsylvania: A Model for Environmental Constitutionalism*, 21 WIDENER L. REV. 151, 151-52 (2015); John C. Dernbach & Edmund J. Sonnenberg, *A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181, 184-86 (2015); and John C. Dernbach, Kenneth T. Kristl & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 RUTGERS L. REV. 803 (2018).

⁴⁴⁴ See JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 41 (2008) (noting that eight of fifteen current state constitutions with equal protection clauses were adopted after 1970). Michigan added its provision in 1962. Connecticut adopted its provision in 1965. Maine adopted its equal protection clause in 1963. States also adopted antidiscrimination norms in their civil service provisions. See, e.g., MICH. CONST. art. XI, § 5 (“No appointments, promotions, demotions or removals in the classified service shall be made for religious, racial or partisan considerations.”); MICH. 1961, *supra* note 413, at 741 (explaining that the antidiscrimination clause regarding civil service was added to the constitution in 1940). States also adopted equal rights amendments. See Judith Avner, *Some Observations on State Equal Rights Amendments*, 3 YALE L. & POL’Y REV. 144, 144 (1984); V MONT. 1971, *supra* note 437, at 1642 (discussing the adoption of an amendment guaranteeing equal protection based on gender); ILL. 1969, *supra* note 437, at 325 (discussing language to be included in a proposed equal rights amendment).

⁴⁴⁵ See HERRON, *supra* note 92, at 216. For example, Georgia adopted its provision in 1868 (during Reconstruction), removed it 1877 (during disenfranchisement), and re-adopted it in 1983. Robert N. Katz, *The History of the Georgia Bill of Rights*, 3 GA. STATE U. L. REV. 83, 112-13 [verified] (1986).

⁴⁴⁶ See generally Williams, *supra* note 252 (tracing such state constitutional provisions over time).

⁴⁴⁷ *Supra* subsection III.A.1.

⁴⁴⁸ See Williams, *supra* note 252, at 1198-1200 (showing how early state constitutional equality provisions were intended as rejections of British colonial rule and royal privileges).

regard. There was essentially no state civil liberties jurisprudence before the twentieth century, especially regarding anti-discrimination.⁴⁴⁹

So why did some states adopt broad-based equality guarantees during the twentieth century? And what do these new provisions indicate about the nature of state constitutional rights? If viewed through the lens of federal constitutional rights jurisprudence, we might expect them to indicate a change in approach to state constitutional rights. After all, Fourteenth Amendment equal-protection jurisprudence provides *marque* examples of rights as entrenched limits on democratic majorities.⁴⁵⁰ And the debates make clear that, like the Fourteenth Amendment, these provisions were intended to introduce anti-discrimination norms into state constitutionalism.

However, the debates suggest a wholly different approach to constitutionalizing equal protection. First, it is clear that these provisions were intended to signal contemporary popular preferences regarding equality and anti-discrimination.⁴⁵¹ Delegates felt that it was important to constitutionalize equal protection, not to bind future majorities, but to solemnly express the values of the current electorate.⁴⁵² Indeed, delegates often suggested (quite audaciously) that their state should celebrate its record on equality by

⁴⁴⁹ See TARR, *supra* note 17, at 163 (“[P]rior to the 1930s state courts failed to develop a coherent body of law relating to . . . civil liberties concerns.”). Indeed, a recurring reason for adopting equal protection clauses in the twentieth century was their conspicuous absence. See II N.Y. 1938, *supra* note 404, at 1065-66 (explaining the convention took on the task of adopting an equal protection provision because the state constitution was then “barren” of any such protection); MICH. 1961, *supra* note 413, at 741 (noting that it was not until 1940 that Michigan adopted any anti-discrimination provision); ILL. 1969, *supra* note 436, at 1499 (“Our constitution in Illinois has not had that type of provision heretofore.”); *id.* at 1596 (“This is a new right. It . . . is a departure from what has been historic and what has been traditional.”); VI LA. 1973, *supra* note 437, at 1022 (asserting anti-discrimination “nowhere” in old constitution).

⁴⁵⁰ DWORKIN, *supra* note 57, at 226-27 (explaining that Fourteenth Amendment equality rights trump otherwise legitimate democratic policies).

⁴⁵¹ See ILL. 1969, *supra* note 436, at 1593 (“The testimony was almost . . . uniformly in favor of some kind of antidiscrimination clause. . . . It seems to us that in the year 1970 that the right to be free from discrimination because you have a different color or a different religion or a different national ancestry are very, very basic rights and are eminently properly included in the constitution.”); MICH. 1961, *supra* note 413, at 742-43 (“[T]his . . . would be in keeping with the most modern and authoritative statement of our purpose and objectives as a nation.”); PROCEEDINGS OF THE THIRD CONSTITUTIONAL CONVENTION OF THE STATE OF CONNECTICUT [1965], at 691-92 (1965) [hereinafter CONN. 1965] (characterizing an anti-discrimination constitutional provision as “symbolic language” to indicate the state “unequivocally oppose[s] the philosophy and the practice of segregation”); VI LA. 1973, *supra* note 437, at 1016 (arguing that provision should be adopted to “lead our own citizens to a body politic in which we recognize the sacredness of the individual”); V MONT. 1971, *supra* note 437, at 1642-43 (noting that provision reflected “considerable support . . . and lack of opposition”).

⁴⁵² See, e.g., V MONT. 1971, *supra* note 437, at 1636-37 (noting that rights changes were the result of issues raised by considerable testimony from the public regarding issues of contemporary concern that the legislature had failed to address, in this instance, “the genuine needs of low-income people”).

announcing equal protection in the constitution.⁴⁵³ There was essentially no discussion of constitutionalizing these rights as a form of pre-commitment. To the contrary, delegates focused on ensuring that the constitutional language accurately captured popular sentiment and did not overstep what the public was likely to endorse.⁴⁵⁴ Moreover, there was no discussion of excluding these provisions from future amendment or subjecting them to higher amendment thresholds. The debates presumed that future generations might adjust or change these guarantees as necessary or desirable to them.⁴⁵⁵ Thus, Robert Williams has aptly concluded that these provisions “did not direct, but merely recorded, the currents of social change.”⁴⁵⁶

Second, delegates also argued that constitutionalizing equal protection was important for purposes of aligning government with popular preferences.⁴⁵⁷ For example, Illinois delegates amended the state’s antidiscrimination provision to declare that “these rights are enforceable without action by the General Assembly.”⁴⁵⁸ This was added because of fear that state courts might not enforce the constitutional provision without enabling legislation, and the related fear that the legislature would continue to ignore popular pressure for anti-discrimination legislation.⁴⁵⁹ Similarly, delegates in various states argued that their constitutions should list specific protected classes that the Supreme

⁴⁵³ See CONN. 1965, *supra* note 451, at 695-96 (lauding Connecticut’s record of civil rights protections and claiming “there is no state in the entire union that has more comprehensive and more liberal legislation with reference to the exercise of political and civil rights, than does the little sovereign State of Connecticut”); MICH. 1961, *supra* note 413, at 744-46 (arguing an equal protection provision should capture “rights that we presently are enjoying”).

⁴⁵⁴ In Illinois, for example, the debate was consumed by whether equal protection should be clarified to include “the unborn.” ILL. 1969, *supra* note 436, at 1499, 1522, 1595 (“[W]e also had in mind . . . the salability of this product to the people of the state of Illinois . . .”). Other states debated popular support for extending non-discrimination norms to private actors since the Supreme Court limited the Fourteenth Amendment to state action. MICH. 1961, *supra* note 413, at 741; accord MONT. 1971, *supra* note 437, at 1642-43 (arguing anti-discrimination limitations should be placed upon private agencies to “remove the apparent type of discrimination that all of us object to with respect to employment, to rental practices, to actual association in matters that are public or matters that tend to be somewhat quasi-public”).

⁴⁵⁵ Indeed, the conventions that first introduced equal protection and anti-discrimination norms also adopted some of the most liberal amendment procedures. DINAN, *supra* note 134, at 56 nn.106-07.

⁴⁵⁶ WILLIAMS, *supra* note 252, at 1211 (quoting JAMES HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 246 (1950)). For an in-depth analysis of Pennsylvania’s 1967 equality guarantee as directed towards recalcitrant state government and an outdated negative conception of equality, see Robert F. Williams, *A Row of Shadows: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 365-66 (1993).

⁴⁵⁷ See, e.g., MICH. 1961, *supra* note 413, at 740-42 (arguing the “encroachment of the corporate structure of the state” is a danger to equal protection).

⁴⁵⁸ ILL. 1969, *supra* note 436, at 1596.

⁴⁵⁹ *Id.* at 1596-98 (“[T]his was an attempt to override the nonaction of the Illinois legislature . . .”); MICH. 1961, *supra* note 413, at 743 (“We don’t want any kind of ‘let George do it, leave it to the legislature, pass the buck.’ We want it spelled out in the constitution.”); MONT. 1971, *supra* note 437, at 1645 (asserting a constitutional provision should be “self-executing”).

Court did not recognize under the Fourteenth Amendment.⁴⁶⁰ The implication being that although the Fourteenth Amendment would permit state government to target certain groups, the people of the state did not want their government to exercise that liberty.

Third, delegates also emphasized that equal protection guarantees were intended to demand a more activist approach to equality by state government.⁴⁶¹ These arguments were analogous to those offered in support of positive economic and environmental rights.⁴⁶² Delegates emphasized that the people wanted government to ensure “the specific means of equality . . . by stating simply, clearly, and enforceably [sic] the right to equal opportunity of each to be educated, to get a job, to buy a home.”⁴⁶³ Constitutionalizing equal protection was about imposing a new affirmative obligation on state government and not simply prohibiting certain classifications.⁴⁶⁴ In this

⁴⁶⁰ See VI LA. 1973, *supra* note 437, at 1021 (debating “gender” or “sex” as protected classes); MONT. 1971, *supra* note 437, at 1642-43 (“Considerable testimony was heard concerning the need to include sex in any equal protection or freedom from discrimination provisions.”); see also MICH. 1961, *supra* note 413, at 742 (debating whether to list categories of “race, color, religion, national origin or ancestry” and prohibit private discrimination).

⁴⁶¹ See ILL. 1969, *supra* note 436, at 1586 (claiming the goal of equal protection was “to eliminate . . . poverty and to eliminate inequality”); MICH. 1961, *supra* note 413, at 743 (asserting that equal protection is the “right to equal opportunity of each to be educated, to get a job, to buy a home”).

⁴⁶² Indeed, the debates sometimes read as if equal protection was understood as a positive right. See, e.g., MICH. 1961, *supra* note 413, at 741 (“Employment, housing, public accommodations and education are fundamental rights in our complex society. Without equal access to the enjoyment of these rights the individual is deprived of his full stature as a man and is deprived of his right of full equality as a citizen.”).

⁴⁶³ MICH. 1961, *supra* note 413, at 743.

⁴⁶⁴ See ILL. 1969, *supra* note 436, at 1586 (stating equal-protection proposal was a “more positive stand” to “eliminate . . . poverty and . . . inequality”). Beyond the generic equal protection provisions, states have adopted a variety of other equality guarantees and antidiscrimination provisions. A good example is the adoption of state Equal Rights Amendments prohibiting forms of gender discrimination. See generally DINAN, *supra* note 5, at 81-84 (outlining the history of state-level adoption of such constitutional provisions); see also Wharton, *supra* note 415, at 1288-93 (listing all ERAs with date of adoption). Many of these provisions were adopted outside of constitutional conventions, but several were adopted by conventions (California, 1879; Hawaii 1978; Illinois 1971, Louisiana 1974; Montana 1978; New Hampshire 1974; New Jersey 1947; Rhode Island 1986; Utah 1896; Wyoming 1890). See also DINAN, *supra* note 134, at 8, tbl.1-1 (cross-referencing Dinan’s list of conventions with Wharton’s dates-of-adoption for ERA amendments reveals which amendments were adopted outside and within conventions). The debates reflect themes similar to the states’ experience with equal protection: support for the ERAs was driven by the delegates’ belief that state populations supported these provisions (especially in the face of limited gender protections offered by the Supreme Court and an uncertain outcome regarding the federal Equal Rights Amendment). See, e.g., IV MONTANA 1971, *supra* note 437, at 1642 (“The committee felt that such inclusion was eminently proper and saw no reason for the state to wait for the adoption of the federal equal rights amendment or any amendment which would not explicitly provide as much protection as this provision.”); ILLINOIS 1969, *supra* note 436, at 3668-78 (detailing debates regarding ERA). Moreover, it is notable that a variety of these efforts failed at referenda along similar lines to the ratification votes for the Federal ERA. See DINAN, *supra* note 5, at 83 (“Voters rejected a number of state ERAs that appeared on the ballot from the mid-1970s through the mid-1980s.”).

sense, constitutionalizing equal protection was about re-constituting state government around a more activist and interventionist approach to equality.

Thus, these provisions are best understood as another effort by state electorates to align government policies and priorities with popular preferences. They were primarily about ensuring that a momentous change in social policy was delivered by government consistent with popular expectations.⁴⁶⁵

IV. UNDERSTANDING STATE CONSTITUTIONAL RIGHTS

My primary purpose in this Article is to resurrect the state approach to constitutional rights. I have argued that state constitutional rights are structured to prioritize and facilitate popular control over government rather than constrain democratic majorities. This finding has important implications for how we assess contemporary state constitutional rights, how constitutional rights operate in our federal system, and how courts should approach constitutional rights. I plan to explore these implications as part of a long-term research agenda, but I conclude this Article with a few preliminary implications.

A. *Twenty-First Century State Constitutional Rights*

My findings both clarify and complicate our understanding of contemporary state constitutional rights. On the one hand, they might help move past misguided critiques of state constitutional rights and arrive at a more authentic and accurate understanding. On the other hand, if we accept state constitutional rights as instruments of popular control over government, we must tackle a variety of different practical and normative questions regarding their design and operation.

If state constitutional rights are primarily about enhancing popular control over government, then the amendomania that characterizes contemporary state constitutional politics might be a natural continuation of

⁴⁶⁵ To be clear, I am not arguing that state bills of rights were never intended to protect minorities. In fact, as I explain above, the states have adopted various minority-oriented provisions, including protections against imprisonment for debt and equal protection. Rather, my point is that minority protection means something different in state constitutional thinking than under the Federal Constitution. With the adoption of the Reconstruction Amendments and the Supreme Court's incorporation of rights against the states, minority protection under the Federal Constitution focused on setting certain topics out of bounds for majorities to protect minorities and individual liberty. In the state tradition, minority-oriented provisions are often the result of a divergence between popular majorities who wish to provide greater minority protections and government institutions and officials who are not responding to those preferences. In this way, state minority protections are actually advancing the preferences of "benevolent majorities." There is very little evidence in the debates that state minority provisions were intended to be deeply entrenched beyond the reach of future popular majorities. Indeed, this perspective on state constitutional rights misunderstands their deepest normative commitment and core structure, which prioritizes popular control over government above all else.

state constitutional design. Rather than indicating dysfunction, it might indicate that state constitutional rights are functioning exactly as designed.

The pre-*Obergefell* marriage amendments, for example, were efforts by intrastate political majorities to override or pre-empt state court rulings that would invalidate existing marriage laws. In this sense, the amendments were consistent with the state tradition of using constitutional rights to align government policy with popular preferences. The recent wave of right-to-hunt-and-fish amendments could be similarly explained. Jeffery Usman has shown, for example, that the right to hunt-and-fish was added to the Tennessee Constitution primarily because of a popular fear that animal and environmental advocates would secure more restrictive regulation.⁴⁶⁶ The state approach to rights might also explain why state courts habitably refrain from expanding counter-majoritarian protections beyond the federal minimum. Although very few courts express a sensitivity to popular reprisal by amendment,⁴⁶⁷ some judges surely wish to avoid being overruled (even by amendment).⁴⁶⁸ Finally, the increasing length and statutory-like detail of state bill of rights is not out of place or inappropriate if we understand the bill of rights to be “an ordinance of the people” designed to align government with popular preferences by limiting government discretion.⁴⁶⁹

Thus, the amendomania that characterizes contemporary state constitutional rights might be nothing more than the natural continuation of state constitutional design. The frequent amendment of constitutional rights reflects popular vigilance in monitoring and correcting government. By overruling errant court opinions, chilling judicial activism, prodding reluctant legislatures, and undoing the spoils of special interest influence, the people are doing nothing more than exercising their right to alter and reform government to counteract recalcitrance and capture.

Importantly, rights amendomania may also explain instances where state courts push back on popular policies without any responsive amendments.⁴⁷⁰ When those rulings persist, it is not because constitutional rights are working to

⁴⁶⁶ See Jeffery Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 83 (2009) (characterizing the amendment as a “pre-emptive strike” to ensure new regulation triggered popular referendum).

⁴⁶⁷ One of the few cases addressing this issue is *Commonwealth v. O’Neal*, 339 N.E.2d 676, 692-94 (Mass. 1975), which spars over whether, in deciding the constitutionality of the death penalty, it was appropriate to consider likelihood of responsive constitutional amendment.

⁴⁶⁸ See Jonathan L. Marshfield, *The Amendment Effect*, 98 B.U. L. REV. 55, 73-97 (2018) (theorizing how ease of amendment might impact judicial decision-making).

⁴⁶⁹ See Versteeg & Zackin, *supra* note 16, 660-61 (theorizing scope and detail in constitutional text as indicative of efforts to limit agency costs).

⁴⁷⁰ Education finance is a good example. See Michael J. Guard & Jean A. LaMaita, *Financing Public Educational Facilities in New Jersey after the Freehold Decision*, 12 SETON HALL L. REV. 195, 205-09 (1982) (discussing New Jersey courts’ zealous protection of the state constitutional right to a thorough and efficient education despite voters’ repeated refusal to authorize school repairs).

remove an issue from the “vicissitudes of political controversy.”⁴⁷¹ In the states, political controversy on any issue is only one referendum or initiative away. A better view is that the electorate has allowed the ruling to stand; either because it is agreeable on the merits or because it is a low priority not worth a response. In other words, inaction by amendment may indicate tacit popular endorsement.⁴⁷² Thus, even when state courts invoke rights to invalidate popular policies, state constitutional rights are, at best, operating as “speedbumps” that cause democratic majorities to think twice before proceeding.⁴⁷³

On the other hand, the situation is surely more complex than this. For one thing, there is good reason to doubt that contemporary amendment processes are reliable indicators of fully formed popular preferences. There is a qualitative difference between amendments originating in a convention and amendments proposed by state legislatures or private citizens. The convention, which solicits direct public input at three distinct phases and limits input from existing government institutions, is the gold standard for meaningful popular involvement in constitution making.⁴⁷⁴ But virtually all amendments now occur by the initiative or legislative referral to voters.⁴⁷⁵ The legislature’s role is especially problematic because it is a principal object of regulation under the state approach to constitutional rights. One might be concerned, for example, that legislative campaigns to amend rights reflect an effort to reduce checks and balances and expand “legislative tyranny” rather than enhance popular control. Indeed, in many states, gerrymandering and other tactics have resulted in legislatures being the “least majoritarian” branch

⁴⁷¹ West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1942).

⁴⁷² Of course, resources for amendment are limited. Even with low barriers, politicians and citizens must prioritize issues. But the many amendments on myriad specific issues suggests that electorates are willing to act when they believe an issue needs to be addressed.

⁴⁷³ In a new book, Adam Chilton and Mila Versteeg explore how rights truly function under constitutions around the world. See ADAM CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER (2020). They conclude that the metaphor of pre-commitment is not a good description of how rights operate. Rather, it is best to understand rights as “speedbumps” that can “slow down governments that seek to transgress their powers.” *Id.* at 11-12. The authors do not specifically consider state constitutions, but their findings ring true with my findings here.

⁴⁷⁴ Conventions generally involve a referendum to convene, a special election for delegates, and referenda on convention proposals. See 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, 1078-82; see also Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 101 (2019) (“Ultimately, the weight of historical authority supports the idea that state constitutions are most properly created by a convention of specially elected delegates.”); JAMES DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS 258 (1915) (arguing that the convention is the “great agency” through which “popular rights may be secured in the constitution, legislative tyranny restrained, and powerful interests subordinated to the general welfare”).

⁴⁷⁵ See Marshfield, *supra* note 97, at 484-90 (finding that 99.5 percent of amendments adopted between 2006 to 2016 occurred by legislative referral or citizen initiative).

of state government.⁴⁷⁶ Likewise there is voluminous literature suggesting that the initiative process is vulnerable to manipulation by well-financed special interests.⁴⁷⁷ All of this suggests that contemporary amendment processes might be ill-equipped to enable popular control over recalcitrant government. What worked well when conventions were the dominant amendment mechanisms may not work for extra-conventional amendment processes.

Thus, state constitutionalism might have its own internal crisis of dysfunction. It is important to note, however, that this is a very different problem from where we began. The complications that I raise here suggest that state constitutional amendment processes may not be majoritarian *enough* to realize the objectives of state constitutional rights. This is a very different critique than the dominant approach, which derides state constitutional rights as too responsive to popular majorities.

We might also conclude that the state approach is normatively misguided because, like Madison, we are more fearful of abusive majorities than recalcitrant government. Indeed, my findings highlight how abusive majorities have leveraged state constitutional rights in harmful and abusive ways. However, even this assessment is complicated by my findings. The state approach to constitutional rights must be examined within the broader federal context. It is not enough to simply dismiss the states' populist approach to constitutional rights. Critics must also explain why it is undesirable within a constitutional system where national government provides a robust set of entrenched and judicially enforced rights against the states. If, under those conditions, we want to encourage experimentation between states on unanswered questions of public law, perhaps an approach to rights that includes direct popular input is beneficial. I do not purport to resolve these issues here. My more modest point is that approaching state constitutions on their own terms can illuminate more sophisticated inquiries about how constitutional rights function within our federal system as a whole and move us past tropes and truisms about the nature and function of constitutional rights *writ* large; as if all fifty-one American constitutions approach rights from the same perspective.

B. *Implications for State Rights Jurisprudence*

This alternative understanding of state constitutional rights likely has important implications for how state courts construe state constitutional rights. This is surely a large and complex inquiry that I leave to future work.

⁴⁷⁶ Miriam Seifter, *Counter-majoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1755-56 (2021).

⁴⁷⁷ See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED* 243 (2000); Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809, 809-27 (1998).

My modest suggestion here is that my findings likely impact how state courts use existing modalities of constitutional construction.

Consider arguments based on the underlying purpose of a bill of rights. As noted above, the Supreme Court often draws on the notion that federal constitutional rights are intended to remove issues from the political realm by entrusting them to judicial construction and enforcement. In *West Virginia Board of Education v. Barnette*, for example, the issue was whether the First Amendment prohibited a state from requiring students to salute the American flag and recite the pledge.⁴⁷⁸ In rejecting arguments that the Court should defer to legislative processes regarding the best means for promoting patriotism, the Court reasoned that searching judicial review was appropriate because “[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”⁴⁷⁹ The Court further concluded that deference to democratic processes regarding rights was fundamentally flawed because “[o]ne’s right[s] . . . may not be submitted to vote; they depend on the outcome of no elections.”⁴⁸⁰

Remarkably, state courts frequently replicate Justice Jackson’s reasoning when interpreting their own bills of rights, sometimes with astounding irony.⁴⁸¹ For example, in *In re Marriage Cases*, the California Supreme Court held that a statute limiting marriage to heterosexual couples violated California’s equal protection clause.⁴⁸² In rejecting arguments that the court should defer to the statutory definition of marriage, the court recited Justice Jackson’s homily to the Federal bill of rights; including that equal protection “may not be submitted to vote” and “depend[s] on the outcome of no elections.”⁴⁸³ The irony, of course, was that the precise issue before the court was submitted to voters six months later as Proposition 8.⁴⁸⁴

My point is this: if state bills of rights serve a different purpose, then state courts should avoid blindly reciting tropes tailored to federal constitutional rights and instead allow the unique structure and design of state constitutional rights to inform their construction. I do not mean to suggest that this is an easy task. In the *Marriage Cases*, for example, the California Supreme Court surely had an obligation to review the marriage statute for constitutional

⁴⁷⁸ 319 U.S. 624, 626-30 (1943).

⁴⁷⁹ *Id.* at 638.

⁴⁸⁰ *Id.*

⁴⁸¹ See, e.g., *State v. Santiago*, 122 A.3d 1, 54 n.87 (Conn. 2015) (citing Supreme Court opinions for the “fundamental principle” that “guarantees of the Bill of Rights, may not be submitted to vote”).

⁴⁸² 183 P.3d 384, 399 (Cal. 2008).

⁴⁸³ *Id.* at 450.

⁴⁸⁴ *Miller, supra* note 4, at 2090.

compliance. It cannot be that statutes are constitutional just because the court somehow divines broad popular support for the statute at the time of review. But judicial review can take various forms.⁴⁸⁵ My point is simply that the nature of judicial review might look very different when a court is constructing an easily amended legal instrument designed to empower popular control over government than if it is constructing a deeply entrenched instrument designed to constrain or limit popular control over government.

Moreover, my findings may be salient for judges of all persuasions. On the one hand, proponents of judicial restraint might infer from my findings that state courts should be more restrained and deferential to democratic outputs; intervening only when there is a clear conflict between the constitution and state action. This approach would respect the notion that the people can easily adjust government behavior through amendment and do not need courts to interfere or update constitutional norms. On the other hand, if state constitutional rights are instruments of popular control over government, courts might feel especially emboldened to actively monitor government on the people's behalf; working to effectuate the spirit and purpose of state constitutional rights to protect the people from government recalcitrance. This approach might be further buoyed by the reality that the people can easily correct errant judicial opinions through amendment. In this sense, an activist state judiciary is working to realize the popular will rather than constrain it, and, as such, is welcoming of clarifying amendments and popular interventions.

These implications deserve more focused investigation than I can undertake here. My immediate goal is to substantiate the state's alternative conception of constitutional rights and point our attention towards important implications.

C. Implications for Federal Rights Jurisprudence

A critical implication from my findings is their corollary: federal constitutional rights are uniquely important for constraining intrastate majorities and protecting political minorities. State constitutional rights are not built to carry that weight. To be sure, state constitutions have been used to adopt minority-oriented protections, but those rights must be understood within the broader design of state bills of rights. They are best understood as privileges bestowed by benevolent majorities and not entrenched constraints that could withstand focused majoritarian opposition (even fleeting opposition). Indeed, myriad examples show that when these rights inhibit

⁴⁸⁵ See Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 386-401 (2018) (giving a brief history of the tiers of scrutiny).

popular priorities, they are quickly changed. Thus, my findings draw attention to the unique importance of federal rights for imposing side-constraints on democratic decision-making, especially within the states.

What might this mean for the Supreme Court's federal rights jurisprudence? I offer two preliminary thoughts. First, it has the potential to complicate or even destabilize a series of structural arguments advanced by various justices that project a false equivalency between state constitutional rights and federal rights. This fallacy was most famously developed and advocated by Justice Brennan, who understood state constitutional rights to provide a "double source" of protection for individual rights.⁴⁸⁶ On this view, the "genius" of American federalism is that when one set of courts fails to advance rights, the other set of courts can operate as a fail-safe and counteract that failure.⁴⁸⁷ Crucial to this view is the notion that courts are the final (or at least most meaningful) arbiters of rights.⁴⁸⁸ The idea is that both sets of courts are independently pushing back on majoritarian abuses; if one becomes too permissive, the other will hopefully step in.

The fallacy, of course, is that while this description may fit the Supreme Court's role when applying the Federal Bill of Rights, it does not accurately capture state constitutional rights. When the Supreme Court declines to extend a national right, it does not leave the issue to fifty independent state judiciaries. Instead, it leaves the issue to the ultimate control of state popular majorities, who can weigh in almost instantaneously if they wish. In other words, the Supreme Court is unique in its position to monitor and constrain intrastate majorities, and we should be skeptical of arguments suggesting that state constitutional rights can operate as equivalent substitutes.

To be sure, Justice Brennan advanced this conception of "judicial federalism" to encourage state courts to develop independent rights jurisprudence, but his ideas have been more recently used to inform the proper scope of federal rights jurisprudence.⁴⁸⁹ Justice Ginsburg argued, for

⁴⁸⁶ See Brennan, *supra* note 109, at 491, 503; *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting) ("In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law.").

⁴⁸⁷ Brennan, *supra* note 109, at 491.

⁴⁸⁸ *Id.* at 503 ("[H]ow much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own.").

⁴⁸⁹ See *Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting) (citing Brennan's understanding of state constitutional rights as the "primary constraints on state action"); *Kansas v. Carr*, 577 U.S. 108, 127, 129 (2016) (Sotomayor, J., dissenting) (citing Brennan for the proposition that the Court should defer to state experimentation with how to best guarantee a fair trial to criminal defendants); *Delaware v. Van Arsdall*, 475 U.S. 673, 707 (1986) (Stevens, J., dissenting) ("[S]tate constitutions have their own unique origins, history, language, and structure—all of which warrant independent attention and elucidation.").

example, that the Supreme Court should reconsider the presumption created by *Michigan v. Long* because it inhibited the ability of state courts to experiment with their own constitutional rights.⁴⁹⁰ According to Justice Ginsburg, the Supreme Court should be more restrictive in accepting cases for review because “[s]tate courts interpreting state law remain particularly well situated to enforce individual rights against the States.”⁴⁹¹ More recently, a majority of the current Court reasoned that it should assume a “limited role” when considering new Eighth Amendment protections because states can broaden their own criminal procedure guarantees.⁴⁹² The Court hinted strongly at notions of rights federalism and referenced authorities dedicated principally to empowering state courts as independent civil rights leaders.⁴⁹³ Thus, as the current Court reevaluates the breadth of certain federal protections, it seems likely that it may invoke notions of rights federalism to justify narrowing the scope of federal rights.

But here again my findings complicate matters. State courts may be well situated to apply state law to state government, but state constitutional rights are not well situated to do what federal constitutional rights do. They are, in many respects, the antithesis of federal constitutional rights. Thus, to the extent the Supreme Court might be faced with a difficult decision on whether to leave a particular issue to the states for further experimentation, my findings emphasize that state constitutional rights are not designed to operate as a parallel corpus of countermajoritarian protections. Leaving a rights issue to the states means leaving its fate with intrastate popular majorities. This is the deep structure and explicit purpose of state constitutional rights. To the extent that the current Court believes that the scope of federal protections should be informed by a sense of comity to state courts and their construction of state constitutional rights, my findings caution that state and federal rights are not like-kind substitutes.

CONCLUSION

State constitutional rights are often misunderstood. The core misunderstanding stems from the assumption that they are directed to the same problems and intended to operate in the same way as the Federal Bill of Rights as it was conceptualized by the Supreme Court during the civil rights revolution of the twentieth century. My core claim in this Article is

⁴⁹⁰ *Evans*, 514 U.S. at 24 (Ginsburg, J., dissenting).

⁴⁹¹ *Id.* at 30. To be clear, Justice Ginsburg framed this issue in response to Court majorities limiting federal rights. She was advocating for greater space for state courts to provide extra protections.

⁴⁹² *Jones v. Mississippi*, 141 S. Ct. 1307, 1322-23 (2021).

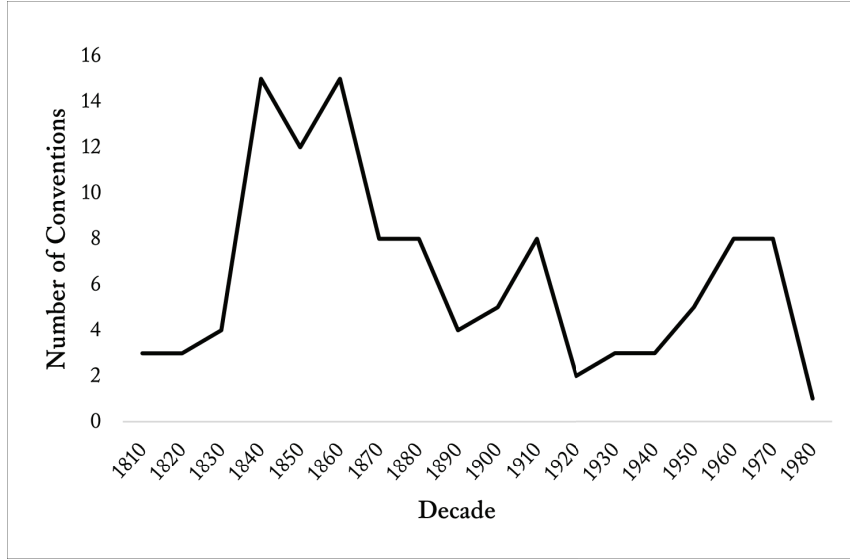
⁴⁹³ *Id.* at 1323 (citing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)).

that state constitutional rights are different. They are deeply tied to popular sovereignty and the fear that government officials and institutions are likely to succumb to their own self-interest and betray the preferences of the people. This is the polestar that defines and decodes state constitutional rights.

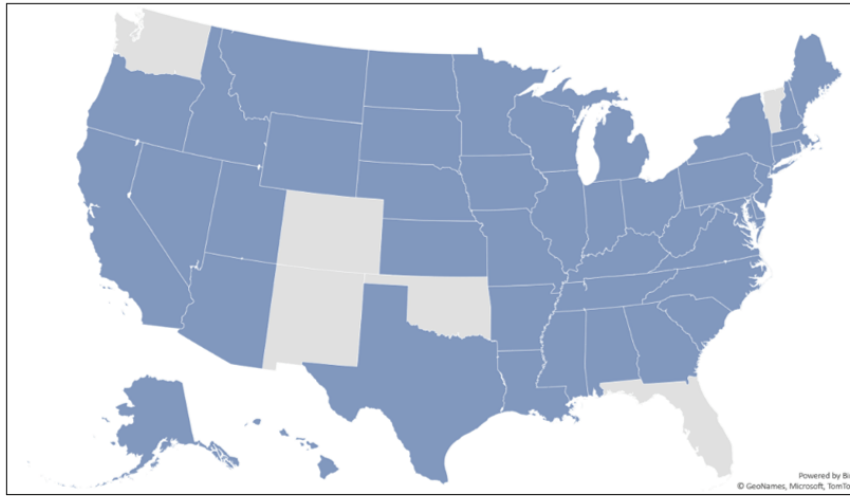
APPENDIX A: CONVENTION DEBATES ADDRESSING
STATE BILLS OF RIGHTS

| STATE | CONVENTION YEAR(S) | STATE | CONVENTION YEAR(S) |
|---------------|---------------------------------|----------------|---|
| Alabama | 1861, 1901 | Missouri | 1861, 1875 |
| Alaska | 1955 | Montana | 1889, 1971 |
| Arizona | 1910 | Nebraska | 1871, 1919 |
| Arkansas | 1868 | Nevada | 1864 |
| California | 1849, 1878 | New Hampshire | 1876, 1889, 1902, 1912, 1918, 1930, 1938, 1948, 1956, 1964, 1974, 1984 |
| Connecticut | 1818, 1965 | New Jersey | 1844, 1947 |
| Delaware | 1831, 1852, 1852 | New York | 1821, 1846, 1867, 1894, 1915, 1938, 1967 |
| Georgia | 1877 | North Carolina | 1835 |
| Hawaii | 1950, 1968, 1978 | North Dakota | 1889, 1972 |
| Idaho | 1889 | Ohio | 1850, 1873, 1912 |
| Illinois | 1847, 1869, 1920, 1969 | Oregon | 1857 |
| Indiana | 1850 | Pennsylvania | 1837, 1872 |
| Iowa | 1844, 1857 | Rhode Island | 1842, 1951, 1955, 1964, 1973 |
| Kansas | 1859 | South Carolina | 1868 |
| Kentucky | 1849, 1890 | South Dakota | 1885, 1889 |
| Louisiana | 1845, 1864, 1973 | Tennessee | 1977 |
| Maine | 1819 | Texas | 1845, 1875, 1974 |
| Maryland | 1851, 1864, 1867, 1967 | Utah | 1895 |
| Massachusetts | 1820, 1853, 1917 | Virginia | 1829, 1850, 1861, 1867, 1901 |
| Michigan | 1835, 1850, 1867, 1907, 1961 | West Virginia | 1861 |
| Minnesota | 1857, 1857 | Wisconsin | 1846, 1847 |
| Mississippi | 1865 | Wyoming | 1889 |

APPENDIX B: TEMPORAL DISTRIBUTION OF DEBATES ADDRESSING STATE BILLS OF RIGHTS (1818–1894)



APPENDIX C: GEOGRAPHIC DISTRIBUTION OF DEBATES



- States with at least one convention debate addressing state bill of rights
- States without a convention debate addressing state bill of rights