Defederalizing State Constitutional Law

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I. Introduction

For over a century and a half, state constitutions have functioned as a safety valve for democratic self-government in the United States. In the face of institutional failure in the legislative and judicial spheres, both at the state and federal levels, ordinary citizens instinctively turn to their state constitutions to protect their rights and further their shared policy preferences. But partially due to practices of federalization, the full potential of state constitutional law remains insufficiently realized—to the detriment of individual rights, social justice, democratic self-government, and popular sovereignty.

The last few decades have seen increasing debate as to whether state courts should interpret state constitutions in lockstep with federal constitutional law.[1] Sometimes, answers can be found explicitly in the text of a state constitution. For example, article I, section 24 of the California Constitution states that the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[2] It follows that California courts' interpretations of state constitutional provisions are not dependent on the federal courts' interpretations of similar provisions in the U.S. Constitution. This is even more evident with respect to state constitutional provisions that have no federal analogue.

But state constitutions need not include the type of language found in California's Constitution to achieve this result. Just like how federal courts interpret the U.S. Constitution according to their own devices and doctrines, state courts have a similar responsibility regarding their own state constitutions. And this duty is not limited to the interpretation of specific provisions; it extends to the general development of their respective state's constitutional law. After all, democratic constitutions, such as the ones adopted by the states, embody the will of a sovereign people. Courts have a duty to fully enforce this will. To do otherwise would be to engage in reverse judicial activism through deliberate inaction. And yet, though the people of individual states continue to look to their state constitutions for protection and assistance, state courts have mostly failed to adequately enforce rights and policy preferences enshrined in those constitutions—the products of democratic choices made directly by the People.

Part of this failure stems from what I refer to as the excessive "federalization" of constitutional law in the United States. "Federalization" alludes to an institutional culture that visualizes, analyzes, and conceptualizes the

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[1] Quinn Yeargain, *Litigating Trans Rights in the States*, 85 Ohio St. L.J. 355, 368 (2024) ("In the last half-century, scholars and judges have debated whether, how, and under what circumstances state supreme courts should deviate from the U.S. Supreme Court's jurisprudence and interpret their own provisions independently."). The phenomenon of "lock-stepping" refers to the practice by which state courts mimic the decisions of the U.S. Supreme Court when interpreting their own state constitutions. *See* Katharine Goodloe, *A Study in Unaccountability: Judicial Elections and Dependent State Constitutional Interpretations*, 35 NYU Rev. L. & Soc. Change 749, 756-57 (2011).

[2] Cal. Const. art. X, § 24.

operation of constitutional law almost exclusively from the perspective of federal law, including its doctrinal paradigms.[3] It has permeated and characterized the general legal discourse and practice in the United States, including in its law schools and state judiciaries. This shortsightedness has hindered the potential of existing state constitutions, and it preemptively derails any real possibility of using state constitutional law to expand democratic self-government in the United States moving forward. The appropriate "defederalization" of state constitutional law, particularly as to the issues of justiciability, state action, and judicial enforcement, would result in greater access to justice and have a significant positive impact on society by allowing the full potential of state constitutional law to be unleashed.

In other words, we are faced with an ever-growing gap between the content of state constitutions and the actual application of state constitutions by the very courts charged with their enforcement. This gap is even more problematic when considered in light of the growth potential of state constitutional law. After all, in terms of their potential, state constitutions are still in their infancy. Unjustified judicial idleness risks stunting further development in this area, thus depriving citizens of an important and powerful tool of democratic self-government. This situation paves the way for further democratic regression and institutional mistrust.

This Article explores several critical first steps that should be taken to reverse the worrying trend of federalization by removing the obstacles that have unduly disrupted the development of state constitutional law. Chief among these obstacles are the many conceptual and normative errors plaguing the doctrines of justiciability, state action, and judicial enforcement at the state level. These errors are the direct result of excessive and unjustified federalization, and they reflect a general misunderstanding of the unique nature of state constitutional law. While some of these problems have been identified in previous academic literature, there is a pressing need for a comprehensive discussion on how state constitutional law requires a break from the federal practice regarding crucial areas related to judicial enforcement. This Article attempts to contribute to that endeavor.

Part II lays the ground for the rest of the Article by highlighting the fundamental differences between state constitutions and their federal counterpart. It analyzes the inner workings of state constitutions along three dimensions: their nature and role, individual history, and substantive content. Part III describes the current situation regarding the underenforcement of state constitutions by state courts and presents the normative argument against this underenforcement. Part IV then zooms in on the undue importation of federal constitutional doctrines that are ill-suited for state constitutions. It advocates for abandoning the federal approaches to justiciability, state action, and judicial enforcement of constitutional provisions, based

[3] *See* Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 Case W. Res. L. Rev. 997, 1035 (2010).

on the unique qualities of state constitutions. Part IV ends by offering some initial suggestions for an alternative approach to state constitutional development—one that hopefully unleashes the full democratic and transformative potential of state constitutions. Part V concludes.

II. State Constitutions as a Separate Phenomenon in U.S. Constitutional Law

State constitutions are not mere subnational versions of the U.S. Constitution. They possess their own energy, history, and content.[4] More fundamentally, they operate in a wholly different political and legal universe, which radically shapes their current role and potential future development.[5] This division also distinguishes the roles of state and federal courts.[6]

This Part examines three fundamental differences between state constitutions and the U.S. Constitution: (A) nature and role; (B) historical foundation; and (C) substantive content. Each section describes how and why state constitutions are distinct from the federal Constitution and introduces some of the potential implications. Together, these significant differences between state constitutions and their federal counterpart lay the ground for the inevitable conclusion that the very *essence* of state constitutions is wholly distinct from that of the U.S. Constitution,[7] with all the normative conclusions that this fact entails.[8]

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[4] *See* John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 Rutgers L.J. 819, 823 (1990).

[5] *See* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 Alb. L. Rev. 1459, 1461 (2010) (observing that "state constitutions have charted a different course"). This deviation challenges the generalized view of the so-called exceptionalism of "American" constitutional law as compared to the rest of the world. *See* Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 Penn St. L. Rev. 783, 793 (2011). It seems evident that a significant number of state constitutions in the United States resemble those of many countries around the world. The outlier, it seems, is not "American" constitutional law, but federal constitutional law specifically. Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. Chi. L. Rev. 1641, 1663 (2014) (noting that "democratic countries' constitutions and US state constitutions resemble one another in scope . . . [and] in their relatively high level of detail").

[6] *See* Jack L. Landau, *State Constitutionalism and the Limits of the Judicial Power*, 69 Rutgers U. L. Rev. 1309, 1316 (2017) (referring to the "profound distinction between federal and state constitutions in general and between federal and state judiciaries in particular").

[7] *See* Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. Pa. J. Const. L. 153, 170 (2018) ("State constitutions and constitutional traditions generally possess certain features that set them apart from the United States Constitution."); *see also* Usman, *supra* note 5, at 1477.

[8] *See* discussion *infra* Part IV.

A. The Distinct Nature of State Constitutions and State Courts

While the U.S. Constitution creates a federal government of enumerated powers and limited jurisdiction,[9] state constitutions establish state governments that possess general police powers and state courts that exercise general jurisdiction.[10] These are differences of kind and not of degree,[11] and they have important normative consequences that should not be ignored or evaded.

The fact that state governments—themselves creatures of state constitutions—possess general legislative powers, not only reflects a paradigmatic break from the federal constitutional reality, but also reveals the significantly broader set of areas and issues that could be the subject of state constitutional enactments.[12] If a state government can exercise broad police powers, addressing important policy matters such as education, health care, environmental protection, labor relations, economic development and distribution, among others, then it necessarily follows that a state constitution can be an adequate vehicle for the entrenchment of specific democratic choices regarding these issues.

In other words, a state's general police powers can be exercised either through ordinary political and legislative channels or through constitutional enactments, which are direct acts of democratic self-government.[13] As a historical matter, the peoples of the states have opted, from time to time,

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[9] Landau, *supra* note 6, at 1317 ("Federal power is, by its very nature, limited."); Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 929 (2011) ("The federal government operates under a theory of limited and enumerated powers, which confines federal action to the affirmative grants of authority in the national Constitution."). The limited nature and scope of federal legislative power suggests that most policy choices regarding daily life will be made at the state level by democratic legislatures that possess general police powers and not by a central government that was explicitly deprived of such power.

[10] Stern, *supra* note 7, at 172 (contrasting the "inherent power" of states with the federal government's lack of an inherent police power); David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 224-25 (2017) (noting that "the [U.S.] Constitution gave the federal government strictly limited powers, and reserved general police power to the states"); Justin R. Long, *State Court Protection of Individual Constitutional Rights*, 70 RUTGERS U. L. REV. 937, 943 (2018) (referencing a state government's "plenary power").

[11] It should also be noted that there are important substantive and historical differences between the different state constitutions. *See* Stern, *supra* note 7, at 169. But these differences are of degree and not of kind, and form part of the pluralism that is inherent in subnational constitutions. *See generally* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992) (noting how state constitutions share many important traits that allow them to operate within the same conceptual universe, in contrast to the U.S. Constitution).

[12] *See* Hershkoff & Loffredo, *supra* note 9, at 929 ("By contrast, state governments build on a theory of plenary power, which preserves a background source of police power."); *see also* Long, *supra* note 10, at 939.

[13] While not all state constitutional modifications require direct approval by the public, popular referenda are one of the most frequent mechanisms used for this purpose. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 59-62 (2009).

to fix the dysfunctions and insufficiencies of ordinary legislative processes through the latter route.[14] This historical tendency should not be seen as an anomaly or as a kink in the system. On the contrary, it reflects how state constitutions can serve as a natural intersection for democratic self-government and general legislative power.

The availability of such wide-ranging general legislative power by states allows for great diversity regarding the types of rights and policies that are entrenched in different state constitutional texts, as well as how each right or policy is designed. Again, this is a feature, not a bug, of the system. It is a necessary consequence of the role of states as "laboratories of democracy,"[15] and in turn, it gives state constitutionalism its inherent inner pluralism.[16]

In the end, state constitutions are designed to do what the U.S. Constitution cannot: address a whole array of substantive issues as an exercise of the general police power. This means that state constitutions are full of subjects and structures that are outside the federal paradigm. Many scholars have noted that state constitutions tend to be lengthier and more detail-rich than their federal counterpart.[17] This is not merely a difference in style and format. It is a simple result of the fact that state constitutions *can say more about more things*. These documents are bound to be longer, more specific, and heftier than the U.S. Constitution.

Detailed and extensive content finds its way into state constitutions when, due to institutional failure at the legislative or judicial level, state constitutional drafters decide to entrench provisions in the state constitution that would otherwise be enacted in statutory form.[18] The drafters of the 1898 California Constitution during the Populist Movement and the drafters of the 1938 New York Constitution during the New Deal made sure that important socioeconomic policies, including important labor protections, were given constitutional status.[19] In doing so, they bypassed unresponsive legislatures and neutralized hostile courts.

The contrast between state constitutions and their federal counterpart is repeated and magnified with respect to the judicial sphere.[20] State courts

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[14] Versteeg & Zackin, *supra* note 5, at 1644 ("Over the past two centuries, Americans have participated in extensive and ongoing constitution making at the state level.").

[15] Joshua M. Cartee, *Behind Closed Doors: An Argument for State Constitutional Standing to Challenge Public-Private Development Corporations*, 76 Ohio St. L.J. 1423, 1441-42 (2015).

[16] *See* Stern, *supra* note 7, at 169.

[17] *Id.* at 171 (noting "breadth of detail"); Versteeg & Zackin, *supra* note 5, at 1646 (noting "constitutional specificity and flexibility").

[18] *See* Versteeg & Zackin, *supra* note 5, at 1665-66; Hershkoff & Loffredo, *supra* note 9, at 930.

[19] *See* Jorge M. Farinacci-Fernós, *Progressive State Constitutionalism*, 71 Buff. L. Rev. 425, 479-84 (2023).

[20] *See* Cartee, *supra* note 15, at 1441; Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 Rutgers L.J. 799, 827 (2002); *see also* Landau, *supra* note 6, at 1316 ("Federal and state courts are different in significant ways.").

are forums of general jurisdiction designed to address most private and public law disputes, while federal courts are forums of limited jurisdiction designed to only address federal questions and diversity suits in certain circumstances. In other words, federal judicial power is first circumscribed by the same boundaries set by the U.S. Constitution to the other branches, and then by the requirement for justiciable cases or controversies as defined in Article III. By contrast, state judicial power is conceptually linked to the general police power held by the states. As a result, "the scope of state courts' substantive authority is greater than that of federal courts."[21]

The differences between these court systems go to the very "nature of federal and state 'judicial power.'"[22] In fact, the very notion of what constitutes the "judicial power" is different at the state level, as compared to the federal structure.[23] Once again, the contrast is one of kind and not of degree.[24]

In summary, state constitutions and state courts are inherently different from their federal counterparts. As discussed later, this has significant normative consequences.

B. The Distinct Historical Underpinnings of State Constitutions

Constitutions are historical phenomena. Each is the result of unique historical processes that determine its particular form, content, and operating mechanisms. The constitutional histories at the state level differ significantly from the events leading to the adoption of the U.S. Constitution in the late eighteenth century.[25]

Throughout the history of the United States, substantial parts of the U.S. population have looked to their state constitution as the primary protector of their rights—well before the U.S. Supreme Court began enforcing federal constitutional rights against the states through the doctrine of incorporation.[26] Neither incorporation nor the enlargement of federal rights under the Warren Court has eliminated the role of state constitutions as safe havens for individual rights and substantive policy entrenchment. State constitutions continue to serve this function, as illustrated by recent state constitutional amendments that protect reproductive choice. Given current events at the federal level, this role is sure only to grow.

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[21] Long, *supra* note 10, at 941.

[22] Landau, *supra* note 6, at 1316.

[23] *See id.* at 1310-11, 1320.

[24] *Id*. According to Landau, "[t]hese differences reflect more than just variations in phrasing." *Id.* at 1316. As a result, "[s]tate courts have much broader authority." *Id.* at 1318.

[25] *See* Soohoo & Goldberg, *supra* note 3, at 1036.

[26] *Id.* at 1036-37; *see also* Hershkoff, *supra* note 20, at 812-13; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1839 (2001) (noting that state constitutions have been a "focal point of policy").

As a result of their historical role in safeguarding individual rights, state constitutions are also the main vehicle for the entrenchment of important rights and policies that, despite possessing strong popular support, were victims of legislative indifference and judicial hostility.[27] In other words, "[s]tate constitutions were designed as change agents."[28] Historically, the entrenchment of individual rights and substantive policies in state constitutions can be characterized as the culminating victories of important historical social movements.[29] These popular victories come from movements of many shapes and sizes, including anti-discrimination movements and movements against economic inequality.[30]

One constant illustration of this phenomenon has been the entrenchment of labor rights, particularly regarding employment conditions. As Versteeg and Zackin observe, "labor unions advocated constitutional change in order to secure protective labor regulations from state governments, which were thought to be captured by large business interests."[31] For example, as early as 1870, the Illinois Constitution included a provision relating to the safety of mine workers.[32] As another example, Hershkoff notes that "[i]n 1876, Colorado amended its state constitution to include child labor restraints, maximum-hours protections, and employer liability for workplace injuries."[33] This trend continued well into the twentieth century, particularly in response to the *Lochner* era.[34] Likewise, in the context of anti-discrimination provisions, many state constitutions significantly expanded the list of protected classes to include aspects like social condition and age.[35] In other words, state constitutional law became an important tool in the struggle to address the injustices of discrimination, both public and private.

Of course, it must be said that not all state constitutional provisions are the result of progressive victories. There have been many instances of

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[27] *See* Versteeg & Zackin, *supra* note 5, at 1700-01 (discussing the phenomenon of entrenchment).

[28] Cartee, *supra* note 15, at 1441.

[29] Versteeg & Zackin, *supra* note 5, at 1698. According to the authors, many of these victories were linked with important "reform projects." *Id.* at 1699.

[30] *See* Micah Zeller, *From Preservative to Transformative: Squaring Socioeconomic Rights with Liberty and the American Constitutional Framework*, 88 WASH. U. L. REV. 735, 745 (2011) (referencing the different circumstances that have led to the entrenchment of substantive issues in modern constitutions, such as addressing instances of past discrimination and tackling the unacceptable misdistribution of wealth).

[31] Versteeg & Zackin, *supra* note 5, at 1699.

[32] Helen Hershkoff, *Just Words: Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1537 n.78 (2010).

[33] *Id.* at 1537. These changes were the result of important historical movements and experiences, including the Populist Movement. *See* Farinacci-Fernós, *supra* note 19, at 460-64.

[34] *See* Hershkoff, *supra* note 32, at 1543.

[35] *See* discussion *infra* section II.C.1.b.

public backlash that led to more regressive policies.[36] But the point remains that unlike statutes, which are almost exclusively dependent on the will of elected legislators, constitutional entrenchment in the states typically requires express popular assent. Regardless of its actual content, a constitution represents the highest mode of lawmaking where the People have the final word. It is therefore unsurprising that popular participation has also been a constant in state constitutional creation and amendment processes.[37]

C. The Distinct Substantive Content of State Constitutions

Of the many differences between state constitutions and the federal Constitution, the most obvious is with respect to substantive content.[38] While "the federal Constitution is silent on many questions of socio-economic concern," it is well-known that "almost every state constitution in the United States explicitly addresses important public goods such as education, income assistance, and housing support."[39] As a result of the historical experiences discussed previously, many states have adopted constitutions that can be adequately characterized as modern, as opposed to their older federal counterpart. By incorporating certain policy provisions, these modern state constitutions are designed to actively influence the direction of society toward the realization of specific policy goals. This is an experience that is mostly absent at the federal level.[40]

The rest of this section describes three types of substantive provisions contained in state constitutions: (1) rights; (2) policies; and (3) structures. Each subsection draws from observations about the unique nature and history of state constitutions to shed light on how these substantive provisions should be interpreted by state courts.

1. Rights

Individual rights in state constitutions come in many forms, ranging from copies of federal counterparts dealing with first generation civil and political rights—albeit with varying reach and effect—to more modern rights dealing with subjects such as labor relations and social services.

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[36] *See generally* Paul B. Linton, *Neutralizing State Constitutions as a Source of Abortion Rights: The Path Forward*, 34 Regent U. L. Rev. 471 (2022); Allan W. Vestal, *Removing State Constitution Badges of Inferiority*, 22 Lewis & Clark L. Rev. 1151 (2018).

[37] Versteeg & Zackin, *supra* note 5, at 1677.

[38] Stern, *supra* note 7, at 170 ("[A] commonality of special importance is that state constitutions and constitutional traditions generally possess certain features that set them apart from the United States Constitution.").

[39] Hershkoff & Loffredo, *supra* note 9, at 924.

[40] Of course, there are vital federal constitutional provisions that directly impact the quality of life in the United States, especially when it comes to individual rights. Yet, these rights are mostly of a political nature—such as equal protection and due process—that do not impact substantive policy directly.

Unlike the federal Constitution, state constitutions contain positive rights as well as negative rights. In addition, many state constitutional rights apply horizontally as well as vertically.

a) Rights with Federal Counterparts

It is unsurprising that most of the rights found in the federal Constitution are also included in state constitutional texts. Many early state constitutions served as models for the original Bill of Rights.[41] Then, as new states were admitted into the Union, state constitutional drafters naturally looked to the federal text for guidance as to the basic list of fundamental rights for their new political unit.[42] As a result, state constitutions are full of provisions—primarily those dealing with individual political rights—that closely mirror their federal counterparts. Some of these provisions are written in identical language, while others diverge slightly or significantly.[43]

But even as it pertains to rights that are very similar to those found in the U.S. Constitution, there are compelling reasons to believe that the substantive content of these state constitutional rights is different from that of their federal counterparts.[44] The nature of state constitutions and the specific historical experiences that led to their adoption almost inevitably—save for rare intentional deviations—have the effect of widening the reach and scope of the protection they offer.[45] There are several reasons for this outcome.

First, the greater scope of state constitutional rights is a necessary consequence of the role played by state constitutions in a federal system. States are intended to be more dynamic and move faster than the federal government, so it should come as no surprise that state constitutional rights expand at a faster rate than those found in the federal text. Second, because state drafters are very aware of the "federal floor" rationale, that almost inherently means that state constitutional rights have a higher ceiling.[46] And third, in many cases, the intent of many state constitutional drafters clearly points to a broader approach regarding the operation of individual rights.[47]

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[41] Randy J. Holland, *State Constitutions: Purpose and Function*, 69 Temp. L. Rev. 989, 997 (1996) ("[S]tate Declarations of Rights were the primary origin and model for the provisions set forth in the Federal Bill of Rights.").

[42] *See, e.g.*, Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 Alaska L. Rev. 293, 299-300 (2005).

[43] *See* Versteeg & Zackin, *supra* note 5, at 1684.

[44] *See* Yeargain, *supra* note 1, at 368.

[45] *See* Stern, *supra* note 7, at 174 (referencing the "more generous judicial conceptions of parallel rights provisions" at the state level).

[46] *Id.* at 172 ("It is almost inevitable that states will provide for more expansive individual rights than the United States Constitution protects.").

[47] *See generally* Farinacci-Fernós, *supra* note 19 (discussing the experiences in California, New York, Illinois, and Puerto Rico).

State and federal constitutional provisions can diverge in meaning even in instances where there is no clear textual difference between the state and federal texts. But in many situations, there are important textual differences that, combined with other contextual and extratextual considerations, point to a more expansive normative effect. Important examples of this phenomenon are rights provisions found in state constitutions that explicitly allow for their enforcement against private actors.[48] For instance, many state constitutions have adopted broader articulations of free speech provisions—some of which have horizontal effect.[49]

Unfortunately, identical or similarly worded rights provisions have been the primary victim of federalization in state courts. As Lawrence Friedman comments: "[t]he promise of . . . independent interpretation by state courts of state constitutional corollaries to the federal Bill of Rights . . . has gone largely unfulfilled."[50] The split between state courts that follow the lockstep approach and those that have opted for a more independent and more expansive interpretive model continues to this day.[51]

b) Rights Without Federal Counterparts

In addition to having their own versions of classic federal rights, state constitutions are also full of rights provisions that have no federal analogues. As Stern observes, state constitutions "contain guarantees of affirmative rights absent from the generally prohibitory federal Bill of Rights."[52] The most notable of these are "second-generation rights," such as social, economic, and cultural rights that received greater attention after World War II, as well as more modern civil and political rights. These are absent in the federal Constitution because of obvious historical factors.[53]

In terms of expanded civil and political rights, many state constitutions have adopted, for example, explicit and expansive privacy protections. As is well-known, the right to privacy is not expressly recognized in the U.S. Constitution, and its implicit existence had to be established by federal

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[48] *See* Hershkoff & Loffredo, *supra* note 9, at 929 ("In addition, some state constitutions include socio-economic provisions that are expected to run not simply against the government, but also against private actors.").

[49] *See, e.g.*, Howard, *supra* note 10, at 247-48; Mark J. Pesce, *(Un)Common Interest Communities: Search for a Workable Extension of Free Speech Rights to CICs*, 45 SETON HALL L. REV. 877, 884 n.44 (2015); Stern, *supra* note 7, at 173; Devlin, *supra* note 4, at 828.

[50] Friedman, *supra* note 5, at 783.

[51] *See* Howard, *supra* note 10, at 240.

[52] Stern, *supra* note 7, at 173; *see also* Zeller, *supra* note 30, at 736 & n.10 (2011); Hershkoff, *supra* note 32, at 1534 ("By contrast to the Federal Constitution, every state constitution in the U.S. includes some textual commitment to a social or economic right.").

[53] Versteeg & Zackin, *supra* note 5, at 1643 (referencing the federal Constitution's "omission of explicit socioeconomic rights"); Zeller, *supra* note 30, at 735 ("The U.S. Constitution is not designed to create legally enforceable socioeconomic rights."); Stern, *supra* note 7, at 174 ("[S]tate constitutions also explicitly furnish grounds for recognition of rights not afforded by the federal Constitution.").

caselaw. State constitutions tell a different story, as many of them contain express and robust privacy provisions. For example, the Alaska Constitution states that "[t]he right of the people to privacy is recognized and shall not be infringed."[54] Similar language can be found in the Hawaii Constitution, where interference with this right is subject to strict scrutiny.[55] Although the language might vary, privacy provisions are prevalent.[56]

The Supreme Court of the United States recently held that whatever remains of the right to privacy at the federal level, it does not guarantee reproductive choice for women.[57] In contrast, many state constitutions include explicit protections for the right to reproductive freedom.[58] Maryland, for example, expressly protects reproductive choice as a specific subset of the general right to liberty and equality, and the state also subjects any regulations to strict scrutiny.[59] The Ohio Constitution also includes a detail-rich provision regarding the right to make reproductive decisions.[60] Some states, however, have taken the opposite course.[61]

Anti-discrimination is another area where state constitutions have expanded civil and political rights.[62] Many states do not limit themselves to guaranteeing the equal protection of the laws in general terms. Their constitutions provide for explicit bans on discrimination based on specific classifications. Among these are race or color,[63] religion or creed,[64] national origin

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[54] Alaska Const. art. I, § 22.

[55] Haw. Const. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.").

[56] The Arizona Constitution decrees that "[n]o person shall be disturbed in his private affairs." Ariz. Const. art. II, § 8. The Montana Constitution declares that "[t]he 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." Mont. Const. art. II, § 10. The Florida Constitution recognizes that "[e]very natural person has the right to be left alone and free from governmental intrusion into the person's private life." Fla. Const. art. I, § 23. For additional examples, see Cal. Const. art. I, § 1; La. Const. art. I, § 5 ("invasions of privacy").

[57] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[58] *See, e.g.*, Cal. Const. art. I, § 1.1; Mich. Const. art. I, § 28; Mo. Const. art. I, § 36; Vt. Const. ch. I, art. 22; *see also* Yeargain, *supra* note 1, at 370-71.

[59] Md. Const. art. 48. ("That every person, as a central component of an individual's right to liberty and equality, has the fundamental right to reproductive freedom . . . The state may not, directly or indirectly, deny, burden, or abridge this right unless justified by a compelling state interest achieved by the least restrictive means.").

[60] Ohio Const. art. I, § 22.

[61] *See, e.g.*, La. Const. art. I, § 20.1.

[62] *See, e.g.*, Yeargain, *supra* note 1, at 396; Justin Walker & Alex Van Dyke, *A Nonpartisan Necessity: State Constitutional Law as an Evenhanded Source of Rights*, 2020 U. Ill. L. Rev. 1415, 1430; Devlin, *supra* note 4, at 838.

[63] Alaska Const. art. I, § 3; Ariz. Const. art. II, § 36; Cal. Const. art. I, §§ 8, 31; Conn. Const. art. I, § 20; Del. Const. art. I, § 21; Fla. Const. art. I, § 2; La. Const. art. I, §§ 3, 12; Mich. Const. art. I, § 2; Mont. Const. art. II, § 4; N.Y. Const. art. I, § 11; Okla. Const. art. II, § 36A; Tex. Const. art. I, § 3a; Wyo. Const. art. I, § 3.

[64] Alaska Const. art. I, § 3; Cal. Const. art. I, §§ 8, 31; Conn. Const. art. I, § 20; Fla. Const. art. I, § 2; Ill. Const. art. I, § 20; La. Const. art. I, § 3; Mich. Const. art. I, § 2; Mont. Const. art. II, § 4; N.Y. Const. art. I, § 11; Tex. Const. art. I, § 3a.

or ethnicity,[65] sex,[66] disability,[67] birth,[68] age,[69] culture,[70] political ideas or affiliations,[71] and social origin or condition.[72]

As for socioeconomic rights, labor rights are the prime example of state constitutional protections that have no analogue in the federal text.[73] Their inclusion in state constitutions has been a historic constant.[74] Moreover, labor and employment provisions possess many of the characteristics that distinguish state constitutions from their federal counterpart. They may be articulated as negative or positive rights,[75] and many feature elements such as self-executability, horizontality, blending of substantive rights and policies, and mixing of specific commands and general authorizations.

Environmental protection and the right to enjoy natural spaces has also been entrenched in state constitutions. These provisions range from the enactment of general—albeit occasionally binding or self-executing—policies regarding environmental conservation,[76] to a broad right to enjoy a "clean and healthful environment,"[77] to more specific rights regarding fishing and other uses of public waters.[78] In New York, "[e]ach person shall have a right to clean air and water, and a healthful environment."[79] In Texas,

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[65] ALASKA CONST. art. I, § 3; ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 3; CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; ILL. CONST. art. I, § 20; LA. CONST. art. I, § 12 ("national ancestry"); MICH. CONST. art. I, § 2; OKLA. CONST. art. II, § 36A ("social origin or condition"); TEX. CONST. art. I, § 3a.

[66] ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, §§ 8, 31; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20, *amended by* CONN. CONST. amend. V; DEL. CONST. art. I, § 21; HAW. CONST. art. I, § 3; ILL. CONST. art. I, §§ 17, 18; LA. CONST. art. I, §§ 3, 12; MD. CONST. art. 46; MONT. CONST. art. II, § 4; N.M. CONST. art. II, § 18; OKLA. CONST. art. II, § 36A; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; WYO. CONST. art. I, § 3.

[67] CONN. CONST. art. I, § 20, *amended by* CONN. CONST. amend. V, XXI; FLA. CONST. art. I, § 2; ILL. CONST. art. I, § 19.

[68] LA. CONST. art. I, § 3.

[69] *Id.*

[70] *Id.*; MONT. CONST. art. II, § 4.

[71] LA. CONST. art. I, § 3; MONT. CONST. art. II, § 4.

[72] MONT. CONST. art. II, § 4; OKLA. CONST. art. II, § 36A.

[73] *See* Zeller, *supra* note 30, at 740. For example, article II, section 16 of the Puerto Rico Constitution guarantees a minimum of time and a half for overtime work.

[74] *See* Hershkoff, *supra* note 32, at 1537 ("Since the nineteenth century, some state constitutions have been amended to include clauses that regulate private workplaces.").

[75] *See* Versteeg & Zackin, *supra* note 5, at 1693 (referring to "positive labor rights" that have existed in state constitutions since at least the 1860s).

[76] *See, e.g.*, ALASKA CONST. art. VIII, § 1; HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 1; LA. CONST. art. IX, § 1; MONT. CONST. art. IX, § 1; S.C. CONST. art. XII, § 1; TEX. CONST. art. XVI, § 59.

[77] HAW. CONST. art. XI, § 9; *see also* ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment.").

[78] *See, e.g.*, ALA. CONST. art. I, § 24; ALASKA CONST. art. VIII, §§ 2-4, 13-15; ARIZ. CONST. art. XVII, § 2; CAL. CONST. art. I, § 25; CAL. CONST. art. X; GA. CONST. art. I, § 28; IDAHO CONST. art. I, § 23; MONT. CONST. art. IX, § 3; NEB. CONST. art. XV, §§ 4, 5, 25; R.I. CONST. art. I, § 17; S.C. CONST. art. I, § 25; WYO. CONST. art. VIII, § 1.

[79] N.Y. CONST. art. I, § 19.

"[t]he public, individually and collectively, has an unrestricted right to use and a right of ingress to and egress from a public beach."[80]

Finally, state constitutions are full of socioeconomic provisions that are designed to provide aid and support for economically vulnerable groups by establishing minimum living conditions for the public.[81] North Carolina's constitutional text explicitly incorporates the moral foundations for its welfare policy: "Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare."[82] This sentiment is echoed in the Preamble of the Illinois Constitution, which expressly states that one of its goals is to "*eliminate poverty and inequality*."[83]

Some of these provisions are articulated at very high levels of generality. For example, article VII, section 5 of the Alaska Constitution states that "[t]he legislature shall provide for public welfare."[84] The New York Constitution's welfare provision is also written in general policy terms, leaving the details to the legislative process: "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine."[85] Although written in binding language ("shall"), these provisions leave almost limitless discretion for the legislative branch to determine how and when to adopt measures addressed at the public welfare.[86] However, this type of general language still can and should inform courts when they are faced with the enforcement of statutory provisions adopted in accordance with this constitutional mandate.

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[80] TEX. CONST. art. I, § 33(b).

[81] As we will see, substantive provisions that deal with socioeconomic matters can be articulated as individual rights or as binding policy commands. *See* discussion *infra* section II.C.2.

[82] N.C. CONST. art XI, § 4.

[83] ILL. CONST. pmbl. (emphasis added).

[84] ALASKA CONST. art. VII, § 5.

[85] N.Y. CONST. art. XVII, § 1; *see also* OHIO CONST. art. VII, § 1 ("Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly."); OKLA. CONST. art. XXI, § 1 ("Educational, reformatory, and penal institutions and those for the benefit of the insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the State in such manner as may be prescribed by law."); WASH. CONST. art. XIII, § 1 ("Educational, reformatory and penal institutions; those for the benefit of blind, deaf, dumb or otherwise defective youth; for the insane or idiotic; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law.").

[86] Similar approaches can be found in the Hawaii Constitution. *See* HAW. CONST. art. IX, § 3 ("The State shall have the power to provide financial assistance, medical assistance and social services for persons who are found to be in need and are eligible for such assistance and services as provided by law."). This entirely discretionary language can be employed by courts when enforcing statutory provisions related to social services and assistance. *See also* LA. CONST. art. XII, § 8 ("The legislature may establish a system of economic and social welfare, unemployment compensation, and public health.").

Beyond general welfare provisions, working people and the poor are also protected by specific rights that have been entrenched in state constitutions. For example, a significant majority of state constitutions expressly prohibit incarceration as an appropriate punishment for debtors[87]—an important victory for the poor and working class. Although many of these provisions include exceptions to the general rule, they still represent a wildly popular type of substantive protection that is visibly absent from the federal catalogue of rights.[88] As another example, over a dozen state constitutions discuss health and health care.[89] Like many other second-generation rights, these provisions have been plagued by insufficient interpretation and enforcement by state courts.[90]

Precisely because second-generation rights lack federal counterparts, state courts that have become fully federalized in their interpretive approach have struggled to construe and failed to enforce these rights.[91] As Hershkoff observes, "[e]ven where moored to the text of a constitution, social and economic rights remain controversial,"[92] especially with respect to judicial enforcement. In other words, federalization has had the practical effect of erasing from state constitutions explicit textual provisions that were intentionally included.

c) Positive Rights

Unlike the federal Constitution, state constitutions contain positive rights as well as negative rights. Positive rights require or compel action, while negative rights merely prohibit it. Scholars continually affiliate positive rights with socioeconomic rights.[93] However, not all socioeconomic rights are positive rights, and not all positive rights are socioeconomic

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[87] *See, e.g.*, ALA. CONST. art. I, § 20; ALASKA CONST. art. I, § 17; ARIZ. CONST. art. II, § 18; ARK. CONST. art. II, § 16; CAL. CONST. art. I, § 10; GA. CONST. art. I, § 23; HAW. CONST. art. I, § 19; IDAHO CONST. art. I, § 15; ILL. CONST. art. I, § 14; IOWA CONST. art. I, § 19; KAN. CONST. art. I, § 16; MICH. CONST. art. I, § 21; MISS. CONST. art. III, § 30; MO. CONST. art. I, § 11; MONT. CONST. art. II, § 27; NEB. CONST. art. I, § 20; NEV. CONST. art. I, § 14; N.J. CONST. art. I, § 13; N.C. CONST. art. I, § 28; N.D. CONST. art. VI, § 15; OHIO CONST. art. I, § 15; OKLA. CONST. art. II, § 13; OR. CONST. art. I, § 19; PA. CONST. art. I, § 16; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; TENN. CONST. art. I, § 18; TEX. CONST. art. I, § 18; UTAH CONST. art. I, § 16; WIS. CONST. art. I, § 16; WYO. CONST. art. I, § 5.

[88] Many state constitutions also address the treatment and rehabilitation of prisoners. *See, e.g.*, DEL. CONST. art. I, § 11; S.C. CONST. art. XII, § 2; TENN. CONST. art. I, § 32; WYO. CONST. art. I, § 15.

[89] Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347 n.91 (2010). Leonard identifies the earliest adoption in 1869. *Id.* at 1347.

[90] *Id.* at 1348.

[91] Soohoo & Goldberg, *supra* note 3, at 1001.

[92] Hershkoff, *supra* note 32, at 1522.

[93] *See, e.g.*, Zeller, *supra* note 30, at 740; Hershkoff, *supra* note 32, at 1522. Scholars also continually link socioeconomic rights with horizontal rights that can only be claimed against the government, which is also incorrect. This will be addressed in the following section.

rights.[94] For example, labor provisions can be either negative (the right to strike) or positive (the right to receive overtime pay).[95] But there is an obvious overlap between positive and socioeconomic rights—a phenomenon that manifests in many state constitutional texts.[96]

As things stand today, most state constitutions "contain positive rights, such as a right to free education, labor rights, social welfare rights, and environmental rights" that require action by a wide variety of institutional actors, including state legislatures and executive officials.[97] When these actors fail in carrying out the required action, courts are recruited by state constitutional drafters to make sure their will is followed. This is a reasonable expectation on the part of the state constitutional drafters who entrenched substantive matters in state constitutions through operative language.

Unfortunately, positive rights are severely underenforced by state courts.[98] Some scholars attribute the current state of underenforcement to a prevailing view among courts that "[p]ositive rights are not constitutional rights."[99] Federalization claims yet another victim.

d) Self-Executing Horizontal Rights

Not all constitutional rights are vertical rights that can only be enforced against governmental actors or institutions.[100] In fact, state constitutions are full of rights that are designed to have horizontal effect against private actors. This phenomenon represents one of the sharpest breaks from the federal paradigm. Some of the relevant provisions are expressly horizontal, while others are more indirect, triggering a "lesser requirement for state action."[101] These horizontal provisions are not a new phenomenon in state constitutionalism. According to Hershkoff and Loffredo:

> Commentators tend to equate the practice of extending constitutional norms to private relations—so-called "horizontality"—as a

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[94] *See* Jorge M. Farinacci-Fernós, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect and Reach*, 41 HASTINGS INT'L & COMP. L. REV. 31, 33 (2018); *see also* Soohoo & Goldberg, *supra* note 3, at 1005 ("not all socio-economic rights claims are positive rights claims").

[95] In that sense, there are many constitutional provisions that generate a "negative obligation to respect socio-economic rights." Soohoo & Goldberg, *supra* note 3, at 999. By the same token, not all positive rights are necessarily of a socioeconomic nature. *See* Farinacci-Fernós, *supra* note 94, at 44.

[96] *See also* Hershkoff, *supra* note 32, at 1523 ("Every state constitution in the United States . . . contains some explicit commitment to positive rights.").

[97] Versteeg & Zackin, *supra* note 5, at 1645; *see also* discussion *infra* section II.C.1.b.

[98] *See, e.g.*, Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 863 (2008) ("Although two dozen state constitutions contain some type of affirmative guarantee of welfare rights, state courts are extremely reluctant to enforce those rights.").

[99] Hershkoff & Loffredo, *supra* note 9, at 931.

[100] *Id.* at 929 ("Some state constitutions include socio-economic provisions that are expected to run not simply against the government, but against private actors.").

[101] Howard, *supra* note 10, at 250.

> contemporary development, yet at least some of these state constitutional provisions date back to the nineteenth-century and reflect Progressive-era reforms aimed at protecting industrial workers from unfair labor practices and ensuring safe employment settings.[102]

Horizontal rights are the result of the obvious realization that "[g]overnment power can be oppressive, but so, too, can economic power."[103] Constitutional provisions that protect, for example, workers and consumers are—by design—meant to protect people from "private oppression"[104] and further individual liberty by addressing an additional source of potentially abusive power.[105] Because the main source of power—and thus potential abuse—between private parties is economic in nature, socioeconomic rights are the most common type of rights that have horizontal effect. In that sense, "[s]ocio-economic rights thus are justified as serving an important bulwark against power, whatever its source."[106]

Horizontal rights in state constitutions include most labor provisions, as well as some instances of anti-discrimination provisions that have textually explicit horizontal effect—particularly with respect to housing and employment. For example, the Illinois Constitution expressly prohibits discrimination based on race, color, creed, national ancestry, and sex, as well as physical or mental handicap, in terms of hiring and promotion practices by "any employer" or as to the sale or rental of property.[107] Some constitutional provisions apply to a more limited universe of private entities, such as those that offer public accommodations.[108]

A state constitutional provision's horizontal effect can be deduced in several ways. Most notably, there may be clear language to that effect.[109] For example, the Illinois Constitution explicitly prohibits discriminatory

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[102] Hershkoff & Loffredo, *supra* note 9, at 929.

[103] Long, *supra* note 10, at 938.

[104] *Id*.

[105] Hershkoff, *supra* note 32, at 1533 ("Socio-economic rights certainly promote individual interests by securing rights to such things as workplace security or to an adequate education.").

[106] Hershkoff, *supra* note 32, at 1534-35.

[107] ILL. CONST. art. I, §§ 17, 19; *see also*, N.Y. CONST. art. I, § 11 ("No person shall, because of race, color, ethnicity, national origin, age, disability, creed, religion, or sex . . . be subjected to any discrimination in their civil rights *by any other person or by any firm, corporation, or institution*, or by the state or any agency or subdivision of the state.") (emphasis added); MONT. CONST. art. II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social original or condition, or political or religious ideas.").

[108] *See* LA. CONST. art. I, § 12 ("In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry, and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition."); *see also* UTAH CONST. art. XVI, § 4 ("The exchange of black lists by railroad companies or other corporations, associations or persons is prohibited."); WYO. CONST. art. XIX, § 7.

[109] Devlin, *supra* note 4, at 926 ("[C]onstitutional guarantees can be written to provide rights that even purely private parties may not infringe.").

practices by any employer, including private firms.[110] Other times, this horizontal effect is the inevitable outcome of a provision's nature and content, such as the rights of workers to receive overtime pay in certain circumstances. In these cases, it is self-evident from the text that the provision refers to relationships between private parties.[111] In yet other situations, a state constitutional provision's horizontal effect may not be textually explicit. But an interpretive approach that considers structure and history, as well as the nature of state constitutions in general, could lead to circumstances in which a state court "may choose to extend state constitutional rights even to the conduct of nongovernmental actors."[112] An example of this was the California Supreme Court decision recognizing free speech rights in private shopping malls.[113] When combined with a justifiably less strict approach to general state action requirements, state constitutional rights are potentially applicable to private parties, even in the absence of explicit language in that direction.[114]

An additional feature of horizontal rights provisions is that they tend to be self-executing.[115] For example, article I, section 17 of the Illinois Constitution states that "[t]hese rights are enforceable without action by General Assembly . . . ."[116] This further negates the need to rely on legislative enactment or executive action to adequately enforce these rights.

2. Policies

State constitutions are full of substantive policy provisions.[117] Although sometimes articulated as "rights," these provisions function more generally as stand-alone policy positions that impact how institutional actors carry out their roles and, more importantly, dictate the substantive direction a particular community is to take. For example, a constitutional provision that establishes a public school system should not be confined to simply recognizing an individual right to public education. This type of provision transcends the realm of individual rights and serves as a constitutional command to institutional actors—particularly the legislature and the executive—to implement specific policies enacted by the constitution.

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[110] ILL. CONST. art. I, §§ 17, 19 (affecting "any employer").

[111] For example, the Puerto Rico Constitution explicitly gives workers employed by private firms the right to engage in collective bargaining. P.R. CONST. art. II, § 17.

[112] Hershkoff, *supra* note 32, at 1524.

[113] Robins v. Pruneyard Shopping Center, 592 P.2d 341, 347 (Cal. 1979).

[114] *See* Devlin, *supra* note 4, at 823-24.

[115] Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773, 774 (2010).

[116] ILL. CONST. art. I, § 17.

[117] Versteeg & Zackin, *supra* note 5, at 1644 (commenting on how state constitutions "include detailed policy choices").

Rights provisions tend to focus on individuals, while policy commands are meant to shape society itself, regardless of individual entitlement. For example, a constitution may require that certain sectors of the economy be held in public hands. When this happens, it would be odd to articulate that provision as a right bestowed on individuals. Instead, it should be regarded as a substantive policy directive pertaining to the general economic organization of the state.

This subsection first discusses the general implications of policy judgments being embedded in constitutional provisions. It then describes the two main types of policy provisions found in state constitutions, each of which addresses a different type of institutional failure.

a) The Implications of Entrenching Policies

Policy provisions often result from intentional efforts to elevate policies that were previously enacted as statutes through the ordinary political and legislative process—perhaps because of the possibilities that a future legislature might repeal the law or that a hostile court may invalidate it as contrary to the state constitution. The resulting constitutionalized policy provisions attain a higher position in the state's legal hierarchy, which in turn, has many important effects.

First, these policies bypass the legislative and executive branches. They are the result of the highest form of lawmaking—constitutional enactment through the democratic processes of a self-governing, sovereign people. The views of the political branches become mostly irrelevant since the main components of the policy have been directly adopted in the constitutional text, regardless of the preferences of legislators or executive officials. Although there are instances of state constitutional amendment processes where the legislature, executive, or other institutional actors play a significant role, the People generally remain the main engine behind the proposed modification, including at the beginning of an initiative process or at the end by way of a ratification referendum.

Second, constitutional policy provisions compel courts to enforce their content, while precluding any attempts to raise traditional objections through the political question doctrine or separation of powers concerns. This is because courts would be simply putting into effect the will of the people as expressed in the constitutional text, which courts are required to follow. If, for example, the state constitution bans the death penalty, courts must enforce this policy when, for whatever reason, a governmental actor seeks to circumvent this prohibition. In this situation, a court would not be able to claim that the issue is outside its judicial role or that it is up to the political branches or the political process. When such a specific policy judgment has been constitutionalized, it becomes wholly justiciable and enforceable by courts.

Third, because these policies now have constitutional rank, they are inherently relevant in any legal analysis that relates to the issues they address.

When a state court interprets a particular statute that is related to a substantive policy provision found in the state constitution, it should interpret and apply the statutory scheme through the lens of the constitutionalized policy. This goes further than ensuring the statute's compatibility with the relevant constitutional provision; it requires that the content of the statute itself be distilled using a constitutional filter. In other words, the specific content of a statute would be viewed through the prism of the relevant constitutional provision and not just as a simple, ordinary statute. If, for instance, the state constitution includes general language regarding environmental conservation, a state statute that protects wildlife, beachfronts, or waterways should be interpreted and enforced in a constitutionally sensitive manner. This could include broadening the reach and effects of the statute at issue.

There are, of course, different types of policy provisions found in state constitutions.[118] Some policy provisions are general statements that may not be enforceable by courts but nonetheless can play an important role in statutory interpretation. Others are specific directives about socioeconomic issues that are designed to be wholly enforceable by courts.[119] Each provision's text, structure, intent, and history will be critical in determining whether it is a self-executing command that offers very little discretion on the part of the institutional actors charged with its observance and enforcement, or if it is a programmatic policy statement that still leaves some room for legislatures and executive officials to exercise their own policy judgments.[120] But regardless of whether the provision is direct (self-executing) or indirect (programmatic), it is a constitutionalized policy *that cannot be simply ignored by courts.*

As a historical matter, state constitutional drafters have addressed two types of institutional failures. First, unresponsive legislatures that, even when faced with overwhelming popular support for a particular policy, refuse to enact it through the ordinary political process.[121] Second, hostile courts that strike down a policy as incompatible with the state constitution when it is enacted as a statute.[122] Each problem has generated different historical responses by state constitutional drafters.

b) Policy Provisions That Result from Legislative Inaction

As to the first problem—an unresponsive legislature—one preferred solution has been to directly entrench the particular policy in the state constitution using clear and unequivocal language. These are the kinds of policy

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[118] *See* Usman, *supra* note 5, at 1471.

[119] *See* Soohoo & Goldberg, *supra* note 3, at 1046.

[120] Hershkoff, *supra* note 20, at 826.

[121] *See, e.g.*, Hershkoff, *supra* note 32, at 1540 (noting how "[d]istrust of legislative activity provides an important window through which to view state constitutional positive rights"); *see also* Zeller, *supra* note 30, at 736 (referencing, for example, the "disparities with and the perceived consequences of legislative failure to address inequality").

[122] *See, e.g.*, Farinacci-Fernós, *supra* note 19, at 435.

commands that completely bypass the ordinary legislative and political process.[123] The main textual articulation of this phenomenon is the use of the word "shall" within the relevant constitutional provision.[124] Ultimately, this type of provision functions "as a substantive constraint on legislative power."[125]

The specific wording of the provision will be key in distinguishing between generic provisions stated at a very high level of generality—with the accompanying enforcement problems faced by courts in circumstances of legislative inaction[126]—and more targeted provisions that are clearly self-executing and can be easily enforced by courts. An example of a clearly self-executing policy provision that leaves no room for legislative discretion is article IV, section 46 of the Michigan Constitution: "[n]o law shall be enacted providing for the penalty of death."[127] The same framework can be seen in Hawaii's constitutional policy regarding nuclear power.[128] Other times, a state constitution will articulate a particular policy with detailed content. Colorado's approach to marijuana is an example of this.[129]

One important textual clue comes from identifying the proper subject of the provision and, therefore, the object of the normative command. Sometimes, the subject is the legislature itself, which means that there is an additional institutional hurdle between the substantive issue, the obligation to act, and the reviewing court.[130] The effect of such a provision is not to establish the policy but to require the legislature to establish one *within its operative bounds*. The legislature has broad discretion to determine *how* to carry out the command but has no discretion to decide *if* to follow it.

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[123] *See, e.g.*, Hershkoff, *supra* note 32, at 1540.

[124] *See, e.g.*, MICH. CONST. art. I, § 21 ("No person shall be imprisoned for debt arising out of or founded on contract, express or implied, except in cases of fraud or breach of trust."); S.D. CONST. art. XIV, § 1 ("The charitable and penal institutions of the state of South Dakota shall consist of a penitentiary, a hospital for the mentally ill, a school for the developmentally disabled, and a reform school for juveniles.").

[125] Hershkoff, *supra* note 32, at 1540; *see, e.g.*, ARK. CONST. art. XIV, § 1 ("[T]he State shall ever maintain a general, suitable and efficient system of free public schools.").

[126] *See, e.g.*, N.C. CONST. art. XIV, § 5 ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . . ."); WYO. CONST. art. I, § 15 ("The penal code shall be framed on the humane principles of reformation and prevention.").

[127] MICH. CONST. art. IV, § 46.

[128] HAW. CONST. art. XI, § 8 ("No nuclear fission power plant shall be constructed or radioactive material disposed of in the State without the prior approval by a two-thirds vote in each house of the legislature.").

[129] *See* COLO. CONST. art. XVIII, § 16. Florida and Missouri have similar provisions. *See* FLA. CONST. art. X, § 29; MO. CONST. art. XIV.

[130] *See, e.g.*, ALASKA CONST. art. VII, § 4 ("The *legislature* shall provide for the promotion and protection of public health.") (emphasis added). But compare with instances in which the subject of the provision is the State itself and not its legislature. *See* HAW. CONST. art. II, § 1 ("The *State* shall provide for the protection and promotion of the public health.") (emphasis added); *see also* KY. CONST. § 243 ("The General Assembly shall, by law, fix the minimum ages at which children may be employed in places dangerous to life or health, or injurious to morals . . . .").

These situations pose the hardest questions for state courts, as they would need to analyze whether the legislature sufficiently fulfilled its constitutional obligation to act. In instances of complete abandonment, that determination may not be particularly difficult, but courts may be required to take provisional measures to address the legislative inaction while, at the same time, ordering the legislature to act *within the general parameters of the relevant constitutional provision*.[131] In other circumstances, the court would have to determine how much legislative action is enough to comply with the constitutional minimum. Some state constitutional provisions establishing public school systems are a prime example of this phenomenon.[132] In these states, the existence of the school system itself is a constitutional requirement, with all the normative consequences that entails—such as recognition of an individual right to receive a public education. The legislature is barred from dismantling the system or even from taking specific steps to seriously undermine it. If that were to happen, a state court could strike down the legislative action as incompatible with the general constitutional command.

Other times, the constitutional text will establish a general right or policy, followed by a direct command to the legislature to implement it. The key question is if courts can determine instances of legislative failure to act and, thus, issue a judicial requirement to the legislative branch to obey the constitutional command. In any event, regardless of the legislature's compliance with the command to adopt implementing legislation, the general right may sometimes still be worded in self-executing terms. In other words, there are two separate commands issued by the constitutional text: first, the recognition of a general, self-executing constitutional right or policy, and second, a separate order to the legislature to enact the appropriate accompanying measures. In these circumstances, any measure adopted by the legislature would simply *complement* the main constitutional provision. A good example of this phenomenon is article I, section 22 of the Alaska Constitution, which states that "[t]he right of the people to privacy is *recognized* and *shall* not be infringed. The legislature *shall* implement this section."[133] Even if

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[131] *See, e.g.*, KAN. CONST. art. VII, § 1 ("Institutions for the benefit of mentally or physically incapacitated or handicapped persons . . . *shall* be fostered and supported by the state, subject to such regulations as may be *prescribed by law.*") (emphases added).

[132] *See, e.g.*, DEL. CONST. art. X, § 1 ("The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools . . . ."); MISS. CONST. art. VIII, § 201 ("The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe."); OKLA. CONST. art. XIII, § 1 ("The Legislature shall establish and maintain a system of free public schools . . . ."); S.C. CONST. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools . . . ."). Note that, in all these instances, the legislature has considerable discretion as to *how* to establish and maintain this system, but the constitution makes the initial determination that it will be free of charge, thus depriving the legislature of that policy choice. *See also* KY. CONST. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.").

[133] ALASKA CONST. art. I, § 22 (emphases added).

the legislature fails in its obligation to implement this provision, the first sentence has sufficient force to be deemed self-executing and to establish a general right to privacy.[134]

c) Policy Provisions That Result from Judicial Hostility

As to the second problem—hostile state courts—the answer has been to entrench authorizing language in the state constitution, which makes it clear that the legislative enactment of a particular policy does not violate the constitution.[135] In other words, it takes away the power of courts to strike the policy down as unconstitutional. However, the legislature remains mostly free to determine whether to enact the policy in the first place. The main textual articulation of this phenomenon is the use of the word "may" within the relevant constitutional provision,[136] but another way of reaching the same result is through the phrase "shall have the power to." In these instances, although the constitutional provision includes the word "shall," it is quite clear that it refers to an authorization to act, instead of an obligation to act.[137] The same can be said about similar textual structures.[138]

It should be stressed that—even in instances of purely discretionary language that is not self-executing and, therefore, cannot be directly enforced in court without accompanying legislation—these provisions are still relevant to statutory interpretation and judicial enforcement. When the legislature finally acts in accordance with such a provision, the enacted legislation should be analyzed and applied through a constitutional lens. By doing so, courts can broaden the potential scope and reach of a particular statute precisely because of its constitutional roots. For example, if a state legislature establishes a detailed statutory scheme regarding worker safety and the state constitution includes general language regarding that issue, the enforcement of such a scheme should take into account the constitutional component.

Finally, in some cases, a constitutional provision may incorporate *both* mandatory and discretionary language. For example, article X, section 1 of the Illinois Constitution states:

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[134] *See also* N.C. CONST. art I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

[135] Usman, *supra* note 5, at 1513.

[136] *See, e.g.*, LA. CONST. art. XII, § 8 ("The legislature may establish a system of economic and social welfare, unemployment compensation, and public health."); NEB. CONST. art. XV, § 8 ("Laws may be enacted regulating the hours and conditions of employment of women and children, securing to such employees a proper minimum wage."); VT. CONST. ch. 2, § 70 ("The General Assembly may pass laws compelling compensation for injuries received by employees in the course of their employment . . . .").

[137] *See, e.g.*, HAW. CONST. art. IX, § 2 ("The State shall have the power to provide for the treatment and rehabilitation of handicapped persons.").

[138] *See, e.g.*, N.Y. CONST. art. I, § 18 ("Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees . . . .").

> The State *shall provide* for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level *shall be free*. There *may be* such other free education as the General Assembly provides by law.[139]

Note the combination of a general policy requirement (establishment of a public educational system) and a specific policy command (that it be free of charge through a particular level), while also authorizing the state legislature to, in its discretion, extend that specific policy to other instances (higher education).

3. Structures

One final difference in substantive content is that state constitutions design institutional structures that are different from the federal model. This divergence partially stems from state experiences of the failures of representative democracy.[140]

The potential dysfunction of the ordinary political and legislative process is normally addressed through two related avenues. First, through the adoption of direct democracy mechanisms, including recalls, popular initiatives, and referenda. These structural tools allow the People to correct institutional dysfunctions without intermediaries. This represents an important safeguard against the failures of representative democracy. Through them, the People reserve for themselves the power to have the final word. Second, these direct democracy mechanisms allow the People to further address dysfunction by expressly entrenching specific policy choices, which takes certain issues off the table for the ordinary political process and prevents legislatures and courts from ignoring popular preferences as to those matters.[141]

State constitutions not only shape the relationship between the People and their government, but also construct their own frameworks for separation of powers. Each state has considerable leeway in how to structure its own government, and though states must respect a republican form of government, there is considerable room for creativity within those bounds. In addition, each time the people of a state entrench an enforceable substantive provision in their constitution—whether it be an individual right or a specific policy preference—they alter the balance of power between the branches. Finally, some state constitutions broaden the possible exercise of

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[139] ILL. CONST. art. X, § 1 (emphases added); *see also* N.D. CONST. art. VIII, § 2 ("The legislative assembly shall provide for a uniform system of free public schools throughout the state, beginning with the primary and extending through all grades up and including schools of higher education, except that the legislative assembly may authorize tuition, fees and service charges to assist in the financing of public schools of higher education.").

[140] Farinacci-Fernós, *supra* note 19, at 432.

[141] Hershkoff & Loffredo, *supra* note 9, at 929 ("The decision to include socio-economic provisions in a state constitution thus is understood as a mandate to the legislature that narrows the scope of political discretion.").

judicial power by state courts—not only by defining it differently, but also by removing many of the obstacles that exist at the federal level.[142] Notably, the texts of most state constitutions *omit* a case or controversy requirement and *include* an open courts provision.[143] By omitting the former, courts become less bound by justiciability concerns. By including the latter, courts operate on solid ground when they widen their scope regarding the types of issues they may adjudicate. The combination of these two factors represents a clear break from the federal experience. At the very least, as we will see, these provisions impede the acritical importation and application of federal justiciability doctrines. They could also require the adoption of a radically different view of what constitutes a "justiciable" issue at the state level.

III. The Problem of Judicial Underenforcement

The development of state constitutional law seems to be permanently caught between the problem of judicial underenforcement and the promise of its full realization.[144] Unfortunately, except for particular state courts and specific historical moments that live up to the real potential of state constitutional law,[145] judicial underenforcement seems to be the driving force behind the current paradigm regarding state constitutions.[146]

Of course, not all state courts are guilty of the sin of underenforcement. For example, Versteeg and Zackin note that some state courts "have demonstrated an increased willingness to enforce" socio-economic rights in certain circumstances.[147] But these instances are rare and isolated,[148] and more importantly, they lack a sophisticated theory as to the development of state constitutional law. As a result, most of the substantive content found in state constitutions remains severely underutilized.[149]

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[142] This has the effect of altering "the relation of the judiciary to the other branches of government, serving to expand or contract the jurisdictional space in which courts review and assess political outputs." *Id.* at 929-30.

[143] *See* discussion *infra* section IV.A.

[144] *See* Yeargain, *supra* note 1, at 367 ("Since the 1970's, state courts emerged as an attractive venue for vindicating constitutional rights.").

[145] *See* Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 Ga. L. Rev. 327, 328 (1990) (referencing a "renaissance in state constitutional law" at that time).

[146] *See* Friedman, *supra* note 5, at 784; *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 763 (1992) (characterizing state constitutional law as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements").

[147] Versteeg & Zackin, *supra* note 5, at 1695.

[148] Hershkoff & Loffredo, *supra* note 9, at 924 ("Other state courts, however, treat socio-economic constitutional provisions as nonjusticiable and so underutilize the authority that the state constitution sets out."); *see also* Pascal, *supra* note 98, at 863 ("Although two dozen state constitutions contain some type of affirmative guarantee of welfare rights, state courts are extremely reluctant to enforce those rights.").

[149] *See* Hershkoff & Loffredo, *supra* note 9, at 925; Pascal, *supra* note 98, at 864 (noting that "state courts have shown a pronounced reluctance to enforce a broad range of constitutionally enshrined positive rights").

The magnitude of judicial underenforcement that persists in the face of explicit textual provisions found in state constitutions supports a charge of clear institutional failure on the part of state courts. There is simply very little justification for this sort of judicial abdication in the presence of clear textual commands handed down by state constitutional drafters.[150] The textual basis for the robust development of state constitutional law exists.[151] All that is missing are willing courts.[152]

As discussed in Part II, there are several fundamental differences between state constitutions and their federal counterpart. The cumulative effect of these differences creates a normative imperative. State courts must approach, interpret, and apply their respective state constitutions without resorting to federal doctrines and practices that respond to a different legal and normative reality than the one state courts inhabit. This normative imperative grows alongside the ever-widening gap between the promise of state constitutional law and its current underdevelopment by state courts.[153] In order to bridge this dangerous gap, federalization must be rejected.

With respect to state court views of the substantive content of state constitutions, it seems that the current situation remains one where "[s]tate courts' underutilization of state constitutional socio-economic provisions may reflect a lingering skepticism about the legitimacy of 'positive rights' and whether they ought to count as rights in any conventional sense."[154] And yet, there has not been a wave of amendments to eliminate these constitutional provisions.[155] This could mean that citizens still support these rights and still expect their courts to duly enforce them. If one side is to blink, it should be the state courts.

The inclusion of substantive provisions in state constitutions also narrows the discretion of courts to remove themselves from the policy arena. This reduction in judicial discretion should not be confused with nonintervention. Quite the opposite, as courts are sometimes commanded by the People—through the entrenchment of state constitutional provisions—to intervene and enforce substantive rights and policies. This represents a

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[150] Concerns regarding lack of institutional capacity, for example, become relevant when faced with the expressed will of the People of a State through their constitution. *See* Hershkoff & Loffredo, *supra* note 9, at 935.

[151] Jack L. Landau, Couey v. Atkins: *A Reevaluation of State Justiciability Doctrine*, 79 ALB. L. REV. 1467, 1478 (2016).

[152] *See* Stern, *supra* note 7, at 174 ("Although judicial reticence in their enforcement can make such claims on state resources less robust that they might seem, they supply a textual foundation to courts inclined to effectuate guarantees of this nature.").

[153] Stern, *supra* note 7, at 169 (referring to "the gap between the state constitutional law and the aspirations for it by scholars . . . . Much of this criticism has centered on the asserted failure of state supreme courts to develop coherent and distinctive constitutional theories that do more than merely mimic federal jurisprudence.").

[154] Hershkoff & Loffredo, *supra* note 9, at 931.

[155] *Id.* (observing that "the late twentieth-century has seen a remarkable absence of legislative and popular campaigns to eliminate socio-economic rights wholesale from state constitutions").

significant deviation from the federal model, where "resolving private conflicts is properly [viewed as] the function of the legislative branch, not the judicial."[156] But in the state context, the constitution directly provides the legal norm and the specific policy, requiring courts to apply them through the ordinary adjudicative process.

A state court that refuses to do so by making appeals to judicial restraint, separation of powers, or other similar grounds would be engaging in judicial activism through inaction, since it would be thwarting the will of the sovereign and replacing that will with its own. This commonly happens when a state court decides that a particular state constitutional provision is unreviewable or unenforceable under federal paradigms.[157] The use of federal justiciability doctrines is a prime example of this phenomenon.[158]

It should be stressed that state courts are not authorized to enforce *their own policy preferences* in these circumstances. Although the end result may be a more active role for state courts at the expense of legislatures and executive officials, this role is substantively cabined by the constitutional text. In other words, courts have more power but less discretion. Ultimately, it is the will of the constitutional drafters that carries the day.

In the end, state constitutions include a wide array of substantive content that strongly counsels against the use of tools and concepts that were first created in response to experiences with the federal Constitution, which is barren of this content.[159] In other words, the doctrines currently used by federal courts are ill-suited for analyzing and enforcing these substantive state constitutional provisions. As Cynthia Soohoo and Jordan Goldberg propose, "[g]iven these differences [between state constitutions and their federal counterpart], the explicit inclusion of socio-economic rights in some state constitutions, and the lack of federal analogue for these rights, state courts interpreting these types of provisions need to look beyond federal models for enforcing state constitutional rights."[160]

IV. The Case for Defederalizing State Constitutional Law

Many federal doctrines used by state courts are based on specific assumptions that simply do not apply to state constitutions. Their use has impeded the adequate enforcement and implementation of state constitutions

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[156] Howard, *supra* note 10, at 225.

[157] *See generally* Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 Fordham L. Rev. 1263, 1284 (2012).

[158] *See* Usman, *supra* note 5, at 1497-500.

[159] Soohoo & Goldberg, *supra* note 3, at 1045 ("The different structure and purpose of state constitutions, as well as the inclusion of unique positive social or economic rights within those documents, may make it inappropriate for states to apply the same standards of review used by federal courts.").

[160] *Id.* at 1001.

and their unique substantive provisions. This Part of the Article examines three areas of federalization that urgently need to be reconsidered: (A) the federal model of justiciability, (B) the federal state action doctrine, and (C) the judicial enforcement of substantive provisions, including individual rights and policy commands. Each of these sections demonstrates that transplanting the federal practice to the state context is inappropriate given the distinct nature, history, and content of state constitutions. This Part ends by offering suggestions for how state courts can instead begin to chart their own path with respect to these three areas.

A. Justiciability

Justiciability broadly refers to whether an issue can be adjudicated by the courts. Although "[j]usticiability is itself a concept of uncertain meaning and scope [and it is] not a legal concept with a fixed content or susceptible to scientific verification,"[161] it is a bedrock principle of federal constitutional law that includes "any question relating [to] whether [the] judicial power is properly exercisable in a particular case."[162] This subsection attacks the conceptual and textual grounds for importing federal justiciability doctrine, before examining a few individual justiciability doctrines more closely.

When a state court adopts a rigid view of justiciability, it risks abstaining from enforcing important rights and policies entrenched in the state constitutional text. As we have seen, state constitutions have a lot to say about a wide range of important substantive issues, and state courts are tasked with the implementation of these provisions. One significant obstacle to this endeavor are the various federal justiciability doctrines that have been transplanted into the state judicial realm.[163] The problem is that the transplanted federal justiciability regime "exercises indirect but pervasive effect in defining the shape and content of the state judge's role: the framing effects of federal doctrine inappropriately inhibit state judges from fully utilizing the political and legal space created by state constitutional socioeconomic provisions."[164] Under federal justiciability doctrines, state courts may never be able to reach the merits regarding a whole array of important substantive provisions found in state constitutions. Thus, as Jack Landau points out, "the subject of justiciability generally—and state justiciability doctrine

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[161] Flast v. Cohen, 392 U.S. 83, 95 (1968).

[162] Robert Allen Sedler, *Standing, Justiciability and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 480 (1972).

[163] *See generally* Usman, *supra* note 5, at 1497-500; *see also* Hershkoff, *supra* note 26, at 1834 ("Many state courts draw heavily from federal justiciability principles to determine whether they can and should resolve particular disputes."); Landau, *supra* note 151, at 1467 ("State justiciability doctrine fares not much better [than the messy federal justiciability doctrine], *especially to the extent that courts draw on federal justiciability doctrine in recognizing constitutional constraints on their authority to exercise judicial power*.") (emphasis added).

[164] Hershkoff & Loffredo, *supra* note 9, at 969.

particularly—is of enormous practical significance."[165] Justiciability constitutes ground zero for the federalization problem discussed in this Article, as it poses the greatest challenge to the adequate enforcement of state constitutions.

There are several compelling reasons why state courts should abandon federal justiciability doctrines. For starters, the conceptual foundations of federal justiciability doctrines are simply inapplicable to states, even on their own terms.[166] The current consensus is that federal justiciability doctrines are based on considerations of (1) federalism, (2) separation of powers, and (3) individual liberty.[167] None of these factors appear in the state constitutional context.[168] As we saw earlier, "[t]he 'judicial power' conferred in state constitutions and exercised by state courts is markedly different from what federal courts are permitted to exercise under Article III."[169] Those differences are even more significant when analyzing the applicability of each one of the conceptual foundations of federal justiciability doctrines in the state context.

Starting with federalism, federal justiciability is grounded in part on the notion that federal courts should not unduly nationalize matters that are ordinarily handled by the states. Because of the possible nationwide effects of federal court decisions, federalism principles dictate caution when exercising the judicial power of the United States. Justiciability is one of the byproducts of this approach. But it is self-evident that this consideration is inapplicable to the states.[170] If anything, federalism principles actually *strengthen the notion that state justiciability must strike a different, if not opposite, track from the federal paradigm*. Federalism in the United States is premised on the robust development of state law, including state constitutional law, since states are the ones that possess the police power, and their courts are supposed to be the main fora for the adjudication of claims. When state judges imitate federal courts, they undermine federalism by insisting on a single national formula. In that sense, the defederalization of state justiciability is much more consistent with federalism than the ill-advised practice of sticking to the lockstep approach.

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[165] Landau, *supra* note 6, at 1310.

[166] Landau, *supra* note 151, at 1467.

[167] *See, e.g.*, C. Douglas Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 863 (1985) (noting that many decisions of the U.S. Supreme Court during that era "emphasized separation of powers and federalism concerns in applying [the doctrines of] justiciability"). According to Hershkoff, scholars also argue "that federal justiciability doctrine protects individual rights by ensuring the proper representation of interests as a requisite for according res judicata effect to judgments." Hershkoff, *supra* note 26, at 1935.

[168] Maria Yvonne Hodgins, *State Action and Gender (In)Equality: The Untapped Power of Washington's Equal Rights Amendment*, 94 Wash. L. Rev. Online 27, 28 (2019) (noting that "concerns of federalism and separation of powers that are present at the federal level . . . are absent at the state level").

[169] Landau, *supra* note 6, at 1323.

[170] Howard, *supra* note 10, at 262.

As for the separation of powers, federal justiciability is based on the idea of limiting and restraining the role of the unelected judiciary *vis-à-vis* the elected branches. Most matters are intended to be left to the ordinary political process, with courts exercising the power of judicial review only when necessary to adjudicate genuine disputes among adverse parties. However, state constitutional drafters are free to empower state courts to enforce the rights and policies entrenched in state constitutions without running afoul of this principle. This is particularly true when one of the main purposes behind the entrenchment of these provisions is precisely *to circumvent ordinary legislatures*. A state constitution does not violate separation of powers when it decides to empower courts as enforcers of the constitutional drafters' will at the expense of the legislature. And as a practical matter, many state judges *are* elected by the public, thus eliminating another separation of powers concern that only applies to the unelected federal judiciary.

Finally, with respect to individual liberty, state court adjudication of constitutional rights and policies adopted through democratic mechanisms is quite consistent with the rule of law and notions of democratic self-government. Individual liberty is strengthened when violations of constitutional rights are vindicated through the judicial process, and conversely, liberty is threatened when constitutional violations go unchecked.

In addition to the conceptual weakness of transplanting federal justiciability doctrine, there are also significant textual reasons it should be abandoned. First and foremost, the case-or-controversy requirement in the text of Article III of the U.S. Constitution, which plays a fundamental role in terms of justiciability, is mostly absent from state constitutions.[171] This has important doctrinal consequences. For example, the presence or absence of justiciability does not automatically have jurisdictional effects. State justiciability doctrines can be grounded exclusively on general notions of the separation of powers and prudential considerations that do not deprive courts of their jurisdiction to analyze the merits of a particular action. This means that state courts are able to decide whether to dismiss or entertain a non-justiciable action based solely on prudential and institutional considerations and not on jurisdictional ones. In some instances, the appropriate result may be to adjudicate the merits of the specific claim instead of dismissing it. As a result, many cases that would be thrown out of federal court can still be adjudicated on the merits in state court.

Another important textual consideration is the proliferation of "open courts" provisions across state constitutional texts.[172] Some of these

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[171] *See* Landau, *supra* note 6, at 1316 ("In other words, the principal textual justification for federal justiciability analysis simply does not apply to state courts.").

[172] *See* ALA. CONST. art. I, § 13; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; ILL. CONST. art. I, § 12; KAN. CONST. art. I, § 18; LA. CONST. art. I, § 22; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OKLA. CONST. art. II, § 6; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI,

provisions are quite explicit in terms of recognizing a constitutional right of access to the judicial forum. Others are worded more implicitly in terms of establishing a general right to seek judicial redress for wrongs suffered. These provisions are consistent with the general jurisdiction of state courts, as opposed to the limited jurisdiction of federal courts. Their inclusion in the text of several state constitutions, in combination with the absence of case-or-controversy provisions in most of them, points to a markedly different legal background than the one in which federal justiciability doctrines are based.

Given the vast conceptual and textual differences just discussed, it makes sense that state courts have had to grapple with the question of justiciability.[173] According to Landau, "[i]n the last few years, some state courts have taken the plunge and reexamined the state constitutional basis for the imposition of justiciability limitations on the exercise of judicial power."[174] For these courts, the principal challenge has been to establish a *definite* case against automatic federalization and in favor of charting a different course. But for the most part, "few state courts have given the matter the sort of attention it deserves."[175] Furthermore, as Landau suggests,

> [a] number of states have explicitly stated that they are not bound by federal justiciability doctrine. And quite a number of them have developed exceptions or qualifications that are foreign to the federal case law. Still, most of those courts continue to rely on the federal doctrine at least as the starting point for state justiciability analysis.[176]

It seems that even those state courts that have recognized the evident and inherent problems of simply importing federal justiciability doctrines to the state context have difficulties in completely shedding the practice. In order to develop a truly autochthonous state justiciability doctrine, state courts must directly account for the normative foundations of state constitutional law in general, as well as their own state constitution in particular.

As a general matter, state judiciaries have a duty to independently analyze the compatibility of each justiciability doctrine with their own state constitutional structure. This exercise includes evaluating the applicability of doctrines such as standing, mootness, and advisory opinions, to name a

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§ 20; TENN. CONST. art. I, § 17; UTAH CONST. art. I, § 11; VT. CONST. ch. 1, § 4; W.V. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

[173] Landau, *supra* note 151, at 1476 ("[E]very state supreme court, at one time or another, has faced the task of determining whether [its] constitutional authority is limited by considerations of justiciability."); *see also* Matthew Hall & Christian Turner, *The Nature of Standing*, 29 WM. & MARY BILL RTS. J. 67, 73 (2020) ("It is unsurprising, then, that state justiciability doctrines differ—often significantly—from Article III-based federal doctrine.").

[174] Landau, *supra* note 6, at 1311.

[175] *Id.* at 1310.

[176] *Id.* at 1315 (emphasis omitted).

few.[177] But there are reasons to be especially skeptical of the importation of the political question doctrine[178]—which is both consistently used by state courts to avoid constitutional questions and inherently problematic in the state context.

The political question doctrine is particularly inapplicable to state constitutional provisions that have no federal counterpart.[179] Disputes that could be considered political questions at the federal level—given the absence of guidance from the constitutional text—are not necessarily political questions at the state level if they are squarely addressed by the state constitution. In such cases, it is the duty of state courts to adjudicate the dispute in a manner consistent with the commands of the state constitution. Automatic recourse to the political question doctrine in these circumstances would ignore both the plain text of the state constitution and the will of its drafters, thus abdicating the judicial role.[180]

And yet, many state courts continue to apply federal justiciability doctrines, regardless of whether there are sufficient reasons to chart an alternative course. According to Hershkoff and Loffredo, "state courts have increasingly invoked the federal political question doctrine as grounds for dismissing state constitutional socio-economic cases as nonjusticiable."[181] The fact that state constitutional drafters included substantive provisions that have no federal analogue is a clear indication that the enforcement of those provisions *is not a political question left to the discretion of the legislative or executive branch*. On the contrary, the adoption of these substantive rights and policies in the constitutional text was meant to bypass unresponsive legislatures. Courts are required to enforce that will.

Standing is another federal justiciability doctrine that has been imported to the states. In this area, "[s]ome states have followed federal standing doctrine to the letter, while many others have adopted discretionary standing

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[177] *See* Hershkoff, *supra* note 26, at 1835-37.

[178] *See* Stern, *supra* note 7, at 180. In particular, it seems "[s]ometimes state courts have followed (often without much introspection) the federal practice of acknowledging the existence of a right but leaving enforcement to government officials." Long, *supra* note 10, at 949. This is especially true in the context of positive rights. According to Hershkoff and Loffredo, "[m]any state courts continue to treat positive rights provisions as nonjusticiable or defer to legislative decisions without determining whether the government action conforms to constitutional commitments." Hershkoff & Loffredo, *supra* note 9, at 955. Moreover, regarding socioeconomic rights, "dismissals of cases on nonjusticiability grounds appear to be on the rise." *Id.*; *see also* Soohoo & Goldberg, *supra* note 3, at 999.

[179] *See* Stern, *supra* note 7, at 188 ("[S]tate courts must carve out distinct ground when addressing the justiciability of provisions that have no parallel in the United States Constitution.").

[180] Usman, *supra* note 5, at 1517-18 (noting that recourse to the federal political question doctrine in the state context amounts to "an improper abdication of the court's constitutional role"); *see also* Soohoo & Goldberg, *supra* note 3, at 1047. Hershkoff and Loffredo suggest that, even in instances where an issue has been delegated to another branch, courts need to interpret and "articulate the scope and nature of the constitution's meaning, even if the other branches possess initial remedial responsibility to effectuate a constitutional duty." Hershkoff & Loffredo, *supra* note 9, at 956. This is particularly true in the context of substantive provisions.

[181] Hershkoff & Loffredo, *supra* note 9, at 958.

regimes that differ markedly from Article III standing doctrine."[182] Among the approaches that are currently allowed at the state level but not the federal level are so-called "public-interest standing"[183] and taxpayer standing.[184] With respect to the latter, "permissive state taxpayer standing doctrines are closely linked to an ubiquitous type of state constitutional provision that is conspicuously absent from the U.S. Constitution."[185] Another notable difference is that state legislatures are able to grant statutory standing to parties that would otherwise be unable to demonstrate the type of injury that is required under Article III of the federal Constitution.[186] Legislative grants of standing are a common phenomena in the United States that state courts should accept as consistent with the general police powers exercised by states, the general jurisdiction possessed by state courts, and the "open courts" provisions found in many state constitutions.

Finally, it is worth noting that many states allow for advisory opinions,[187] which are, of course, unavailable at the federal level. This practice has been commonplace for many years and has proven quite uncontroversial, which strengthens the argument that federal justiciability doctrines are not based on universal truths that states must follow. In summary, "state courts should be open to rethinking the subject of justiciability from the ground up [since] the essential underpinnings of federal justiciability doctrine do not translate well to state courts."[188]

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[182] Hall & Turner, *supra* note 173, at 73; *see also* Long, *supra* note 10, at 949 (explaining why state courts, as judicial bodies that possess general jurisdiction, "must grant standing liberally").

[183] *See* Hall & Turner, *supra* note 173, at 73. *See generally* John Dimanno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 U. Conn. L. Rev. 639 (2008). Public-interest standing allows citizens, in certain circumstances, to seek the adequate enforcement of public policies that transcend private disputes. Something similar happens in the context of taxpayer suits, where citizens are able to question governmental action that may be in violation of the state constitution simply because of their status as taxpayers.

[184] *See* Urquhart, *supra* note 157, at 1267 (noting that "state courts grant taxpayers much broader standing than federal courts to challenge unlawful state expenditures").

[185] *Id*. According to Urquhart, thirty-six states "clearly permit state taxpayer lawsuits," eight states prohibit them, and there is a lack of clarity as to the remaining six states. *Id.* at 1277. Curiously enough, three of the eight states that do not allow taxpayer suits do permit public interest lawsuits. *Id.* at 1278.

[186] *See generally* James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported into State Constitutional Law?*, 108 Colum. L. Rev. 839 (2008).

[187] *See* Hall & Turner, *supra* note 173, at 74. Among these states are Alabama, Colorado, Delaware, Florida, Massachusetts, Michigan, Minnesota, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Dakota, and Texas. *Id.*

[188] Landau, *supra* note 6, at 1310.

B. State Action

Most federal constitutional rights only operate on governmental entities and actors.[189] This is the foundation for the state action doctrine that permeates federal constitutional law as taught in law schools across the United States and as routinely applied as a matter of course by federal and state courts. This subsection attacks the textual and conceptual grounds for importing federal state action doctrine to state constitutional law.

In the state context, the reality is that many constitutional provisions operate, either explicitly or implicitly, against private actors. In that sense, "even though the federal government requires state action under the U.S. Constitution, states are free to impose their own requirements for seeking the protections of state constitutions."[190] In other words, state courts are untethered to the federal state action doctrine and are free to expand the reach of state constitutional rights.[191] Unfortunately, the "vast majority" of state courts have adopted a state action doctrine based on the federal experience.[192] These courts have been unable or unwilling to adequately develop a state action doctrine that actually tracks their state constitution's text, history, and structure. This is another example of acritical federalization that should be discarded in favor of developing an autochthonous approach.

The federal state action doctrine is automatically inapplicable to state constitutional provisions that are designed to operate against private actors. So the questions regarding the applicability of the state action doctrine are confined to the provisions that lack this explicit horizontality. In these cases, as David Howard explains, "[t]he first question to ask is whether the state constitution *even requires state action* before the states can apply a state action test."[193] This generates a wide array of operational, analytical, and normative consequences.

For civil and political rights, the applicability of the state action doctrine will depend on the specific language, intent, purpose, structure, and history of each individual provision. When these elements point in the direction of horizontality, the state action doctrine should be discarded. Some anti-discrimination provisions exemplify this.[194] On the other hand, when

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[189] An obvious example of a federally protected constitutional right that has clear horizontal effect is the Thirteenth Amendment's ban on slavery.

[190] Pesce, *supra* note 49, at 884.

[191] Hershkoff, *supra* note 32, at 1524 ("State courts are not required to follow the federal state action doctrine: they may choose to extend state constitutional rights even to the conduct of nongovernmental actors."); *see also* Devlin, *supra* note 4, at 825 ("[T]here are no inherent or a priori reasons for generally imposing federal state action requirements onto state constitutional guarantees.").

[192] Cole, *supra* note 145, at 330.

[193] Howard, *supra* note 10, at 240 (emphasis added).

[194] *See, e.g.*, Walker & Van Dyke, *supra* note 62, at 1429 (identifying instances where state courts appear to "reimagine the equal protection clause in a manner that does not require state action").

the relevant analysis reveals that we are dealing with classic liberal rights that only have vertical effect, then the state action doctrine may be justifiably invoked.[195]

The incompatibility of the federal state action doctrine goes beyond the obvious fact that many state constitutional rights provisions are expressly worded in horizontal terms.[196] Similar to the analysis of federal justiciability doctrine, it also results from the inapplicability of the *conceptual foundations* of the federal state action doctrine. Among these conceptual foundations are (1) the protection of "individual liberty by allowing private choice,"[197] (2) the goal of "restricting federal law and judicial authority,"[198] (3) concerns regarding separation of powers,[199] and (4) considerations related to federalism.[200] Once analyzed through the prism of state constitutional law, these foundational elements reveal their obvious incompatibilities.

The protection-of-individual-liberty rationale "is based on the idea that individuals would be denied freedom . . . if forced to conform to constitutional requirements."[201] Under this view, the state action doctrine "prevents the Constitution from superseding individual liberty and the freedom to make certain choices."[202] But individual liberty can also be furthered when fundamental rights are made applicable to private conduct. After all, private power can just as easily stifle individual liberty as governmental authority. What is more, many state constitutional provisions simply promote statutory rights that already exist in the private realm to constitutional status. The enforcement of such constitutional rights is not an inherent threat to individual liberty. On the contrary, it could be an important tool in the project of advancing human freedom.

Another foundational principle of the federal state action doctrine is the notion that, without it, courts would become unrestricted referees of private behavior. This, in turn, would unjustifiably enlarge the scope and reach of

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[195] *See* Howard, *supra* note 10, at 241 ("Like the federal courts, most states interpret their state constitutions to require state action prior to finding a constitutional violation."). Of course, even in these circumstances, a more flexible version of the doctrine should be applied by state courts. *Id.* at 240. This adequately considers the important normative effects that stem from the nature of state constitutions and the operation of state courts. Hodgins, *supra* note 168, at 41 (noting that "state courts have the freedom to be more flexible in their interpretation and definition of state action"). In other words, even in these circumstances, automatic federalization should be avoided. *See* Howard, *supra* note 10, at 240 ("State action can also arise under state constitutions, where federal precedent, while pervasive, is not binding."). As a result, a "lesser requirement for state action under certain provisions" would be warranted. *Id.* at 250.

[196] *See, e.g.*, Howard, *supra* note 10, at 247 ("Some state constitutions, like the Washington Constitution, do not explicitly require state action in the text.").

[197] *Id.* at 224; *see also* Cole, *supra* note 145, at 347.

[198] Howard, *supra* note 10, at 224.

[199] *Id.* at 224-25; Hodgins, *supra* note 168, at 28; Cole, *supra* note 145, at 347.

[200] Hodgins, *supra* note 168, at 28 (stating that "concerns of federalism and separation of powers . . . are present at the federal level, but . . . are absent at the state level").

[201] Howard, *supra* note 10, at 224.

[202] *Id.*

judicial power.[203] However, there are multiple problems with applying this to the state context. First, it is ultimately an issue of whether *state constitutional drafters*, not courts, decided to abandon or disregard the traditional federal view of the state action doctrine. If so, there is no unilateral power grab by the courts. Quite the opposite: they would be faithfully carrying out the will of the constitutional drafters. Second, courts already supervise private conduct. The only difference is that, ordinarily, they do so through the enforcement of *statutory* rights or legislatively created private causes of action. It is up to the political process whether courts supervise private conduct as a *constitutional imperative* or a *legislative mandate*. If that political process culminated with the People deciding to elevate a particular right or policy to constitutional status, it would be wrong to sabotage their will by depriving courts of the tools needed for adequate enforcement. Sometimes, it is the democratic will of a self-governing people to entrench in their constitution rights that transcend state action and to empower courts to enforce those rights.

As we saw when analyzing the conceptual basis of federal justiciability doctrines, the principle of separation of powers does not mandate the adoption of a rigid, pre-existing, and free-standing governmental structure. It allows for multiple articulations of the distribution of public power, and constitutional drafters have a wide berth when designing governmental structures that are consistent with the separation of powers. Many state governments have deviated, even if only slightly, from the federal structure.[204] This has multiple consequences. First, federal notions of separation of powers are, at best, not automatically applicable to the state constitutional context. At worst, there are instances where these notions are simply incompatible with the operation of state constitutional rights. Second, state courts should develop local state action doctrines—when appropriate—that draw exclusively on their own state constitution's articulation of the principle of the separation of powers. It may be the case that a particular state's constitutional drafters adopted a specific modality of the separation of powers that, in turn, supplies the normative foundation of a localized version of the state action doctrine.

Finally, as we saw earlier regarding justiciability, federalism as a conceptual pillar of the state action doctrine has no place in the state constitutional context. If anything, federalism considerations point in the opposite direction.

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[203] Devlin, *supra* note 4, at 825 ("The underlying concern appears to be that if courts abandon threshold requirements of state action there will be no principled means to prevent the 'constitutionalization' of an unacceptably broad range of private law and private relationships.").

[204] *See* Howard, *supra* note 10, at 224-25 (discussing how the "separation of powers between the legislature and the courts" at the federal level serves as a basis for the current articulation of the federal state action doctrine).

C. Judicial Enforcement

Federal courts often find rights without any judicial remedies. Due to federalization, state courts have started to do the same.[205] This subsection advocates for an alternative approach that better accounts for the historical and legal context of state constitutions.

As we saw in Part II, state constitutions include broader articulations of rights found in the U.S. Constitution, as well as an array of substantive provisions that have no federal constitutional counterparts. But even state constitutional provisions that were expressly designed to *deviate* from the federal experience have been severely underenforced by state courts *precisely because of* federal judicial practices and models.[206] In that sense, federalization has claimed as victims both rights that mirror the federal text and those that intentionally wish to break from it. As we have seen, there is an immense variety in terms of the wording—and corresponding operational effect—of substantive policy provisions in state constitutions. Although there is no one-size-fits-all approach to their interpretation and implementation, it is evident that merely adopting the current federal framework for these matters would be highly unjustified.

For the rights that have federal counterparts, courts should carry out an independent analysis of the state version. This examination should take into account (1) the general nature and role of state constitutions in a federalist system and (2) the specific language, history, purpose, and intent related to the particular right at issue.

For the rights that have no federal counterpart—especially substantive provisions like socioeconomic rights—state courts should adopt the view that these rights and policies are, at least presumptively, judicially enforceable. When a particular issue is entrenched in a state constitution, there are strong reasons to believe that courts are authorized to enforce it within the bounds of the text and other relevant considerations, regardless of the subject matter. There is no normative reason to treat a socioeconomic right such as overtime pay any differently from a political right such as free speech. As a result, "[w]hen courts are asked to adjudicate violations of the government's negative obligation to refrain from interfering with socio-economic rights, judicial review would be similar to review of traditional civil and political rights claims."[207] In most instances, state constitutional drafters have placed both kinds of rights in the same normative sphere by adopting both types

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[205] Long, *supra* note 10, at 949 ("Sometimes state courts have followed (often without much introspection) the federal practice of acknowledging the existence of a right but leaving enforcement to government officials.").

[206] Soohoo & Goldberg, *supra* note 3, at 998-99 ("The failure of state courts to enforce socio-economic rights provisions can be traced to a reluctance to enforce state constitutional rights *where there is no clear federal analogue.*") (emphasis added).

[207] *Id.* at 1010.

using similar language and placing them in the same places within the constitutional text.

Socioeconomic rights in general, and positive rights in particular, present a challenge for state courts that have extensively imported federal judicial practices. While some may believe that these types of provisions constitute "political questions that are better left to the political branches,"[208] this belief discounts the fact that the state constitutional drafters decided—as a political matter—to answer these questions through the constitutional text. "Americans have enshrined many explicit positive rights in their state constitutions,"[209] and the minimum these citizens can expect is that courts will prioritize their sovereign commands over doctrines created by federal courts for a dramatically different constitutional universe. When adequately applied by state courts that acknowledge their duty to follow the democratic determinations of the People, positive rights can help establish a "minimum social welfare" as a constitutional imperative.[210] Because they compel action, positive rights require enforcing courts to be more active and interventionist.[211] This outcome is not the result of an illegitimate instance of judicial activism, usurpation, or overreach. Instead, it is a necessary consequence of duly enforcing the will of the People as established in the text of a particular state's constitution. As Hershkoff and Loffredo observe, "some positive rights in state constitutions are intended to alter the relation of the judiciary to the other branches of government, serving to expand or contract the jurisdictional space in which courts review and assess political outputs."[212]

Many state constitutions are not silent regarding their own judicial enforcement. For example, state constitutions include express statements regarding self-execution of certain provisions. Article XVI, section 16 of the Hawaii Constitution goes even further, stating that "[t]he provisions *of this constitution* shall be self-executing to the fullest extent that their respective natures permit."[213] When state constitutional provisions address self-execution as a general matter or for particular provisions, judicial enforcement should follow without difficulty and state courts should abandon the federal predisposition to treat substantive constitutional provisions as inherently nonjusticiable or unenforceable.[214]

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[208] Soohoo & Goldberg, *supra* note 3, at 999.

[209] *See* Versteeg & Zackin, *supra* note 5, at 1683.

[210] *Id.*

[211] *See* Walker & Van Dyke, *supra* note 62, at 1419.

[212] Hershkoff & Loffredo, *supra* note 9, at 929-30.

[213] HAW. CONST. art. XVI, § 16 (emphasis added); *see also* S.C. CONST. art. I, § 23 ("The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms."); UTAH CONST. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

[214] *See* Versteeg & Zackin, *supra* note 5, at 1697; Hershkoff & Loffredo, *supra* note 9, at 960.

Once again, labor rights are the prime examples of self-executing state constitutional provisions. Article XV, section 15 of the Nebraska Constitution states that "[t]his article [relating to labor rights] is self-executing and shall supersede all provisions in conflict therewith."[215] The newest addition to this trend are provisions relating to reproductive choice. For example, article I, section 22(D) of the Ohio Constitution establishes unequivocally that "[t]his Section is self-executing."[216]

Sometimes, self-execution and interpretive instructions are included in the same provision. For example, the Florida Constitution's approach to minimum wage states that "[i]mplementing legislation is not required in order to enforce this amendment . . . . This amendment provides for payment of a minimum wage and shall not be construed to preempt or otherwise limit the authority of the state legislature or any other public body to adopt [more expansive measures]."[217]

A final challenge resulting from excessive federalization is the identification of the proper standard of review needed to analyze compliance with the requirements of substantive state constitutional provisions. One mistake commonly made by state courts is to automatically apply rational basis review without first determining if, as required by text, intent, history, and other relevant considerations, the particular provision under review requires a more exigent judicial analysis.[218] Here, as with other aspects of judicial enforcement of state constitutions, a new conceptual approach is urgently needed.

D. First Steps Toward Defederalizing

Defederalization should encompass most aspects of state constitutional law, starting with matters related to justiciability, state action, and judicial enforcement of substantive provisions. Removing these obstacles would allow for the development of a robust and independent approach to the interpretation and application of state constitutions.

First, as to justiciability, state courts should develop their own doctrines free from the limitations of federal law. They must account for the lack of case-or-controversy requirements, the inclusion of "open courts" provisions, the nature of state courts as forums of general jurisdiction, and the inapplicability of the political questions doctrine when it comes to subjects that the state constitution directly speaks to, regardless of their status at the federal level.

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[215] Neb. Const. art. XV, § 15.

[216] Ohio Const. art. I, § 22(D).

[217] Fla. Const. art. X, § 24(f).

[218] *See* Soohoo & Goldberg, *supra* note 3, at 1000. In the end, as Soohoo and Golberg point out, "[t]he different structure and purpose of state constitutions, as well as the inclusion of unique positive social or economic rights within those documents, may make it inappropriate for states to apply the same standards of review used by federal courts." *Id.* at 1045.

Next, with respect to the state action doctrine, state courts should consider the fact that many state constitutional provisions explicitly contain direct horizontal effects. There is simply no room for a state action doctrine for these provisions. But even in situations where there is no such express language, there is still no reason to implement a strict version of the state action doctrine. Instead, a flexible model should be adopted, one that accounts for the indirect roles that constitutional provisions should play in statutory interpretation and the adjudication of private disputes.

Finally, for the judicial enforcement of substantive constitutional provisions, state courts should start with the presumption that such provisions are to be treated the same as their more traditional brethren, such as civil and political rights. Specifically, they should presume that these provisions are wholly enforceable. They should then focus on identifying the proper standard of review, which will depend on the specific textual characteristics of the provision, as well as the intent, history, and purpose behind it. Courts should avoid the path of judicial abdication that has had the practical effect of erasing constitutional provisions that were adopted by We the People.

All of these exercises should be based on, in general, the unique nature, role, and history of state constitutions and, in particular, the specific structure and content of each individual state's document. This will almost always lead to the exploration of a different path than the one taken by federal courts. The result could be the unleashing of the full potential of state constitutional texts as they exist today. This, in turn, could start a new chapter in state constitutional law, where new substantive provisions are added to state constitutions as the peoples of the different states continue to explore new avenues of addressing legislative and judicial failures at the state and federal levels.

V. Conclusion

The familiar story of state constitutional jurisprudence tells us that most state courts act in lockstep with the doctrines, decisions, and approaches of the U.S. Supreme Court. Of course, there have been important deviations from this practice and there have always been voices calling for more independent interpretation.[219] While most of the debate has focused on the interpretation of specific individual rights, we have seen that the practice of lockstepping has also led to the importation of federal practices in terms of justiciability, state action, and judicial enforcement.[220] At the end of the day, these doctrines and practices stunt the potential development of state

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[219] *See* Howard, *supra* note 10, at 240.

[220] *See* Stern, *supra* note 7, at 178; Cole, *supra* note 145, at 330 (observing that the "vast majority of [state courts have] embraced [the federal] state action doctrine"). As to justiciability, Hershkoff explains that "[m]any state courts draw heavily from federal justiciability principles to determine whether they can and should resolve particular disputes." Hershkoff, *supra* note 26, at 1834.

constitutional law and deprive millions of people of the democratic victories they achieved through their state constitutions.

State constitutional law must be defederalized. State courts must embark on an independent and grounded analysis regarding the development of their state constitutions.[221] This process has partially begun. However, although the instinct by some state courts to chart a different path is laudable, it is not enough to simply deviate at the branches. State courts must look deeper and start their independent analysis earlier.[222]

They should start by developing autochthonous models of justiciability, state action,[223] and judicial enforcement of their constitution's substantive provisions. This exercise should take into account the different elements addressed throughout this Article, namely, (1) the distinct nature and role of state constitutions in the U.S. federal structure,[224] (2) the individual historical underpinnings of those foundational texts,[225] and (3) the specific substantive provisions—whether regarding rights or policies—that have been entrenched in these documents through the democratic mechanisms of a self-governing people.

In the end, we should encourage an "independent state constitutionalism" that is founded on each state's "constitutional experience, including text and history, which distinguishes [them] from the federal experience."[226] All that is missing are state courts willing to embrace their role as the ultimate enforcers of the will of the People. If that happens, then state constitutional law can finally achieve its full potential, and the idea of democratic self-government can continue to endure.

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[221] Stern, *supra* note 7, at 179 (emphasizing the important role that should be given to the "distinctive text, history, and legal culture of the state constitution under review").

[222] *See* Landau, *supra* note 6, at 1316.

[223] *See* Devlin, *supra* note 4, at 825 (emphasizing the role, as to the state action doctrine, of the "plain meaning of the particular state constitutional guarantees at issue, the framers' specific intent, general principles of constitutional interpretation, the need to preserve the competing rights of the allegedly infringing private parties, and in order to preserve an appropriate allocation of powers between the courts and legislatures").

[224] Hershkoff, *supra* note 26, at 1834 ("Rather than automatically adher[ing] to a federal model, state courts should independently construct judicial access rules to promote the purposes of state and local governance, including the need to encourage self governance and public participation, to promote community through the provision of public goods, to curb faction-dominated decisionmaking, and to cure adverse externalities and spillovers.").

[225] *See* Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wis. L. Rev. 1063, 1070. The historical underpinnings of most state constitutions in the United States not only explain the presence of certain rights and policies in these documents, but also necessarily inform the way in which these provisions should be interpreted and enforced. *See* Zeller, *supra* note 30, at 744-45 ("The relative importance assigned to such rights—and the likely role they play within a particular constitutional design—depends on the context in which such rights arise.").

[226] Friedman, *supra* note 5, at 788.