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The Power of the Electorate Under State Constitutions

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Abstract

Voters are special. They are the foundation of our constitutional democracy. Everything starts with the voters.

State constitutions, too, are special, as the recent surge in scholarship on state constitutions demonstrates.

This Article bridges the gap between various strands of scholarship on state constitutions, the right to vote, and democracy, making several novel claims about the way in which state constitutions protect voters. First, this Article canvasses all fifty state constitutions to conclude that they contain multiple levels of protection for the right to vote through numerous clauses that, in combination, elevate the status of voters in the constitutional structure. This Article explains these clauses and tallies how many state constitutions include each one, offering a descriptive fifty-state survey of the holistic state constitutional protection for voters. Second, this Article situates this multilayered right to vote within separation of powers principles, showing how the electorate is the most vital entity in state governance. An analogy to separation of powers ideals is a useful tool to check legislative or executive abuses of the election process. Third, this Article applies this theory to real-world voting rights disputes, arguing that courts should invalidate a law that infringes upon the multilayered right to vote. This approach differs from typical tiers of scrutiny and means-end analysis in right to vote cases. Instead, the test borrows from the non-retrogression principle once used in Voting Rights Act Section 5 cases: a plaintiff would have an evidentiary burden to show that a new law will make it harder for voters to participate or will reduce turnout. Importantly, if a legislature is taking away the power of the electorate to direct the government, then there is no valid state interest that can justify that encroachment. A plaintiff could invoke the theory

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by demonstrating empirically that a law will reduce voter participation.

A recognition of the multilayered right to vote under state constitutions, combined with an analogy to state separation of powers principles, will ensure that voters, not politicians, remain the most important actors in state governance.

INTRODUCTION

Voters are special. They are the foundation of our constitutional democracy. Everything starts with the voters.

State constitutions, too, are special, as the recent surge in scholarship on state constitutions demonstrates. Scholars and litigants have advocated for courts to use state constitutions to recognize a host of rights, especially given narrower jurisprudence from the U.S. Supreme Court under the federal Constitution on many of these issues.[1] The idea of using state constitutions to protect individual rights is not new: Justice William Brennan famously argued in 1977 that "[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[2] Even the U.S. Supreme Court has recognized the importance of state courts invoking their state constitutions, noting in *Moore v. Harper*,[3] the "independent state legislature" case, that state courts engage in traditional judicial review when they strike down a state law under the state constitution.[4]

The question remains, however, how courts should conduct that judicial review when the issues involve the very foundation of democracy itself. As I have shown in prior scholarship, state constitutions go beyond the U.S. Constitution in their conferral of voting rights, so state courts should offer stronger protection for voters as compared to federal jurisprudence, especially given the U.S. Supreme Court's narrow interpretation of the right to vote under the U.S. Constitution.[5] But a simple means-

1. *See, e.g.*, *State Constitutions and Abortion Rights*, CTR. FOR REPROD. RTS., (July 2022), https://reproductiverights.org/wp-content/uploads/2022/07/State-Constitutions-Report-July-2022.pdf [https://perma.cc/FF26-QLHR]; Quinn Yeargain, *Challenging Anti-Trans Legislation Under State Constitutions*, BRENNAN CTR. FOR JUST. (July 11, 2023), https://www.brennancenter.org/our-work/analysis-opinion/challenging-anti-trans-legislation-under-state-constitutions [https://perma.cc/L2JS-2DAW]; Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 953 (2014); G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1171–72 (1992); Steven Gow Calabresi et al., *Individual Rights Under State Constitutions in 2018: What Rights are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49, 146–50 (2018).

2. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 380 (1980) (stating that states' bills of rights "come first" in protecting individual rights).

3. 600 U.S. 1 (2023).

4. *See id.* at 36.

5. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 120–21 (2014).

ends test, where a court balances the rights of voters with the authority of state legislatures to regulate an election, has proven not up to the task. Many state courts simply fall back on federal jurisprudence that defers to states, despite the textual, contextual, and historical differences between the U.S. Constitution and state constitutions regarding the individual right to vote.[6] Pursuant to this deference to legislatures, voters suffer from judicial acceptance of laws that curtail their ability to participate fully and equally in an election.

State constitutions, however, do much more than simply confer an individual right to vote. They protect voters through multiple means, both granting the right to vote and establishing various safeguards for voters throughout the election process.[7] That is, state constitutions confer a *multilayered* right to vote that focuses on the entire electorate's participation in democracy. Based on many protections throughout state constitutions, voters enjoy an elevated status as the most important actors in state governance. Although not every state constitution is the same, all include many of the provisions that comprise the multilayered right to vote: explicit conferral of voting rights, allowance of direct democracy, free and equal elections clauses, privilege from arrest while going to and from the polls, guarantees of a secret ballot, protections against losing residency status while temporarily away, and others.[8] Thus, state constitutions, understood holistically instead of clause-by-clause, demonstrate a commitment to the electorate as a whole, granting voters an elevated, special status as the starting point for democratic legitimacy.[9]

This formulation relates to—but goes beyond—the "democracy principle" under state constitutions that Professors Jessica Bulman-Pozen and Miriam Seifter have identified.[10] That useful theory highlights how state constitutions favor popular sovereignty, majoritarianism, and political equality. Their account offers an important contribution to the election law scholarship that focuses on the structure of democratic processes. The multilayered right to vote that this Article

6. *Id.*; *see also* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 926 (2021).

7. *See* Bulman-Pozen & Seifter, *supra* note 6, at 869–71.

8. *See infra* Part I.

9. *See* Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1897 (2023) (explaining how state courts construe their state constitutions holistically).

10. *See* Bulman-Pozen & Seifter, *supra* note 6, at 861–62.

recognizes also draws upon the structure of state constitutions and their commitment to voters as the starting point for democratic legitimacy. But the theory goes beyond majoritarianism to uncover how state constitutions favor participation for all. Put differently, while the democracy principle concentrates primarily (though not exclusively) on ensuring majority rule, the multilayered right to vote recognizes the participation interest of the electorate as a whole as the most important input to democratic governance. The theory therefore offers a complementary account to the democracy principle of state constitutions: these founding documents favor both majoritarianism *and* robust participation for all.

Given the unique way that state constitutions treat voters, a typical balancing test that weighs the rights of voters with the legislature's interest in regulating an election is insufficient. A balancing test, which tends to aggrandize the legislature's judgment as the duly elected body, can minimize the ability of voters to direct their government while elevating the legislature's role in ensuring integrity and fairness. Elected politicians are self-interested and may pass rules to help keep themselves in power,[11] often in the name of election integrity.[12] That entrenchment concern is not new, yet most state courts have failed to invoke a suitable theory to combat the problem. Each case becomes a battle between the rights of voters and the interest of the legislature to run the election as it wishes, with the legislature often enjoying substantial deference.

Separation of powers principles can help find a way out of the morass. When one branch of government oversteps its bounds by encroaching upon the powers of another branch, a court will invalidate the law.[13] Voters, of course, are not a "branch" in the traditional sense, but they are still an important—the most important—actor for state governance. An analogy to separation of powers ideals can help to effectuate the participatory interest of voters under state constitutions.

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11. *See* Gill v. Whitford, 585 U.S. 48, 85–86 (2018) (Kagan, J., concurring) (recognizing that partisan gerrymanders require a judicial remedy because "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms").

12. *See* Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. U. L. REV. 879, 905 (2014).

13. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2350 (2006) ("When the Executive has acted without legislative approval, . . . the courts have applied close scrutiny and, even during wartime, have sometimes invalidated those actions.").

But this analogy does not rest on the Madisonian concept of separation of powers, which focuses on the power struggles between the branches as each seeks to "balance and check" the others.[14] Instead, as Professor Jonathan Marshfield has explained, the state separation of powers doctrine considers the ability of "the people" to provide an external check on the government.[15] This Article invokes Professor Marshfield's persuasive explication of this theory of state separation of powers but goes further by identifying the electorate as a distinct entity in the separation of powers calculation. Of course, voters are certainly not a co-equal branch to the elected bodies, as they give those branches their legitimacy. But a recognition of how state constitutions elevate the status of voters, combined with an analogy to a state separation of powers theory that promotes democratic accountability, offers a new way forward to check legislative abuses of the election process.

This Article bridges the gap between various strands of recent scholarship on state constitutions, the right to vote, and democracy, particularly drawing on Professors Bulman-Pozen and Seifter's democracy principle and Professor Marshfield's focus on state separation of powers. This Article stretches further than the democracy principle by explaining how state constitutions elevate the participation interest of all voters, going beyond a focus on popular sovereignty, majority rule, or political equality.[16] Universal participation, as a foundational principle inherent within state constitutions, is also about the government's legitimacy. This Article then invokes state separation of powers scholarship as a useful analogy. In doing so, this Article demonstrates that state constitutions have immense power to protect voters and the overall structure of democracy.

Part I identifies the multilayered right to vote, which combines features of both an individual constitutional right and a structural aspect of democracy. Numerous clauses within state constitutions, when considered in combination, elevate the status of voters and their participatory interest. Part I also explains these clauses in detail and tallies how many state constitutions include each one, offering a descriptive fifty-state survey of the holistic state constitutional protection for voters.

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14. *See id.* at 2317.

15. Jonathan L. Marshfield, *America's Other Separation of Powers Tradition*, 73 DUKE L.J. 545, 583 (2023).

16. *See* Bulman-Pozen & Seifter, *supra* note 6, at 896–902.

Part II situates the multilayered right to vote within state separation of powers principles, showing how the electorate is the most vital entity in state governance. An analogy to separation of powers ideals is a useful tool to check legislative or executive abuses of the election process. A court should strike down a legislative enactment that encroaches upon the voters' ability to exercise their rights to direct their government and give it legitimacy. Part III further defines the theory and considers how it would apply to recent voting rights disputes in state courts, describing how this approach differs from typical tiers of scrutiny and means-end analysis in right-to-vote cases. Instead, the test borrows from the non-retrogression principle once used in Voting Rights Act Section 5 cases: a plaintiff would have an evidentiary burden to show that a new law will make it harder for voters to participate or will reduce turnout. Importantly, if a legislature is taking away the power of the electorate to direct the government, then there is no valid state interest that can justify that encroachment. A plaintiff could invoke the theory by demonstrating empirically that a law will reduce voter participation.

State constitutions offer immense promise for ensuring fair election processes where legislatures face meaningful limits on the kinds of voting rules they can adopt. A recognition of the multilayered right to vote under state constitutions, combined with an analogy to state separation of powers principles, will ensure that voters, not politicians, remain the most important actors in state governance.

I. STATE CONSTITUTIONAL PROTECTIONS FOR VOTER PARTICIPATION

Courts and scholars have long debated the theoretical underpinnings of the constitutional right to vote. The Declaration of Independence states that a government derives its "just powers from the consent of the governed."[17] This Lockean understanding of the constitutional grounding for American democracy focuses on the consent of the governed as providing legitimacy to the government.[18] Voters therefore have

17. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18. *See* James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192 (1990) ("[T]he legitimacy of the United States government—that is, its rule by right rather than by force—rests on the consent of the governed."); *see also* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 358 n.21 (2d ed. 2023).

primacy in a constitutional democracy. But, perhaps strangely, the U.S. Constitution does not explicitly confer the right to vote. The original seven Articles barely discuss voters directly, merely providing that those who may vote for Congress are the same people who may vote for state legislature.[19] For electing the president, the Constitution says that states can appoint presidential electors but gives no guidance on how to choose those electors beyond noting that the state legislature can determine the "manner" of selecting them.[20] The U.S. Supreme Court famously said in *Bush v. Gore*[21] that "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."[22] The state legislature therefore can confer voting rights to the people to elect presidential electors—or can deny the right to vote altogether and keep for itself the power to choose the electors. Four amendments—the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth—forbid states from denying the right to vote based on certain characteristics (race, sex, inability to pay a poll tax, and age over 18, respectively), but none explicitly confer the right to vote.[23]

Of course, the ideals behind the U.S. Constitution suggest that the right to vote exists and is a fundamental right. In a series of cases, the U.S. Supreme Court protected voting rights under the Equal Protection Clause of the Fourteenth Amendment.[24] But recent jurisprudence has underprotected that right, instead deferring to state rules that regulate the

19. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

20. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

21. 531 U.S. 98 (2000).

22. *Id.* at 104.

23. U.S. CONST. amend. XV, § 1; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIV, § 1; U.S. CONST. amend. XXVI, § 1.

24. *See* Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622, 633 (1969); *see also* James A. Gardner, *The Illiberalization of American Election Law: A Study in Democratic Deconsolidation*, 90 FORDHAM L. REV. 423, 442 (2021) (noting that the Equal Protection Clause is "an awkward location that seems far from self-evidently the logical place for a right to vote").

voting process.[25] State legislatures typically have primacy over voters under current Supreme Court case law.

In contrast to the U.S. Constitution, most state constitutions explicitly confer the right to vote to state citizens.[26] But some state courts have not robustly protected that right.[27] These courts have often followed U.S. Supreme Court case law in lockstep, construing their state constitutional grants of the right to vote to be coterminous with the federal protection from the Equal Protection Clause.[28] Thus, the individual rights framework has only partially protected the right to vote.

What courts and scholars have underappreciated is that the right to vote enjoys further protection under state constitutions beyond the specific clauses that grant the right to vote to individuals. The combination of clauses that confer special rights and protections on voters reveals a multilayered right to vote under state constitutions.

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25. *See* Joshua A. Douglas, *Undue Deference to States in the 2020 Election Litigation*, 30 WM. & MARY BILL RTS. J. 59, 62 (2021) [hereinafter Douglas, *Undue Deference*]; Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 554 (2015) [hereinafter Douglas, *(Mis)Trusting States*]; *see also* Atiba R. Ellis, *The Dignity Problem of American Election Integrity*, 62 HOW. L.J. 739, 746 (2019) (identifying an interest in "dignity" for voters but lamenting that "this dignitary conception of the right to vote has suffered from decisions that have re-centered the right to vote on a rational basis that tends to defer to the states regarding their voting decisions"). Although the lack of voting rights protection has accelerated in recent years, it is not a new phenomenon from the Roberts Court. As Professor Burt Neuborne recounted in 1999, "[J]udges have protected a narrowly defined, strictly formal right to vote, but have balked at developing a robust, affirmative right to vote that would confront the fact that the law currently skews American electoral participation radically toward the wealthy and well-educated, and denies voters a chance to use the ballot expressively." Burt Neuborne, *Making the Law Safe for Democracy: A Review of "The Law of Democracy Etc."*, 97 MICH. L. REV. 1578, 1590–91 (1999).

26. *See* Douglas, *supra* note 5, at 101.

27. *See, e.g.*, League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 315 (Wis. 2014) (upholding a voter ID law); Albence v. Higgin, 285 A.3d 840, 840 (Del. 2022) (per curiam) (striking down a vote-by-mail statute under the Delaware Constitution).

28. *See, e.g.*, Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 74 (Ga. 2011) (following the U.S. Supreme Court's decision in *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008), in rejecting a challenge to Georgia's photo ID law under the Georgia Constitution). In *Perdue*, the court dismissed the argument that "the Georgia Constitution provides greater protections under its equal protection clause than does the United States Constitution, and, therefore, Georgians should enjoy enhanced equal protection of their right to vote." *Id.*

A. *The Individual and Structural Theories of the Right to Vote*

Election law scholarship once divided the constitutional protection for the right to vote into two main theories: an individual rights framework and a structuralist framework.

The individual rights theory recognizes the right to vote as a fundamental component of each person's participation in a democracy. Individual voters are the most important actors and the fundamental right to vote is a personal right that the state cannot infringe without a particularly important justification.[29] A state's regulation of the election process should not unduly infringe upon this individual right, at least not without a very strong reason. As Professor Joey Fishkin points out, "Most election regulations place some burdens on the individual right to vote."[30] He also notes, in response to the force of the structuralist framework that once dominated election law scholarship, that "the individual right to vote matters, in significant part, for reasons that are not reducible to structural value . . . because by allowing individuals to vote, the polity includes them in the circle of full and equal citizens."[31] That formulation tracks an ideal that the U.S. Supreme Court has long espoused: the right to vote is a "fundamental political right" because it is "preservative of all rights."[32] Professor Rick Hasen recognized that an individual rights framework might cabin courts against making "contested value judgments in political cases."[33]

The other main branch of election law scholarship, most prominent a decade or two ago, considered the main debates involving voting rights through a structuralist lens. In the seminal article *Politics as Markets: Partisan Lockups of the Democratic Process*, Professors Sam Issacharoff and Rick Pildes argued that courts should focus less on a balancing test between individual rights and state interests and instead should consider how an election regulation harms group rights.[34] Political equality and overall fairness in the outcome are the

29. *See* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 149 (2008).

30. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1316 (2011).

31. *Id.* at 1296.

32. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

33. RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 154 (2003).

34. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 717 (1998).

cornerstones of this framework. The structuralist lens is best suited to redressing group harms such as minority vote dilution, where a state, through practices such as racial gerrymandering, reduces the power of an identifiable group of voters. As Professor Pildes further wrote, the purpose of judicial supervision of the election process is to "address structural problems and enforce structural values concerning the democratic order as a whole."[35]

Other scholars suggested that election law cases exhibit a little bit of both theories. As Professor Guy Charles explained, "Whether styled as individual rights claims or structural claims, courts can, and most likely will, and sometimes must, use an individual rights framework to confront the structural pathologies of the electoral process."[36] Professors Lisa Marshall Manheim and Elizabeth G. Porter noted that "the Constitution does indeed provide individuals with a broadly applicable right to vote," which also includes the right "to have it counted."[37] Professor Franita Tolson argues that, under the Guarantee Clause, it is "impossible to disaggregate questions about the scope of the individual right to vote from structural questions about how political power is aggregated when thinking through issues of majority rule."[38] Thus, recent scholarship has reconciled the individual rights and structuralist theories by noting that courts do some of each and that the right to vote is best protected through a combination of both approaches.

Yet neither theory fully protects the entire electorate as a specific sovereign actor for democratic governance. The individual rights framework focuses on voters but not on the electorate as a whole. The structuralist theory promotes democratic outcomes and redresses group harms, sometimes at the expense of individual voters. Courts have failed to elevate the participatory interest of all voters when invoking aspects of the theories. On the individual rights front, federal courts have often refused to vindicate voters' rights, instead generally allowing states to regulate their election processes as they wish, even if that means the disenfranchisement of some voters. In

35. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 44 (2004).

36. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005).

37. Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 240 (2018).

38. Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CAL. L. REV. 2381, 2403 (2021).

Crawford v. Marion County Election Board,[39] for example, the Supreme Court refused to invalidate Indiana's photo identification requirement for voting even while recognizing that the law might disenfranchise some voters.[40] In *Jones v. Governor of Florida*,[41] the Eleventh Circuit upheld a Florida law that required individuals convicted of a felony to pay back all fines and fees before regaining the right to vote, even though the state's electorate had adopted a state constitutional amendment to restore voting rights.[42] During the pandemic election of 2020, the Supreme Court and numerous other federal courts refused to require states to ease their voting rules even though voters suffered significant new hurdles to cast a ballot.[43] These decisions permitted states to make it harder for some voters to participate in democracy.

To be sure, some state courts have elevated the rights of individual voters, such as the Missouri Supreme Court, which recognized the "express constitutional protection of the right to vote" within the state constitution when invalidating a voter ID requirement.[44] But that court focused primarily on two clauses within the state constitution instead of considering more holistically how the state constitution elevates the role of all voters.[45] Many state courts, however, have not recognized this same protection, even though the provisions of state constitutions conferring the right to vote are more explicit than the language of the U.S. Constitution.[46] For example, the Tennessee Supreme Court, in upholding the state's photo ID law, followed the U.S. Supreme Court in determining that the burden of a photo ID requirement was not too onerous.[47] During the COVID-19 pandemic, numerous state courts ruled in favor of states when voters sought relief from state laws, such as absentee balloting deadlines, that would likely cause

39. 553 U.S. 181 (2008).

40. *Id.* at 202–04.

41. 975 F.3d 1016 (11th Cir. 2020) (en banc).

42. *Id.* at 1049.

43. *See* Douglas, *Undue Deference*, *supra* note 25.

44. Weinschenk v. State, 203 S.W.3d 201, 211 (Mo. 2006).

45. *See id.* (citing the following Missouri constitutional provisions: "all elections shall be free and open; . . . no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage"; and "[a]ll citizens of the United States . . . over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, if . . . they are registered within the time prescribed by law").

46. *See* Douglas, *supra* note 5, at 93–94.

47. City of Memphis v. Hargett, 414 S.W.3d 88, 108 (Tenn. 2013).

disenfranchisement.[48] These state courts often invoked the same "flexible" standard that the U.S. Supreme Court uses for constitutional protection of the right to vote, citing *Anderson v. Celebrezze* and *Burdick v. Takushi* to apply a balancing test for "non-severe" burdens.[49] State courts might dutifully cite the state constitutional protection for the right to vote but then apply a more lenient means-end standard from the U.S. Supreme Court that defers to state legislatures in the voting rules they adopt.

A structuralist approach has also inconsistently protected "the people" from unfair voting rules or skewed outcomes. Both federal and state courts have refused to intervene in partisan gerrymandering claims, instead deferring to legislatures in how they draw the maps.[50] Partisan gerrymandering creates a group harm as legislatures draw lines to ensure a particular electoral outcome, yet some courts have essentially ignored the problem by following the U.S. Supreme Court in saying there are no "judicially manageable standard[s]" to evaluate the claims. To be sure, some state courts—such as the Pennsylvania Supreme Court and the Alaska Supreme Court—have ruled partisan gerrymandering unconstitutional under their state constitutions.[51] But many other courts have rejected the claims. In 2019, the U.S. Supreme Court decided in *Rucho v. Common Cause*[52] that partisan gerrymandering claims are nonjusticiable political questions in federal court under the U.S. Constitution, yet the majority also explained that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."[53] Several state courts, however, refused to heed that advice. The North Carolina Supreme Court initially invalidated a severely gerrymandered map but then reversed itself after the court's composition changed; in its second decision it simply followed

48. *See, e.g.*, Mich. All. for Retired Ams. v. Sec'y of State, 964 N.W.2d 816, 829–30 (Mich. Ct. App. 2020) (reversing a lower court opinion that had enjoined Michigan's rules on the deadline for mail-in ballots and on who could lawfully possess someone else's ballot); Abbott v. Anti-Defamation League Austin, 610 S.W.3d 911, 923 (Tex. 2020).

49. *See, e.g.*, *Abbott*, 610 S.W.3d at 919 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) and Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

50. *See* Rucho v. Common Cause, 588 U.S. 684, 716–18 (2019); Harper v. Hall, 886 S.E.2d 393, 400 (N.C. 2023).

51. *E.g.*, *In re* 2021 Redistricting Cases, 528 P.3d 40, 101 (Alaska 2023); League of Women Voters v. Commonwealth, 178 A.3d 737, 821 (Pa. 2018).

52. 588 U.S. 684 (2019).

53. *See id.* at 719.

Rucho and disclaimed any responsibility for the courts to ensure a fair redistricting process.[54] Similarly, the Wisconsin Supreme Court initially indicated in 2021 that it would follow the U.S. Supreme Court in refusing to find partisan gerrymandering unconstitutional.[55] The court cited Article I, Section 1 of the Wisconsin Constitution, which provides that "governments are instituted, deriving their just powers from the consent of the governed," but the court said that so long as voters "retain their freedom to choose among candidates," there is no constitutional concern.[56] After a change in the court's composition, however, the new majority said that the partisan gerrymandering issue under the state constitution remained "unresolved" when it ruled that the state legislative districts were noncontiguous in violation of the Wisconsin Constitution.[57]

There are scores of other examples in which both federal and state courts have failed to protect voters—who are the most important actors in a democracy. The U.S. Supreme Court and other federal courts have unduly deferred to state legislatures in their voting rules. Many state courts—though not all—have followed the U.S. Supreme Court's lead. Courts have refused to strike down laws that make it harder for individuals to cast a

54. *See Harper*, 886 S.E.2d at 400–01.

55. Johnson v. Wis. Elections Comm'n, 967 N.W.2d 469, 474 (Wis. 2021) ("Claims of political unfairness in the maps present political questions, not legal ones. Such claims have no basis in the constitution or any other law and therefore must be resolved through the political process and not by the judiciary."), *overruled by* Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370 (Wis. 2023).

56. *Johnson*, 967 N.W.2d at 485–86.

57. Clarke v. Wis. Elections Comm'n, 998 N.W.2d 370, 380 (Wis. 2023). The court further stated,

> We will consider partisan impact when evaluating remedial maps. When granting the petition for original action that commenced this case, we declined to hear the issue of whether extreme partisan gerrymandering violates the Wisconsin Constitution. As such, we do not decide whether a party may challenge an enacted map on those grounds.

Id. at 399. But instead of having to analyze remedial maps, state Republican lawmakers essentially capitulated in the litigation, adopting maps that Democratic Governor Tony Evers had proposed because Republicans believed that the state supreme court would adopt maps even less favorable for their side. *See* Scott Bauer, *GOP-Led Wisconsin Legislature Passes Democratic Governor's Legislative Maps*, ASSOC. PRESS (Feb. 13, 2024, 8:34 PM), https://apnews.com/article/wisconsin-redistricting-republican-democrat-fe0e8c7b96eb55caed5540db8d110759 [https://perma.cc/EYX4-HXWX].

ballot that will count; they have also failed to dismantle structural hurdles to fair representation.[58] Many state courts simply follow the U.S. Supreme Court in underprotecting the right to vote, even though state constitutions include myriad provisions that collectively offer stronger protection. As Professor Tolson notes, "The [U.S.] Constitution, as interpreted by a current majority of the Supreme Court, has facilitated the states' ability to undermine majority rule, and political elites seeking partisan gain have taken advantage of the fact that the hardwired features of our constitution can be exploited by demographics and partisan sorting."[59] Professors Joshua Sellers and Justin Weinstein-Tull lament that although "[o]ne might think, given its importance, the right to vote would be universally protected, both rhetorically championed and immunized from partisan squabbles[,] . . . history reveals the opposite: The right to vote is and always has been contested, delimited, and subject to retrenchment."[60]

Ultimately, both federal and state courts have underprotected the right to vote, perhaps because judges have neglected to invoke the prominent theories of election law in a way that places voters at the forefront of the democratic process. Scholars and judges have also failed to appreciate the full extent of voting rights and voter protections within state constitutions. A refined theory of the state constitutional right to vote that reads constitutions holistically and recognizes the multilayered protections within state constitutions provides a stronger approach.

B. *State Constitutional Clauses that Elevate the Role of Voters*

Many state courts that have considered the state constitutional protection of the right to vote have construed their founding documents too narrowly. Courts sometimes focus on one section or one phrase of a state constitution. But state constitutions are holistic, lengthy documents. Most importantly, state constitutions give a special status to voters

58. *See* Douglas, *Undue Deference*, *supra* note 25, at 60–62; Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is it Enough?*, 2016 WIS. L. REV. 100, 101, 121 (2016) ("[C]ourts are misguided in relying upon softening devises to justify otherwise upholding unnecessary voting restrictions. . . . and in the meantime, an uncertain number of voters are being disenfranchised, inconvenienced, and discouraged from voting.").

59. Tolson, *supra* note 38, at 2384–85.

60. Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1129 (2021).

as voters. No other group of non-elected people enjoys a special status as a significant actor within the structure of government. A combination of state constitutional clauses makes voters special within our democracy—and requires courts to provide even greater protection to the ability of everyone to cast a ballot that will count. State courts should interpret these provisions together to recognize an overarching, multilayered right to vote—one that is not solely clause-based but that comes from the constellation of protections that voters enjoy.[61] Of course, each state's constitution differs slightly, but they share common features, especially about voters.[62] As Professor Wilfred Codrington notes:

> [S]tate charters do more than simply grant their citizens a right to vote. They also articulate broad guidelines to ensure that eligible members of the electorate have a real opportunity to participate in elections, and that elections themselves are conducted in a manner leading to outcomes that are truly reflective of the public will.[63]

The history of state constitutional protection of the right to vote is neither linear nor wholly positive.[64] States disenfranchised Black individuals, women, and others for years, and several provisions, such as those that disenfranchise individuals with felony convictions or impose strict voter ID requirements, disproportionately impact minority voters to this day. Although bumpy, however, the trend has been toward the expansion of voting rights. Indeed, several state constitutions that once expressly or implicitly disenfranchised Black people

61. Bulman-Pozen & Seifter, *supra* note 9, at 1882 ("The abundance of state constitutional rights and the popular amendment processes that have shaped these rights underscore that clauses must often be combined to recognize the full scope of a right as well as its limits.").

62. Bulman-Pozen & Seifter, *supra* note 6, at 865–66 ("Given fifty different state constitutions, adopted and amended by different people, in different places, at different times, is it possible to describe a shared state constitutional commitment? Although we recognize variance across the states—including provisions, histories, and politics that are unique to particular jurisdictions or shared by only a subset of the states—we nonetheless believe that it is reasonable, and ultimately more instructive, to speak of a common democracy principle."); Wilfred U. Codrington III, *Voting Under State Constitutions*, OXFORD HANDBOOK AM. ELECTION L. (forthcoming 2024) (manuscript at 10–11) (on file with author) (noting that the similar provisions within state constitutions "permit[] some ability to speak broadly about the structural provisions of state constitutions that regulate voting and elections").

63. Codrington III, *supra* note 62 (manuscript at 11).

64. *See id.* (manuscript at 7).

now explicitly protect the right to vote for all.[65] Read holistically, today's state constitutions elevate voters as the key actors in state democracy. Indeed, state constitutions have often led the way in the expansion of voter eligibility, such as for women's suffrage, with many states enfranchising women well before the adoption of the Nineteenth Amendment to the U.S. Constitution.[66] State constitutional protection of the right to vote is not solely an individual, clause-bound right. Understood through its multiple layers, it is also a key part of the structure of state constitutions.[67] In addition, the state constitutional recognition of the primacy of voters is not solely to ensure majoritarian outcomes; it also seeks to promote universal participation of the entire electorate, thereby lending the government greater legitimacy.

This state constitutional protection reinforces the democratic value of participation. Professor Chad Flanders identifies four reasons to promote participation in American democracy: a "foundational legitimizing value," an "expressive value," an "informational value," and an "equality" value.[68] The most significant of these values is the way in which voter participation contributes to the legitimacy of government;[69] as the Declaration of Independence notes, a government derives its "just powers from the consent of the governed."[70] Voters participate to "join their voices to exert force on the political process."[71] The U.S. Supreme Court has long recognized that the right to vote is fundamental to democracy:

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65. For example, compare Louisiana's 1898 constitution to its current constitution. *Compare A History of Racial Injustice*, EQUAL JUST. INST., https://calendar.eji.org/racial-injustice/may/12 [https://perma.cc/C637-UJ4V] ("On this day[,] May 12, 1898[,] Louisiana Officially Disenfranchises Black Voters and Jurors[.]"), *with* LA. CONST. art. I, § 10 (1974) ("Every person who is both a citizen of the state and of the United States, upon reaching eighteen years of age, shall have the right to register and vote.").

66. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 186 (2000).

67. *See* Bulman-Pozen & Seifter, *supra* note 6, at 868 (noting that "a structural approach to state constitutions helps to harmonize ample text").

68. Chad Flanders, *What is the Value of Participation?*, 66 OKLA. L. REV. 53, 55 (2013).

69. *See* Joshua A. Douglas, *The Foundational Importance of Participation: A Response to Professor Flanders*, 66 OKLA. L. REV. 81, 81 (2013).

70. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52 (C. B. McPherson ed., Hackett Publ'g Co. 1980) (1690).

71. Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. BRIEF 41, 41 (2007).

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[72]

Through the interplay of numerous clauses, state constitutions textually and holistically express a strong commitment to voter participation.

As the delegates to Montana's 1972 constitutional convention recognized, in highlighting the primacy of the electorate, "[i]f we are to have a true participatory democracy, we must insure that as many people as possible vote for the people who represent them."[73] The goal was "to preserve the rights of the public" by "preserv[ing] their vote, because that's the only power the public has."[74]

With this background understanding of the role of state constitutions, this Section highlights the numerous aspects of state constitutions that protect voters. Drawing upon the text of all fifty state constitutions, as well as prior analysis by other scholars and my own previous work,[75] it shows how state constitutions offer a constellation of rights to promote voter participation for all.

1. Conferral of an Individual Right to Vote

State constitutions explicitly grant the individual right to vote. As I have shown in prior scholarship, forty-nine state constitutions directly confer the right to vote with language providing that every citizen shall be entitled to vote or is a qualified voter.[76] Georgia's constitution is emblematic:

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72. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

73. 3 MONT. CONST. CONVENTION 1971–1972, at 402 (1981) (statement of Delegate McKeon).

74. *Id.* at 409 (statement of Delegate Holland).

75. *See generally* Bulman-Pozen & Seifter, *supra* note 6 (highlighting the majoritarian provisions of state constitutions, including on voting rights); Douglas, *supra* note 5 (analyzing the effect of state constitutions' explicit grant of voting rights).

76. *See* Douglas, *supra* note 5, at 104. Arizona's constitution is the only state constitution that does not explicitly confer the right to vote; it instead describes the right in the negative: "No person shall be entitled to vote at any general election . . . unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election

> Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people.[77]

In recent years, fourteen states—Alabama, Colorado, Florida, Idaho, Iowa, Kentucky, Louisiana, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, and Wisconsin—have amended their state constitutions to provide that "[o]nly a citizen" enjoys the right to vote or to otherwise make it clear that noncitizens are not eligible to vote in any elections in the state.[78] Thus, the Ohio Constitution now provides:

> Only a citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections.[79]

A change in language from "every voter" to "only a voter" forbids localities from enfranchising non-citizens in local elections, as several cities in other states have done.[80] But the

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as prescribed by law . . . ." ARIZ. CONST. art. VII, § 2. An Arizona appeals court ruled that the state constitution still protects the right to vote through its "free and equal elections" clause. *See* ARIZ. CONST. art. II, § 21; Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) ("We conclude that Arizona's constitutional right to a 'free and equal' election is implicated when votes are not properly counted.").

77. GA. CONST. art. II, § 1, para. 2.

78. Six states enacted this reform in 2020 or 2022. *See* ALA. CONST. art. VIII, § 177; COLO. CONST. art. VII, § 1; FLA. CONST. art. VI, § 2; LA. CONST. art. I, § 10(A) (requiring eligible voters to be "both a citizen of the state and of the United States"); N.D. CONST. art. II, § 1; OHIO CONST. art. V, § 1. Eight more states passed it in 2024 as this Article was about to go to print. *See* Adam Edelman, *Ballot Measures Targeting Noncitizen Voting Approved in 8 States*, NBC NEWS (Nov. 6, 2024, 1:28 AM), https://www.nbcnews.com/politics/2024-election/ballot-measures-targeting-noncitizen-voting-approved-8-states-rcna178888 [https://perma.cc/NVL5-4L9P] (projecting that all eight ballot initiatives to amend state constitutions on this subject would pass in 2024). Arizona also bans noncitizens from voting. ARIZ. CONST. art. VII, § 2.

79. OHIO CONST. art. V, § 1.

80. *See* Deanna Garcia, *New York Becomes Largest City to Grant Vote to Noncitizens*, POLITICO (Dec. 9, 2021, 8:04 PM), https://www.politico.com/states/new-york/city-hall/story/2021/12/09/new-york-becomes-largest-city-to-grant-vote-to-noncitizens-1399231 [https://perma.cc/4EWA-3M2N]; Fred Lucas, *'Real Foreign*

language still confers a special status on eligible voters; they are "entitled to vote at all elections."[81] Thus, although the U.S. Constitution does not explicitly confer the right to vote, state constitutions do.

More importantly, however, state constitutions go beyond simply conferring an individual right to vote. They also promote robust participation. The fact that state constitutions are more explicit than the U.S. Constitution on voting rights is an important factor counseling toward greater state-level protection, but it is not the only way that state constitutions elevate voters. Several other provisions also treat the electorate as a vital actor in state constitutional democracy. Courts should construe all of these provisions together to recognize the multiple layers of state constitutional protection for voters.

2. Immunity from Arrest While Voting

State constitutions confer a special status on voters in a meaningful way: they immunize voters from arrest while going to and from the polls. Twenty-eight state constitutions offer this privilege to voters while they undertake the important task of voting.[82] Mississippi's constitution, for instance, says that "the electors, in all cases except in cases of treason, felony, and breach of peace, shall be privileged from arrest during their attendance at elections and in going to and returning therefrom."[83] This protection for voters has a long pedigree: it was a component of the original constitution in most states. The Tennessee provision, for example, dates to 1796.[84]

Interference': DC Latest Jurisdiction to Allow Noncitizens to Vote, DAILY SIGNAL (Mar. 13, 2023), https://www.dailysignal.com/2023/03/13/dc-joins-parts-of-these-5-states-in-allowing-noncitizens-to-vote/ [https://perma.cc/U7NH-A6Y5].

81. OHIO CONST. art. V, § 1.

82. ARIZ. CONST. art. 7, §§ 4–5; ARK. CONST. art. 3, § 4; COLO. CONST. art. VII, § 5; CONN. CONST. art. VI, § 6; DEL. CONST. art. V, § 5; IND. CONST. art. 2, § 12; IOWA CONST. art. II, § 2; KAN. CONST. art. 5, § 7; KY. CONST. § 149; LA. CONST. art. XI, § 3; ME. CONST. art. II, § 2; MINN. CONST. art. 7, § 4; MISS. CONST. art. 4, § 102; MO. CONST. art. VIII, § 4; MONT. CONST. art. IV, § 6; NEB. CONST. art. VI, § 5; NEV. CONST. art. 2, § 4; OKLA. CONST. art. III, § 5; OR. CONST. art. II, § 13; PA. CONST. art. VII, § 5; S.C. CONST. art. II, § 11; TENN. CONST. art. IV, § 3; TEX. CONST. art. VI, § 5; UTAH CONST. art. IV, § 3; VA. CONST. art. II, § 9; WASH. CONST. art. VI, § 5; W. VA. CONST. art IV, § 3; WYO. CONST. art. 6, § 3. Michigan's 1908 constitution also included this protection, but its current constitution does not; a statute, however, does confer this immunity. *Compare* MICH. CONST. art. III, § 5 (1908), *with* Mich. Comp. Laws § 600.1825(1) (1963). The Alabama Constitution also once had this protection but no longer does. *Compare* ALA. CONST. art. VIII, § 192 (1901), *with* ALA. CONST. art. VIII, § 192 (2022).

83. MISS. CONST. art. 4, § 102.

84. *See* TENN. CONST. art. III, § 2 (1796).

These clauses are analogous to the ones in state constitutions that immunize lawmakers while they are going to and from a legislative session—similar to the protection for U.S. Senators and U.S. House members within the U.S. Constitution.[85] Mississippi's constitution, like many others, also provides this immunity for state legislators: "Senators and Representatives shall, in all cases, except treason, felony, theft, or breach of the peace, be privileged from arrest during the session of the Legislature, and for fifteen days before the commencement and after the termination of each session."[86] Thus, both legislators and voters enjoy a privilege from arrest for certain categories of cases while undertaking the valuable role the state constitution designates upon them. Although the U.S. Constitution does not provide this immunity to voters, a majority of state constitutions do, showing the primacy of voters within state founding documents.

These provisions have only a minimal practical effect. They do not exempt voters (or legislators) from arrest for felonies. They also do not protect legislators from service of process in a civil suit, at least according to an 1864 case from the Texas Supreme Court.[87] And they do not immunize legislators from the enforcement of general traffic laws; the Oklahoma Supreme Court construed the protection extremely narrowly to "encompass[] only arrest on civil process."[88] "Since no crime comes within the purview of the privilege, there can be no privilege from arrest for even the most minor criminal offenses."[89] Moreover, not all state constitutions include this protection.[90] Thus, the immunity does not have much modern-day relevance, though in New Hampshire, legislators recently pondered whether the state constitution allowed a member who was in jail due to a stalking charge to be released so she could execute her duties (she ultimately declined to attend the

85. U.S. CONST. art. I, § 6 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same[.]").

86. MISS. CONST. art. 4, § 48.

87. Gentry v. Griffith, Hyatt & Co., 27 Tex. 461, 462 (1864).

88. Howard v. Webb, 570 P.2d 42, 47 (Okla. 1977).

89. *Id.*

90. Some state constitutions that do not offer the privilege to voters also do not confer it upon legislators. For example, the constitutions of Maryland, New York, North Carolina, and Vermont do not provide this immunity for either voters or legislators. *See, e.g.*, MD. CONST. art. I; N.Y. CONST. art. II; N.C. CONST. art. VI; VT. CONST. §§ 43–55.

opening of the legislative session).[91] Additionally, lawyers, invoking the Pennsylvania constitutional provision that protects voters from arrest while going to the polls, threatened the City of Philadelphia with a lawsuit against the city's curfew during the COVID-19 lockdown and racial unrest following the murder of George Floyd.[92] The curfew would have made it a crime for people to be out after 6:00 PM, which was before the polls closed at 8:00 PM.[93] The City backed down and extended the curfew to 8:30 PM.[94]

Regardless of whether these provisions have seen much modern-day use, the relevant point is that a majority of state constitutions confer this privilege to voters and legislators, meaning that state constitutions single out these two groups of people for special treatment.[95] The conclusion follows that voters, as a group, have a special status under state constitutions.

3. Political Power Inherent in the People

Every state constitution besides New York's expresses a "commitment to popular sovereignty."[96] North Carolina's constitution, for instance, provides that "All political power is vested in and derived from the people; all government of right

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91. *See* Damien Fisher, *NH Dem State Rep Still in Jail on Stalking Charge as Organization Day Approaches*, NH J. (Nov. 29, 2022), https://nhjournal.com/nh-dem-state-rep-still-in-jail-on-stalking-charge-as-organization-day-approaches/ [https://perma.cc/JJM5-XLFD]; Michael Graham, *NH House Dem in Jail on Stalking Charges Will Skip Organization Day*, NH J. (Dec. 5, 2022), https://nhjournal.com/exclusive-nh-house-dem-in-jail-on-stalking-charges-will-skip-organization-day/ [https://perma.cc/M9S8-JA2Z].

92. Exec. Order No. _-20: Declaration of Emergency Related Imminent Danger of Civil Disturbance, Disorder, or Riot in Philadelphia No. 3 (June 1, 2020); (executive order of Philadelphia Mayor James F. Kenney), https://www.phila.gov/media/20200601141758/EO-Curfew-6.1.2020.pdf [https://perma.cc/S897-6T8U]; Julia Shanahan, *Common Cause Fears 'Chilling Effect' on Turnout in Cities Impacted by Protests*, PA. CAPITAL-STAR (June 2, 2020, 3:58 PM), https://penncapital-star.com/government-politics/live-coverage-the-latest-on-the-2020-pennsylvania-primary-election/ [https://perma.cc/JU3G-SQ7M] (noting the 8:30 pm curfew on the day of the primary); E-mail from Ben Geffen, Senior Att'y, Pub. Int. L. Center, to Joshua A. Douglas, Professor of L., U. of Ky. J. David Rosenberg Coll. Of L. (March 7, 2024) (on file with author) [hereinafter E-mail from Geffen to Douglas].

93. *See* E-mail from Geffen to Douglas, *supra* note 92.

94. *Id.*

95. A few state constitutions also provide immunity from arrest to members of the militia. *See, e.g.*, ILL. CONST. art. XII, § 5 ("Except in cases of treason, felony or breach of peace, persons going to, returning from or on militia duty are privileged from arrest.").

96. *See* Bulman-Pozen & Seifter, *supra* note 6, at 869.

originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."[97] The North Carolina Supreme Court relied on this provision when striking down a partisan gerrymander, declaring,

> Under popular sovereignty, the democratic theory of our Declaration of Rights, the "political power" of the people which is "vested in and derives from [them]," is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be "founded upon their will only."[98]

This language is not mere surplusage. It demonstrates that voters have primacy under state constitutions. Professors Bulman-Pozen and Seifter note that these provisions conveying the idea of popular sovereignty are a core component of a "democracy principle" within state constitutions.[99] "This idea of popular sovereignty is linked not only to the people's initial creation of state constitutions but also to their ongoing right to change them."[100] As the Massachusetts Constitution explains,

> [T]he people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it . . . . In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.[101]

Ohio's constitution similarly gives a right to "[t]he people" to "instruct their representatives."[102] As Professors Bulman-Pozen and Seifter explain, these clauses espouse a commitment

97. N.C. CONST. art. I, § 2.

98. Harper v. Hall, 380 N.C. 317, 370 (2022), *overruled by* Harper v. Hall, 384 N.C. 292 (2023).

99. *See* Bulman-Pozen & Seifter, *supra* note 6, at 869.

100. *Id.* at 870.

101. MASS. CONST. pt. 1, art. VII–VIII.

102. OHIO CONST. art. I, § 3.

to majoritarianism and equality that animate the democracy principle.[103] Beyond that fidelity to popular sovereignty, these provisions—especially when layered on top of each other—also show how state constitutions confer a special participatory status on voters as the initial and most important actors within state democracy, thereby lending government greater legitimacy.

A constitutional clause that confers power on "the people" can have modern relevance. In Utah, the people passed an initiated statute in 2018 to create an independent redistricting commission, but in 2020 the legislature repealed the statute and enacted its own gerrymandered maps.[104] In response, the League of Women Voters (LWV) filed suit, arguing in part that the legislation violated article I, section 2 of the Utah Constitution,[105] which provides that the people have "the right to alter or reform their government as the public welfare may require."[106] As Professor Quinn Yeargain notes, "[T]he specific argument raised by the LWV is interesting because it suggests a way to read the 'power' of the people to propose initiated statutes in tandem with the thematically related power to alter or reform their government."[107] The litigation is still pending as of this writing, but it shows how a state constitution, if read holistically, can elevate the status of voters as the driving force behind governmental legitimacy.

4. No Loss of Residence in State for Certain Reasons

Twenty-two state constitutions provide that, for voting purposes, people will not lose their legal residence in the state based on temporary absence for a variety of reasons, such as military service.[108] Colorado's constitution, for instance, declares that

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103. *See* Bulman-Pozen & Seifter, *supra* note 6, at 869.

104. League of Women Voters v. Utah State Legislature, No. 20220991, 2024 WL 3367145, at *5–7 (Utah 2024).

105. *Id.* at *9.

106. UTAH CONST. art. I, § 2.

107. Quinn Yeargain, *Administrative Capacity in Direct Democracy*, 57 U.C. DAVIS L. REV. 1347, 1432 (2023).

108. ALA. CONST. art. I, § 31; ARIZ. CONST. art 7, § 3; COLO. CONST. art. VII, § 4; HAW. CONST. art. II, § 3; IDAHO CONST. art. VI, § 5; IND. CONST. art. 2, § 4; ME. CONST. art. II, § 1; MICH. CONST. art. II, § 1; MINN. CONST. art. 7, § 2; MO. CONST. art. VIII, § 2, § 6; NEB. CONST. art. VI, § 3; NEV. CONST. art. 2, § 2; N.J. CONST. art. II, § 1, para. 4; N.M. CONST. art. VII, § 4; N.Y. CONST. art. II, § 4; N.D. CONST. art. II, § 1; OR. CONST. art. II, § 4; S.C. CONST. art. I, § 5; S.D. CONST. art. VII, § 2; VA. CONST. art. II, § 1; WASH. CONST. art. VI, § 4; WYO. CONST. art. 6, § 7.

> For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his or her presence, or lost it by reason of his or her absence, while in the civil or military service of the state, or of the United States, nor while a student at any institution of learning, nor while kept at public expense in any asylum, nor while confined in public prison.[109]

Thus, voters retain their place of residence for voting purposes even if they are temporarily away. This mandate demonstrates another way in which state constitutions elevate the status of voters: the state founding documents protect the ability to vote even when the voter is absent from the state.

As the Colorado provision demonstrates, many state constitutions also note that temporary presence in a state does not create residency for voting. The Iowa Constitution, for example, states that "No person in the military, naval, or marine service of the United States shall be considered a resident of this state by being stationed in any garrison, barrack, or military or naval place, or station within this state."[110] This provision is not as protective of voters—at least those from out of state. But it does protect in-state voters from having their vote diluted by those who are there only for a specific purpose and not permanently. Additionally, the U.S. Supreme Court summarily affirmed a lower court ruling that a state cannot automatically deny voting rights to university students based on a presumption of non-residency, which limits the force of these clauses when applied to students.[111]

Either way, many state constitutions include specific rules to protect voters, noting that they remain "voters" under the state constitution—with the enhanced conferral of rights—even if they are away from the state for a variety of reasons. Further, many state constitutions either explicitly allow for absentee voting or direct the state legislature to authorize absentee

109. COLO. CONST. art VII, § 4.

110. IOWA CONST. art. II, § 4.

111. Symm v. United States, 439 U.S. 1105, 1105 (1979) (summarily affirming *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978)); *see* Yael Bromberg, *The Future Is Unwritten: Reclaiming the Twenty-Sixth Amendment*, 74 RUTGERS L. REV. 1671, 1673 (2022) (highlighting the *Symm* decision and discussing the force of the Twenty-Sixth Amendment to protect student voters).

voting.[112] These provisions add another layer to the conferral of voting rights within state constitutions.

5. Secrecy of the Ballot

Forty-four state constitutions require a secret ballot (while the remaining six provide for secret balloting via legislation).[113] These provisions protect the sanctity of casting a ballot, thereby reinforcing the primacy of the act of voting under state constitutions. Some of these provisions are explicit; the Maine Constitution, for instance, declares that "the right of secret voting shall be preserved."[114] The Wyoming Constitution states that "All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory."[115] The Alabama and South Dakota constitutions both deem the secret ballot to be

112. *See, e.g.*, CONN. CONST. art. 6, § 8 ("The general assembly may provide by law for the absentee admission of electors."); N.D. CONST. art. II, § 1 ("The legislative assembly shall provide by law . . . for absentee voting.").

113. CAITRIONA FITZGERALD, PAMELA SMITH & SUSANNAH GOODMAN, SECRET BALLOT AT RISK: RECOMMENDATIONS FOR PROTECTING DEMOCRACY 12–34 (ELEC. PRIV. INFO. CTR., VERIFIED VOTING FOUND., and COMMON CAUSE EDUC. FUND 2016), https://www.secretballotatrisk.org/Secret-Ballot-At-Risk.pdf [https://perma.cc/B2Z3-BZXT]; ALA. CONST. art. VIII, § 177, *amended by* ALA. CONST. amend. 865.; ALASKA CONST. art. V, § 3; ARIZ. CONST. art. 7 § 1; ARK. CONST. amend. 50, § 2; ARK. CONST. amend. 81; CAL. CONST. art. II, § 7; COLO. CONST. art. VII, § 8; CONN. CONST. art. 6 § 5, *amended by* CONN. CONST. art. 24 (1986); DEL. CONST. art. V, § 1; FLA. CONST. art. VI, § 1; GA. CONST. art. II, § 1, ¶ I; HAW. CONST. art. II, § 4; IDAHO CONST. art. VI, § 1; ILL. CONST. art. III, § 4; IND. CONST. art. 2, § 13; IOWA CONST. art. II, § 6; KAN. CONST. art. 4, § 1; KY. CONST. § 147; LA. CONST. art. XI, § 2; ME. CONST. art. II, § 5; MD. CONST. art. I, § 1; MASS. CONST. amend. art. 38; MICH. CONST. art. II, § 4; MINN. CONST. art. 7, § 5; MISS. CONST. art. 12, § 240; MO. CONST. art. VIII, § 3; MONT. CONST. art. IV, § 1; NEB. CONST. art. VI, § 6; NEV. CONST. art. 2, § 5; N.M. CONST. art. VII, § 1; N.Y. CONST. art. II, § 7; N.C. CONST. art. VI, § 5; N.D. CONST. art. II, § 1; OHIO CONST. art. V, § 2; PA. CONST. art. VII, § 4; S.C. CONST. art. II, §§ 1, 10; S.D. CONST. art. VI, § 28, art. VII, § 3; TENN. CONST. art. IV, § 4; TEX. CONST. art. VI, § 4; UTAH CONST. art. IV, § 8; VA. CONST. art. II, § 3; WASH. CONST. art. VI, § 6; W. VA. CONST. art. IV, § 2; WIS. CONST. art. III, § 3; WYO. CONST. art. 6, § 11. The remaining six states have statutory provisions protecting the secret ballot. *See* Fitzgerald, Smith & Goodman, *supra*, at 1; N.H. REV. STAT. ANN. §§ 659:37, 659:52 (2024); N.J. STAT. ANN. §§ 19:15-26, 19:34-7, 19:34-14, 19:53A-3, 19:53A-6(c), 19:53A-15, 19:63-12, 19:63-13, 19:63-16 (West 2024); OKLA. ST. ANN. tit. 26 §§ 7-120, 3-122, 16- 115 (2024); OR. REV. STAT. §§ 246.560(a)(1), 254.472, 260.695(7)-(9) (2024); 17 R.I. GEN. LAWS §§ 17-19-3, 17-20-1.1, 17-20-34, 17-20-14.1, 17-20-14(a) (2024); VT. STAT. ANN. tit. 17, § 2504, 2316 (2024).

114. ME. CONST. art. II, § 5.

115. WYO. CONST. art. 6, § 11.

"fundamental."[116] Other state constitutions are less explicit, simply saying that voting shall be by ballot,[117] but the implication is (or at least should be) that voting by ballot allows for secrecy.[118] States began to adopt the secret ballot, often known as the Australian ballot based on its origin, to root out undue influence and voter fraud.[119] Thus, state constitutional provisions requiring a secret ballot exist to protect voters against intimidation and to prevent vote-buying.[120] State constitutions seek to have voters express their free will independently, thereby offering unimpeded consent to be governed by the winners. The requirement of secret balloting demonstrates how the act of voting is precious, adding another layer to the ways in which state constitutions confer a special status on voters.

6. Direct Democracy

Many state constitutions amplify voters' voices in the lawmaking process by giving them a direct say on public policy through ballot initiatives or referenda.[121] As Professors Bulman-Pozen and Seifter recount, "Eighteen [states] have a constitutional initiative process, and twenty-one have a statutory initiative process."[122] In 1898, South Dakota was the first state to enact a mechanism of direct democracy, and the reform then spread, particularly among western states.[123]

The Arizona Constitution exemplifies how "the people" retain significant powers under many state constitutions:

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116. ALA. CONST. art. VIII, § 177, *amended by* ALA. CONST. amend. 865; S.D. CONST. art. VI, § 28.

117. *See, e.g.*, MD. CONST. art. I, § 1 ("All elections shall be by ballot"); MISS. CONST. art. 12, § 240 ("All elections by the people shall be by ballot.").

118. *See* Fitzgerald, Smith & Goodman, *supra* note 113, at 6.

119. *See* Burson v. Freeman, 504 U.S. 191, 202–05 (1992).

120. *See* Fitzgerald Smith & Goodman, *supra* note 113, at 5; *Burson*, 504 U.S. at 202–06; Allison R. Hayward, *Bentham & Ballots: Tradeoffs Between Secrecy and Accountability in How We Vote*, 26 J. L. & POL'Y 39, 45, 48–49 (2010) (discussing the origin of secret balloting as a means to impede vote-buying and its adoption in the United States).

121. *See* Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 13–14 (1997).

122. Bulman-Pozen & Seifter, *supra* note 6, at 876.

123. *See* Daniel A. Smith & Dustin Fridkin, *Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States*, 102 AM. POL. SCI. REV. 333, 333 (2008).

> The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.[124]

The U.S. Supreme Court explained, in a case in which the state legislature challenged the authority of an initiative to take away the legislature's power to engage in redistricting, that "[a]s to the 'power that makes laws' in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do."[125]

Ballot initiatives and referenda (which allow the people to accept or reject a legislatively enacted law) elevate voters to the status of direct lawmakers themselves. State constitutions that allow for direct democracy thus give voters an even bigger role in democratic governance. The Supreme Court noted that although direct democracy was not a feature of Founding-era democratic practice, the powers behind it are wholly consistent with the authority given to voters to direct their government:

> The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.[126]

Professor (now Judge) Anthony Johnstone similarly conceives of the initiative as a power delegated to the people, as opposed to merely a right, which gives that power greater force in state constitutional design.[127]

Related to direct democracy, all state constitutions provide a procedure to call for a constitutional convention, though the

124. ARIZ. CONST. art. 4, pt. 1, § 1.

125. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 814 (2015) (citing ARIZ. CONST. art. IV, pt. 1, § 1).

126. *Id.* at 819.

127. Anthony Johnstone, *The Separation of Legislative Powers in the Initiative Process*, 101 NEB. L. REV. 125, 139 (2022).

mechanisms vary slightly across states.[128] Typically, the convention process allows voters to decide whether to hold a convention at all, asks voters to elect delegates to a convention, and then submits the resulting draft constitutional reform to a statewide referendum.[129] In this way, the people have a direct say on the scope of the state's founding document.

Direct democracy is perhaps the purest form of state constitutional conferral of special powers to the electorate to control its government. State constitutions that provide for direct democracy bolster the value of voter participation in democratic governance.

7. "Free," "Free and Equal," or "Free and Open" Elections

In addition to the numerous ways that state constitutions elevate the role of individual voters, state constitutions safeguard elections themselves. Of course, because voters are the lifeblood of elections, these provisions also offer meaningful protection to voters.

Most state constitutions contain equal protection clauses, which have an obvious counterpart in the Fourteenth Amendment to the U.S. Constitution and which courts have invoked to protect voters.[130] In addition, about half of the state constitutions contain a clause saying that elections shall be "free," "free and equal," or "free and open."[131] Several courts have invoked these clauses to strike down state laws that harmed voters, such as severe partisan gerrymanders. The Pennsylvania Supreme Court ruled that the "free and equal" Clause in the Pennsylvania Constitution

> mandates clearly and unambiguously, and in the broadest possible terms, that *all* elections conducted in this Commonwealth must be "free and equal." In accordance with the plain and expansive sweep of the words "free and equal," we view them as

128. Jonathan L. Marshfield, *American Democracy and the State Constitutional Convention*, 92 FORDHAM L. REV. 2555, 2570–71 (2024) ("Americans have used conventions for this purpose hundreds of times before, and all fifty states allow for reform by convention.").

129. *Id.* at 2575–79.

130. *See* Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773, 773–74 (2009); Bulman-Pozen & Seifter, *supra* note 9, at 1868–69 ("[W]hile the Fourteenth Amendment to the U.S. Constitution recognizes 'equal protection of the laws,' many state equality clauses specify relevant characteristics (such as race, color, religion, national origin, sex, and disability) and domains (such as civil and political rights, employment, and property).").

131. Bulman-Pozen & Seifter, *supra* note 6, at 871; Douglas, *supra* note 5, at 104.

> indicative of the framers' intent that all aspects of the electoral process, to the greatest degree possible, be kept open and unrestricted to the voters of our Commonwealth, and, also, conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government. Thus, Article I, Section 5 guarantees our citizens an equal right, on par with every other citizen, to elect their representatives. Stated another way, the actual and plain language of Section 5 mandates that all voters have an equal opportunity to translate their votes into representation.[132]

Similarly, the North Carolina Supreme Court initially ruled—before reversing itself after a change in composition—that the state constitutional language "[a]ll elections shall be free" "guarantees the equal power of each person's voice in our government through voting in elections that matter."[133] The Alaska Supreme Court also provided elevated protection for voters when it struck down a partisan gerrymander by invoking its state constitution's Equal Protection Clause and noting that "Alaska's fair representation standard is stricter than the federal standard because Alaska's Equal Protection Clause requires a more demanding review than its federal analog."[134]

That said, some state courts have construed their free elections clauses more narrowly. The Kentucky Supreme Court, for example, ruled that the Kentucky Constitution's Free and Equal Elections Clause does not reach partisan gerrymandering.[135] Instead, the "guarantee of *free* elections is . . . violated when restraint or coercion, physical or otherwise, is exercised against a voter's ability to cast a vote. [The] guarantee of *equal* elections is violated when a voter's vote is not afforded 'the same influence as that of any other voter.'"[136]

In sum, about half of the state constitutions provide an additional layer of protection beyond the explicit grant of the right to vote by declaring that all elections must be free, free and equal, or free and open. As Part II discusses, courts should invoke these clauses in conjunction with the explicit conferral

132. League of Women Voters v. Commonwealth, 178 A.3d 737, 804 (Pa. 2018).

133. Harper v. Hall, 868 S.E.2d 499, 508, 510 (N.C. 2022), *rev'd*, Harper v. Hall, 886 S.E.2d 393 (N.C. 2023).

134. *In re* 2021 Redistricting Cases, 528 P.3d 40, 57 (Alaska 2023).

135. Graham v. Sec'y of State Michael Adams, 684 S.W.3d 663, 682 (Ky. 2023).

136. *Id.* at 684–85 (quoting Asher v. Arnett, 132 S.W.2d 772, 776 (Ky. Ct. App. 1939)).

of the right to vote—along with the other provisions that confer a special status on voters—to offer extra protection to the electorate.

8. Additional Special Protections for Voters Within State Constitutions

State constitutions provide a range of additional protections to voters, elevating voters as the most significant actors in state governance. Twenty-eight state constitutions "foreclose particular restrictions on the franchise, such as interference by civil or military powers, or simply prohibit 'disenfranchise[ment].'"[137] As the Wyoming Constitution puts it, "Elections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammeled exercise of the right of suffrage."[138] Other states that do not explicitly prohibit interference from "civil or military" powers protect voters in other ways. Alabama's constitution states that "The privilege of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct."[139] The Kentucky Constitution says that the legislature must pass a law that requires employers to give voters at least four hours off on Election Day to cast their ballot.[140] The Kentucky Constitution also explicitly protects voters with disabilities: "The General Assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or voted as herein required."[141] The California Constitution protects not only voting but also the counting of a ballot: "A voter who casts a vote in an election in accordance with the laws of this State

137. Bulman-Pozen & Seifter, *supra* note 6, at 871 n.60 (citing ARIZ. CONST. art. 2, § 21; *id.* art. 7, § 2; ARK. CONST. art. 3, § 2; CAL. CONST. art. I, § 22; CONN. CONST. art. 1, § 20; HAW. CONST. art. I, § 8; IDAHO CONST. art. I, § 19; *id.* art. I, § 20; ILL. CONST. art. III, § 8; IND. CONST. art. 2, § 2; MICH. CONST. art. I, § 2; MINN. CONST. art. 1, § 2; MO. CONST. art. I, § 25; MONT. CONST. art. II, § 13; NEB. CONST. art. I, § 22; NEV. CONST. art. 2, § 1; N.H. CONST. art. 11; N.J. CONST. art. I, § 5; N.M. CONST. art. II, § 8; N.Y. CONST. art. I, § 1; N.C. CONST. art. I, § 11; OKLA. CONST. art. I, § 6; PA. CONST. art. I, § 5; S.C. CONST. art. II, § 2; S.D. CONST. art. VI, § 19; TENN. CONST. art. I, § 5; UTAH CONST. art. I, § 17; WASH. CONST. art. I, § 19; W. VA. CONST. art. III, § 11; WYO. CONST. art. 1, § 27).

138. WYO. CONST. art. 1, § 27.

139. ALA. CONST. art. I, § 33.

140. KY. CONST. § 148.

141. *Id.* § 147.

shall have that vote counted."[142] The Arkansas Constitution similarly requires election officials to count a validly cast ballot: "If the officers of any election shall unlawfully refuse or fail to receive, count, or return the vote or ballot of any qualified elector, such vote or ballot shall nevertheless be counted upon the trial of any contests arising out of said election."[143]

Many state constitutions are similar to the U.S. Constitution in forbidding the denial of the right to vote based on a protected characteristic, such as race or sex. Illinois's constitution is emblematic: "No person shall be denied the right to register to vote or to cast a ballot in an election based on race, color, ethnicity, status as a member of a language minority, national origin, religion, sex, sexual orientation, or income."[144] New Mexico's constitution provides another layer of protection: it prohibits discrimination based on numerous traits, including "religion, race, language or color, or inability to speak, read or write the English or Spanish languages," while increasing the threshold to amend that provision.[145] Most amendments to the New Mexico Constitution require a majority vote in the legislature and majority vote of the people, but amendments to the provisions that grant and protect voting rights require the vote of three-quarters of the members of each house and ratification by three-quarters of the state's voters, including two-thirds of those voting in each county.[146] Thus, the New Mexico Constitution elevates the importance of voters by making it particularly difficult to pass amendments that restrict their rights.

Nevada's constitution goes further than any of the other state constitutions by including a voters' bill of rights. In 2020, the state's voters approved a ballot initiative to constitutionalize the protections already included within Nevada's statutes, stipulating a list of eleven items that comprise the "voters' bill of rights":

> Each voter who is a qualified elector under this Constitution and is registered to vote in accordance with Section 6 of this Article and the laws enacted by the Legislature pursuant thereto has the right:
>
> To receive and cast a ballot that:

142. CA. CONST. art. II, § 2.5.
143. ARK. CONST. art. 3, § 11.
144. ILL. CONST. art. III, § 8.
145. N.M. CONST. art. VII, § 3.
146. *Id.*; *id.* art. XIX, § 1.

> (a) Is written in a format that allows the clear identification of candidates; and
>
> (b) Accurately records the voter's preference in the selection of candidates.
>
> To have questions concerning voting procedures answered and to have an explanation of the procedures for voting posted in a conspicuous place at the polling place.
>
> To vote without being intimidated, threatened or coerced.
>
> To vote during any period for early voting or on election day if the voter is waiting in line at a polling place at which, by law, the voter is entitled to vote at the time that the polls close and the voter has not already cast a vote in that election.
>
> To return a spoiled ballot and receive another ballot in its place.
>
> To request assistance in voting, if necessary.
>
> To a sample ballot which is accurate, informative and delivered in a timely manner as provided by law.
>
> To receive instruction in the use of the equipment for voting during any period for early voting or on election day.
>
> To equal access to the elections system without discrimination, including, without limitation, discrimination on the basis of race, age, disability, military service, employment or overseas residence.
>
> To a uniform, statewide standard for counting and recounting all votes accurately as provided by law.
>
> To have complaints about elections and election contests resolved fairly, accurately and efficiently as provided by law.[147]

As this list reveals, the state constitution gives an affirmative right to voters to receive education about the voting process and to have easy voting procedures. Nevada's constitution demonstrates a fidelity to voters as paramount to democratic governance. That said, Nevada voters in 2024

147. NEV. CONST. art. 2, § 1A.

approved a ballot initiative to amend the state constitution to include a voter ID requirement, though the measure needs to pass again in 2026 for it to go into effect.[148] The voter ID requirement, as a restriction on voting, would cut against the idea of expanded participation from the voters' bill of rights. But the voters' bill of rights still demonstrates a general commitment to the electorate as a whole. Additionally, the absence of a voters' bill of rights in other state constitutions does not mean that those constitutions do not offer meaningful protection to voters. The previous Subsections show that the multiple layers of numerous provisions within state constitutions promote the participation of the entire electorate. The Nevada approach simply makes that commitment even stronger.

Other states, too, have amended their constitutions recently to offer stronger rights for voters. Connecticut voters amended their state constitution in 2022 to allow the legislature to adopt early voting and amended the constitution again in 2024 to adopt no-excuse absentee balloting.[149] Michigan amended its state constitution in 2022 to add several pro-voter measures, such as requiring at least nine days of early voting and making absentee voting easier.[150] The 2022 Michigan constitutional amendment followed the state's 2018 voting rights amendment, which adopted automatic voter registration, same-day voter registration, and other measures to promote voter access.[151] The provision notes that it "shall be liberally construed in favor

148. *See* Eric Neugeboren, *Nevadans Approve Ballot Question to Require Voter ID; Measure Heads to 2026 Ballot*, THE NEVADA INDEPENDENT (Nov. 5, 2024, 10:02 PM), https://thenevadaindependent.com/article/nevadans-approve-ballot-question-to-require-voter-id-measure-heads-to-2026-ballot [https://perma.cc/8QR5-DGJG].

149. *See Connecticut Question 1, Allow for Early Voting Amendment (2022)*, BALLOTPEDIA (2022), https://ballotpedia.org/Connecticut_Question_1,_Allow_for_Early_Voting_Amendment_(2022) [https://perma.cc/M73M-AM76]; Susan Haigh, *Connecticut Approves Constitution Change Easing Restrictions on Mail-In Voting*, ASSOCIATED PRESS, Nov. 6, 2024, https://apnews.com/article/absentee-ballots-no-excuse-connecticut-voting-52f8b4e280ae6183a0be80d10803f13c [https://perma.cc/WX7Z-YURN].

150. *See Michigan Proposal 2, Voting Policies in Constitution Amendment (2022)*, BALLOTPEDIA (2022), https://ballotpedia.org/Michigan_Proposal_2,_Voting_Policies_in_Constitution_Amendment_(2022) [https://perma.cc/XE58-WYWL]. The measure also requires voters to show photo identification or sign an affidavit when voting in person or applying for an absentee ballot. *Id.*

151. *See Michigan Proposal 3, Voting Policies in State Constitution Initiative (2018)*, BALLOTPEDIA (2018), https://ballotpedia.org/Michigan_Proposal_3,_Voting_Policies_in_State_Constitution_Initiative_(2018) [https://perma.cc/L2EH-8ZWW].

of voters' rights in order to effectuate its purposes."[152] Some states have enshrined expanded voter access for certain constituencies in their constitutions. California, for example, adopted an amendment in 2020 to allow people on parole for felony convictions to vote.[153] The point here is not to chronicle all of the recent activity on state constitutional amendments regarding voting but to note that many states are placing additional specific voter protections or expanded voter access within their state constitutions, bolstering the ways that voters enjoy a special status under state founding documents.

Counterbalancing the multilayered state constitutional protection of the right to vote is the fact that many state constitutions also restrict voting for certain individuals, such as those convicted of felonies or those adjudged mentally incompetent.[154] Mississippi's constitution is even worse. It sets out rules for voter registration and voter ID requirements and declares that "registration under the Constitution and laws of this state by the proper officers of this state is hereby declared to be an essential and necessary qualification to vote at any and all elections."[155] Other states have also adopted amendments to add voter restrictions, such as strict voter ID requirements and

152. MICH. CONST. art. II, § 4.

153. *See California Proposition 17, Voting Rights Restoration for Persons on Parole Amendment (2020)*, BALLOTPEDIA (2020), https://ballotpedia.org/California_Proposition_17,_Voting_Rights_Restoration_for_Persons_on_Parole_Amendment_(2020) [https://perma.cc/3C8Z-7VTN].

154. All but two states—Maine and Vermont (as well as Washington, D.C.)—disenfranchise individuals at least while they are incarcerated after conviction of a felony. *See* Christopher Uggen, Angela Behrens & Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCI. 307, 307–08 (2005); Kira Lerner, *The District of Columbia Allows Incarcerated People to Vote, A Rarity in The U.S.*, VA. MERCURY (June 21, 2022, 12:02 AM), https://virginiamercury.com/2022/06/21/the-district-of-columbia-allows-incarcerated-people-to-vote-a-rarity-in-the-u-s/ [https://perma.cc/256M-PQJD].

Many state constitutions also carve out an exception to the general conferral of voting rights for individuals with mental disabilities. "Looking solely at constitutional provisions, only California, Connecticut, Idaho, Illinois, Indiana, Maine, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Vermont have no constitutional disenfranchisement provision for persons with a category of mental impairment or disability." Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 936 (2007); *see also* Naomi Doraisamy, *Out of Mind, Out of Sight: Voting Restrictions Based on Mental Competency*, 56 IDAHO L. REV. 135, 138 (2020).

155. MISS. CONST. art. 12, § 241; *id.* art. 3, § 5; *id.* art. 12, § 249.

bans on noncitizens voting.[156] These provisions place hurdles on voter access in the name of election integrity.

These restrictions within state constitutions, however, exist alongside the elevation of qualified voters as paramount. For example, the Mississippi Constitution confers the right to vote (while excluding certain people such as those convicted of a felony); explains that "[a]ll political power is vested in, and derived from, the people"; requires a secret ballot; and offers immunity to voters as they travel to and from the polls.[157] Thus, although the protection for voters is not as strong in the Mississippi Constitution as compared to other state constitutions, it still confers a special role for voters in democratic governance through a multilayered right to vote.

Of course, each state constitution is different, so perhaps speaking of state constitutions through a singular analysis paints with too broad of a brush. The state constitutional protection for the right to vote is stronger in some places than in others, as the comparison of the Nevada and Mississippi constitutions reveals. But all state constitutions include multiple provisions that elevate voters as a primary actor for state governance.

C. *State Constitutions' Multilayered Protection for Voters*

Most state constitutions have specific, separate articles devoted to voters that contain many of the provisions discussed above. These clauses elevate voters as a fundamental—in fact, *the* fundamental—actor in state governance. All state constitutions (except New York's) say that political power derives from "the people."[158] The provisions that give voters a special status and promote universal voter participation (with some exceptions, such as for those convicted of felonies) exist within that foundational framework.

It is a mistake to read the clauses about voters in isolation from one another. Together, they form a holistic bulwark for

156. *See* Joshua A. Douglas, *Opinion: Election Deniers Aren't the Only Threats to Democracy This Year*, CNN (Nov. 1, 2022, 4:36 PM), https://www.cnn.com/2022/11/01/opinions/democracy-ballot-measures-midterm-elections-douglas/index.html [https://perma.cc/6RQH-DBEC] (highlighting ballot measures in 2020 in Arizona, Nebraska, Ohio, Louisiana, and other states); Joshua A. Douglas, *What I'm Watching on Election Night*, WASH. MONTHLY (Nov. 5, 2024), https://washingtonmonthly.com/2024/11/05/what-im-watching-on-election-night/ [https://perma.cc/3566-6ZJD] (highlighting ballot initiatives about democracy in 2024).

157. MISS. CONST. art. 3, § 5; *id.* art. 12, § 240; *id.* art. 4, § 102.

158. Bulman-Pozen & Seifter, *supra* note 6, at 869.

voters that places them above other governmental entities.[159] That is, voters have their own institutional nature within a state's constitutional architecture, which reorients constitutional theory and prioritizes the ability of voters to express themselves freely without governmental interference.[160] Courts should analyze any governmental action that impacts voter participation and representation within the context of this multilayered state constitutional protection for voters. As Professors Bulman-Pozen and Seifter note, "All state constitutions include not only the right to vote but also additional protections to safeguard popular participation in and control over elections."[161] Moreover, courts in all fifty states "purport to interpret their state constitutions as a whole, rather than clause by clause."[162] If courts read the provisions about voters holistically, they will see that voters enjoy a special place in state democracy. The right to vote under state constitutions is not a clause-bound right stemming from just one or two provisions. State constitutions offer a multilayered right to vote in both the conferral of specific rights and in the protections provided to voters to participate in democracy.

This account is similar to Professors Bulman-Pozen and Seifter's recognition of a "democracy principle," though it considers state constitutions and voting rights through a slightly different lens.[163] Professors Bulman-Pozen and Seifter highlight how state constitutions favor popular sovereignty, majoritarianism, and political equality.[164] Regarding popular sovereignty, Professors Bulman-Pozen and Seifter explain that state constitutions "place the people themselves above government."[165] State constitutions elevate voters through the multilayered right to vote. Majoritarianism, of course, concerns the ability of the majority to rule itself.[166] But all voters, not just those who choose the winning candidates, enjoy rights under state constitutions. They have broader protections that go beyond ensuring majoritarian outcomes, favoring robust voter participation for all. As for political equality, Professors Bulman-Pozen and Seifter explain that state constitutions

159. *See infra* Part II.

160. A broader inquiry into the implications for constitutional theory is left for a future paper.

161. Bulman-Pozen & Seifter, *supra* note 9, at 1916.

162. *Id.* at 1891 n. 208 (citing cases from each state).

163. *See* Bulman-Pozen & Seifter, *supra* note 6, at 864.

164. *Id.*

165. *Id.* at 880.

166. *Id.*

"attempt to make government accessible to all members of the political community" and "seek to foreclose forms of special treatment by the government."[167] A narrow (and incorrect) formulation of this principle might suggest that the government simply must be open to everyone equally—even if that access is equally limited. The multilayered right to vote gives proper scope to the equality ideal by requiring full participation for all. Ultimately, the "democracy principle" emphasizes how state constitutions facilitate majoritarian *outcomes*. The multilayered right to vote recognizes more explicitly that state constitutions privilege *all* voters as the key *inputs* in every aspect of state democracy.

Beyond the clauses specific to the role of voters and their act of voting, state constitutions also include additional provisions that further guarantee a fair democratic process. State constitutional requirements about redistricting, for example, seek "to guarantee that ballots cast are afforded substantially equal weight irrespective of where voters reside."[168] Provisions on campaign finance help to ensure that wealthy interests do not have an undue influence on election outcomes.[169] Those clauses relate to the fair functioning of elections and thereby also support voters. Supplementing that "democratic commitment"[170] within state constitutions, the provisions discussed in this Article explicitly elevate voters as the fundamental participatory actors for state governance.

Of course, not every state constitution includes every provision discussed above. As recounted earlier, Nevada's constitution, which has most of the clauses alongside a voters' bill of rights, is perhaps the best governing document in promoting the participatory role of voters. Mississippi's constitution is likely the worst because it includes various mechanisms, such as explicit registration and voter ID rules, that make it harder for people to cast a ballot. Yet a proper analysis of the role of voters in democratic governance should not come down to a simple tally of how many protective clauses exist within state constitutions. Instead, these provisions reinforce each other, with each one adding another layer of protection for voters. As Professors Bulman-Pozen and Seifter note, "State constitutions have also bolstered the right to vote

167. *Id.*
168. Codrington III, *supra* note 62 (manuscript at 15).
169. *See, e.g.*, OR. CONST. art. II, § 22 (imposing campaign contribution limits).
170. Bulman-Pozen & Seifter, *supra* note 6, at 876–79, 881.

through linked provisions,"[171] including many of the clauses discussed above. Every state constitution includes at least several of these provisions, and some have them all.

In any litigation, a state court should look to the array of provisions that protect voters in that specific state's constitution. As this Section reveals, all state constitutions include at least some of these clauses. When layered on top of each other, the provisions form a holistic, robust right to vote. Therefore, while the claim that state constitutions elevate voters to a special status is stronger in some states as compared to others based on the kinds of protections the different state constitutions afford, all state constitutions demonstrate a commitment to voters as the primary and most important participants in democratic governance. Voters' participatory interest is paramount.

D. *The Uniqueness of the Special Status of Voters*

The previous Sections highlighted the ways that state constitutions confer a special status on voters. Through a myriad of provisions, state constitutions offer numerous protections to voters as a group, elevating their importance to the foundation of state government.

While significant in its own right, the point is even more poignant when considering that state constitutions do not confer a similar special status on other groups of people. This analysis seeks to prove a negative in some ways, looking at whether state constitutions fail to identify other people who act collectively in the public sphere, giving them special protections when doing so. Although state constitutions do mention other individuals or groups for various actions under state governments, no people enjoy the same elevated importance as voters. That is, state constitutions do not offer the same kinds of rights and protections in a multilayered fashion to any other people.

State constitutions create the three main branches of government, of course, and thereby set out the roles of legislators, the governor and lieutenant governor, judges, and sometimes other state officials such as the secretary of state or the treasurer.[172] But these are specific positions of state

171. Bulman-Pozen & Seifter, *supra* note 9, at 1877; *see also id.* ("Both by locating democracy protections in bills of rights and by expressly casting many of these protections as rights, state constitutions propose a mutually constitutive relationship between democracy and rights.").

172. *See, e.g.*, KY. CONST. § 91.

government, not a group of people with special protections who are not otherwise official governmental actors. They derive their powers initially from the voters who elect them, while the state constitution then delineates the scope of that power. The state constitutional conferral of powers simply designates what these individuals may do while in office.

There are two other groups of people that many state constitutions mention as enjoying special protections—jurors and militia members—but neither have the same kinds of elevated protections as voters.

Jurors are essentially governmental actors for a limited purpose, and most state constitutions delineate their roles and responsibilities, often saying that the right to a jury trial is "inviolate."[173] As Ohio Court of Appeals Judge Pierre H. Bergeron wrote when advocating for a renewed focus on how state constitutions promote the right to a jury trial, "if you dust off the debates around the time of the adoption of many state constitutions, it's not difficult to find proponents of the jury right explaining how important and central it is, particularly as a check on the other branches of government."[174] Juries are vital to democracy in the protection they offer against government overreach. As Professor Suja Thomas has written, juries are best understood as a "branch or constitutional actor" of government such that the failure to recognize the jury's status in this way "has contributed to its decline and its loss of power to the traditional actors."[175]

But juries are small groups of individuals at any one time, not the populace as a whole, and they act only within the context of the judiciary. Their role relates to a specific case and once the case is over, jurors return back to the community and no longer serve in the role of a juror. Additionally, state

173. *See, e.g.*, ALA. CONST. art. I, § 11 ("That the right of trial by jury shall remain inviolate."); N.Y. CONST. art. I, § 2 ("Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."); OHIO CONST. art. I, § 5 ("The right of trial by jury shall be inviolate.").

174. Pierre H. Bergeron, *The Promise of State Constitutions in Restoring Jury Trials*, BRENNAN CTR. FOR JUST. (Apr. 19, 2023), https://www.brennancenter.org/our-work/analysis-opinion/promise-state-constitutions-restoring-jury-trials [https://perma.cc/ZJD9-TQ5B].

175. Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1299–1300 (2016) (arguing for the Court to recognize the jury as "effectively a branch or constitutional actor" of government); *Why Jury Trials are Important to a Democratic Society*, NAT'L JUD. COLL., https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf [https://perma.cc/K93K-AUPL].

constitutions do not confer special protections to jurors themselves. The jury exists to offer protection to defendants against state power. Further, state constitutions do not declare that all citizens are automatically jurors. Thus, while state constitutions identify the jury as an important component of individual rights protection, a jury is not similarly situated to the electorate as a whole in the way in which state constitutions confer a special status.

Militias perhaps offer a better analogy to voters in that most state constitutions identify the militia and give militia members specific protections. Most state constitutions note the importance of militias to the security of the state, often—like the Second Amendment to the U.S. Constitution—tying the role of a militia to the individual right to bear arms.[176] Some state constitutions have separate articles related to the militia.[177] And many state constitutions declare that all "able bodied men" between a certain age are members of the militia.[178] In addition, similar to the protection given to voters while they travel to and from the polls, Illinois offers members of the militia immunity from arrest when going to or returning from militia duty.[179]

But in several important ways the militia is not similarly situated to the electorate as a whole, especially given the content, volume, and context of protections that voters enjoy. Virtually every state constitution declares that the military is strictly subordinate to civil power.[180] These clauses prohibit

176. *See, e.g.*, VA. CONST. art. I, § 13 ("That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state[.]").

177. *See, e.g.*, IDAHO CONST. art. XIV; ILL. CONST. art. XII; OR. CONST. art. X.

178. *See, e.g.*, IDAHO CONST. art. XIV, § 1 ("All able-bodied male persons, residents of this state, between the ages of eighteen and forty-five years, shall be enrolled in the militia, and perform such military duty as may be required by law[.]").

179. ILL. CONST. art. XII, § 5.

180. ALA. CONST. art. I, § 27; ALASKA CONST. art. I, § 20; ARIZ. CONST. art II, § 20; ARK. CONST. art. II, § 27; CAL. CONST. art. I, § 5; COLO. CONST. art. II, § 22; CONN. CONST. art. I, § 16; DEL. CONST. art. I, § 17; FLA. CONST. art. I, § 7; GA. CONST. art I, § 2, para. 6; HAW. CONST. art. I, § 16; IDAHO CONST. art. I, § 12; ILL. CONST. art. XII, § 2; IND. CONST. art. I, § 33; IOWA CONST. art. I, § 14; KAN. CONST., Bill of Rights, § 4; KY. CONST. § 22; LA. CONST. art. 12, § 2; ME. CONST. art. I, § 17; MD. CONST. Decl of Rights Art. 30; MASS. CONST. pt. I, art. XVII; MICH. CONST. art. I, § 17; MINN. CONT. art. I, § 14; MISS. CONST. art. III, § 9; MO. CONST. art. I, § 24; MONT. CONST. art. II, § 32; NEB. CONST. art. I, § 17; NEV. CONST. art I, § 11; N.H. CONST. art. I, § 26; N.J. CONST. art. I, § 15; N.M. CONST. art. II, § 9; N.C. CONST. art. I, § 30; N.D. CONST. art. I, § 19; OHIO CONST. art. I, § 4; OKLA. CONST. art. II, § 14; OR. CONST. art. I, § 27; PA. CONST. art. I, § 22; R.I. CONST. art. I, § 18; S.C. CONST. art. I, § 20; S.D. CONST. art.

private paramilitary or militia organizations.[181] They also state unequivocally that the "civil power"—which, as discussed above, derives from "the people" acting as voters—is paramount over the military. Some state constitutions explicitly favor voters themselves over the military. Arizona's constitution, for example, declares that "No elector shall be obliged to perform military duty on the day of an election, except in time of war or public danger."[182] Therefore, even though state constitutions protect both groups, voters are superior to members of the militia.

State constitutions do not designate any other group of individuals as having special powers or responsibilities, or name anyone else as a vital participant in democracy. They also do not confer specific protections on an identifiable set of people. And they do not layer the protections for any other group on top of each other. Of course, state constitutions provide numerous individual protections, often through a bill of rights, so in that sense all individuals enjoy important liberties such as freedom of speech and equality.[183] Those provisions are typically couched as limitations against government overreach. The clauses conferring a special status on voters are different. They first confer the right to vote and then offer layers of protections that are specific to the act of voting. State constitutions do not identify the citizenry as a whole in any way other than as voters and do not delineate a suite of protections for any other act related to democratic governance.

VI, § 16; TENN. CONST. art. I, § 24; TEX. CONST. art. I, § 24; UTAH CONST. art. I, § 20; VT. CONST. ch. 1, art. 16; VA. CONST. art. I, § 13; WASH. CONST. art. I, § 18; W. VA. CONST. art. III, § 12; WIS. CONST. art. I, § 20; WYO. CONST. art I, § 25. Only New York's Constitution fails to state that the military is subordinate to the civil power. Albert Lobb, *Civil Authority Versus Military*, 3 MINN. L. REV. 105, 105 (1919) ("The constitution of each state in the Union, except New York, provides for the subordination of the military to the civil power.").

181. *See Prohibiting Private Armies at Public Rallies*, GEO. L.: INST. FOR CONST. ADVOC. & PROT. (3d. ed. Sept. 2020), https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2018/04/Prohibiting-Private-Armies-at-Public-Rallies.pdf [https://perma.cc/F75Y-9YSG].

182. ARIZ. CONST. art. 7, § 5. The constitutions of Iowa, Maine, and Wyoming have similar provisions. IOWA CONST. art. II, § 3; ME. CONST. art. II, § 3; WYO. CONST. art. 6, § 4; *see also* MICH. CONST. art. II, § 4(b) (providing that military personnel have a right to an "absent voter ballot" sent to them).

183. *See* Jonathan L. Marshfield, *The People and Their Constitutions*, 71 RUTGERS U. L. REV. 1233, 1234 (2019) ("State constitutions fill many vital gaps left open by the Federal Constitution. They also address myriad areas of significant public policy with no federal analogs or counterparts."); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 172 (1983).

State constitutions treat voters as a unique, special group. They layer the protections for voters on top of each other in a way that is different from how they treat other actors in state governance. They favor voter participation as the key input for democratic legitimacy. As the next Part explains, courts should recognize this special state constitutional protection so that another governmental entity, such as a legislature, cannot encroach upon the participatory interest inherent in the multilayered constitutional right to vote.

II. A SEPARATION OF POWERS ANALOGY

If voters are so important to the structure of state constitutions, then how does their elevated status compare to the status of the representatives they elect? A government derives its legitimacy from the consent of the governed, yet judicial review of election rules has often favored legislatures over voters. Using a means-end analysis, courts have deferred to legislative judgments on how to run elections.[184] That approach is backwards. A recognition of the electorate as a separate, special entity has ramifications for how to consider the structure of government and the relationship between the various branches.

All fifty state constitutions demonstrate a commitment to separation of powers.[185] As Professor Jim Rossi recounts, "Since the time of the founding, most state constitutions have expressly acknowledged separation of powers principles in their constitutional texts."[186] Thirty-five state constitutions explicitly split governmental powers between the legislative, executive, and judicial branches and provide that one branch may not exercise the powers of another.[187] Five states separate governmental power into three branches but do not explicitly prohibit one branch from exercising the powers of a different branch.[188] The remaining ten states set out the powers of each branch, implicitly providing for separation of powers.[189]

None of the state constitutions name the electorate as an additional "branch" of government. But given the findings in Part I on the multilayered right to vote, there is a strong

184. *See* Douglas, *Undue Deference*, *supra* note 25, at 66.

185. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999).

186. *Id.* at 1190.

187. *Id.* at 1191.

188. *Id.*

189. *Id.*

argument that state constitutions elevate voters to a venerated status—one that is analogous to the primary "branch" of government—such that another branch cannot encroach upon the powers of the electorate. Democracy has long relied on the idea that the people are sovereign, and voters cast their ballots to express and effectuate that sovereignty.[190]

Voters are not, of course, a branch of government in the traditional sense. They act only at regular intervals and otherwise do not govern on a day-to-day basis. Yet there is a meaningful analogy for voters under separation of powers principles. Just as the executive may not impinge upon the powers that a constitution delegates to the legislature, state constitutions implicitly forbid a branch of state government from infringing upon the power of voters to participate in the very act that gives the other branches their legitimacy.

The idea of separation of powers, at least for American government, derives from James Madison's influential advocacy in the Federalist Papers.[191] It remains a core tenet of democratic governance.[192] Separation of powers scholarship, however, has largely overlooked the possibility of the electorate as tantamount to an additional branch. This Part discusses the Madisonian ideal of separation of powers before exploring a new theory that uses separation of powers principles as applied to the participatory interest of the electorate as a whole under state constitutions.

A. *Madisonian Separation of Powers*

The idea that the three branches of government would check each other was a core principle of Founding-era discussion over

190. *See* Chisholm v. Georgia, 2 U.S. 419, 471–72 (1793) (noting that "at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects . . .; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.").

191. *See* Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 375–76 (1976).

192. *See* Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 436 (2013) (arguing that the separation of powers is "an indispensable part of our theory of politics" and democracy in America, although not a "freestanding principle of our Constitution").

the new constitution.[193] James Madison famously explained that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[194] Thus, one of the driving principles behind the Framers' institution of a new democratic republic was the "'balances and checks' that distinctively characterize the American system of separation of powers."[195] As Madison noted in Federalist 51,

> In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.[196]

Madison also explained that no branch "ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers."[197] Government officials in charge of each branch would act to ensure that another branch would not encroach upon its power; in Madison's words, "[a]mbition must be made to counteract ambition."[198] The competitive branches would therefore "balance and check" one another so that none would aggrandize too much power for itself.[199] Thus, for example, the Supreme Court held that the President could not seize steel mills during a time of war without congressional authorization.[200]

193. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 525 (2015).

194. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

195. Levinson & Pildes, *supra* note 13, at 2312 (citing THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

196. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

197. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

198. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

199. Levinson & Pildes, *supra* note 13, at 2317.

200. *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Numerous scholars have criticized this Madisonian ideal,[201] yet "Madison's approach remains at the center of federal separation of powers theory and jurisprudence."[202] As Professor Akhil Amar recounted, "the phrases 'separation of powers' and 'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically."[203]

Madison was also concerned with the "tyranny of the majority"—the idea that self-interested majorities would ameliorate the rights of the political minority.[204] Various features of the U.S. Constitution, such as bicameralism of the legislature and the indirect election of the president—work in tandem to ensure that there are checks on "majority faction."[205] Madison opposed direct democracy for the same reason.[206] A representative democracy could provide a "cure for the mischiefs of faction" among the people.[207]

Professors Daryl Levinson and Rick Pildes argue that true Madisonian separation of powers does not exist in the federal system because Madison failed to consider the role of political parties—and, in particular, party competition—in governing.[208] "[F]rom the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power."[209] Today's American government revolves around the desire to enhance political power, not the attempt for one branch to dominate over another. This conclusion gives force to the idea that the electorate as a whole should have a role in separation of powers debates. If the goal is to ensure that no political party faction can dominate, then one solution is to give full force to the multilayered state constitutional right to vote that elevates the status of all voters above the elected branches of government.

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201. *See, e.g.*, Levinson & Pildes, *supra* note 13, at 2312; Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 724 (2011).

202. *See* Marshfield, *supra* note 15, at 557.

203. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 30 (2000).

204. *See* JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 48–49 (2d. ed. 2002).

205. *See* Marshfield, *supra* note 15, at 558–60.

206. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

207. *Id.*

208. Levinson & Pildes, *supra* note 13, at 2317–19.

209. *Id.* at 2323.

B. *The Electorate in the Separation of Powers Analysis*

State constitutions do not share the same Madisonian goals of self-interested governmental branches checking each other's powers.[210] They instead place greater faith in voters by promoting popular sovereignty as the cornerstone of state governance.[211] State constitutions require separation of powers—many explicitly by noting that one branch may not exercise the powers given to another[212]—but they do not follow the Madisonian model.[213] Instead, as Professor Jonathan Marshfield persuasively argues, "[S]tate constitutions separate powers—not to unleash intra-government rivalries and prop up representative institutions—but to enhance the public's ability to directly monitor government from the outside."[214]

Separation of powers under state constitutions "point toward a theory that prioritizes external checks on government more than internal checks."[215] Instead of adhering to Madisonian designs of internal checks and balances, Professor Marshfield shows how the language and force of state constitutions "reflect a persistent commitment to the idea that the separation of powers is built to facilitate popular control over government."[216] That is, to address the problem of partisan lockup of state government, state constitutions favor stronger voter participation so that the public can "track and respond to malfeasance."[217] Professor Robert Williams echoes this formulation, noting that "separation of powers arguments can be deployed to protect rights as well as defend against abuse of government power," which is a different goal from federal separation of powers ideals.[218]

This focus of state constitutions—with their elevation of voters as the ultimate check on government—is not a new concept.[219] As Marshfield notes, "Early state legislatures were also designed to facilitate direct popular oversight as much as

210. Marshfield, *supra* note 15, at 551.
211. *Id.*
212. Rossi, *supra* note 185.
213. Marshfield, *supra* note 15, at 551.
214. *Id.*
215. *Id.* at 561.
216. *Id.* at 553.
217. *Id.* at 551.
218. Robert F. Williams, *From Rights Arguments to Structure Arguments: The Next Stage of the New Judicial Federalism*, 2023 WISC. L. REV. 1615, 1623–24.
219. *See* G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87, 89–90 (Elliot Abrams ed., 2002).

possible through a variety of mechanisms, including annual elections, term limits, and the obligation to receive instructions from constituents."[220] Thus, state constitutions have always focused on the role of the popular majority as the legitimizing source of the power of the elected branches.

The multilayered constitutional right to vote and the accompanying elevated status of voters under state constitutions falls squarely within this account of state constitutional separation of powers. Because the people are sovereign and hold greater power than the elected branches, many state constitutions provide for direct democracy. They also include numerous provisions to protect voters that run contrary to the Madisonian anti-majoritarian ideal.[221] Instead of a focus on interbranch rivalries, state constitutions empower the electorate to provide an external check on the branches of government. In this way, voters are the most important actors in state governance.[222]

State constitutions offer rights to individuals while also conferring powers to a variety of actors: the legislature, the Governor, the judiciary, other governmental entities, and "the people" as voters. The question in a separation of powers analysis is how to reconcile competing claims between those entities when the constitution not only grants rights but also gives authority to another actor that could impede those rights. Put more concretely, state constitutions confer a multilayered right to vote and promote voter participation for the entire electorate, but they also give authority to legislatures to regulate the election process. Who should win when those principles directly conflict—when the legislature enacts a rule that impedes the ability of the voters to exercise their rights?

Alongside the multilayered constitutional right to vote, most state constitutions direct legislatures to craft election rules. Virginia's constitution, for example, says that the General Assembly "shall provide for the nomination of candidates, shall regulate the time, place, manner, conduct, and administration of primary, general, and special elections, and shall have power to make any other law regulating elections not inconsistent

220. Marshfield, *supra* note 15, at 597 (citing G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition, in* DEMOCRACY: HOW DIRECT? VIEWS FROM THE FOUNDING ERA AND THE POLLING ERA 87 (Elliot Abrams ed., 2002)).

221. *See supra* Section I.B.

222. Marshfield, *supra* note 15, at 600 (explaining that "the separation of powers in state constitutions is an instrument designed to reinforce and facilitate direct popular control over government").

with this Constitution."[223] Many constitutions also allow legislatures to enact rules to support election integrity, such as Connecticut's constitution, which says that "[l]aws shall be made to support the privilege of free suffrage, prescribing the manner of regulating and conducting meetings of the electors, and prohibiting, under adequate penalties, all undue influence therein, from power, bribery, tumult and other improper conduct."[224] Legislatures have rested on the authority that these clauses grant to enact a wide range of election rules that often make it harder for some people to vote.[225] And courts have generally deferred to legislators as the elected representatives—even when the laws they enact might shape the very electorate that gives those legislators their power.[226] But this deference is based on an incorrect reading of the state constitutional language. The clauses do not exist to grant unfettered power to legislatures; they instead are part of the overall constitutional design to ensure that voters have the ultimate say in democratic governance. Legislatures may enact election laws that will promote fairness and honest outcomes so that voters have the final say in who represents them. The legislature oversteps its bounds when the laws it passes, even if purportedly to promote election integrity, have the effect of taking power away from voters to participate in the process of giving the government its legitimacy. Any rule that regulates the election, even to root out bribery or fraud, must be in service of the electorate's ultimate power.

State constitutional separation of powers theory demonstrates that the authorization of power cannot outweigh the conferral of rights.[227] State constitutions favor popular

223. VA. CONST. art. II, § 4.

224. CONN. CONST. art. 6, § 4.

225. *See, e.g.*, Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213, 246–47.

226. *See infra* Part III; *see also* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–04 (2008) (rejecting a challenge to Indiana's voter ID law based on the state's justification of protecting election integrity, even though the state had no evidence of integrity problems and even though the law would make it harder for some people to vote).

227. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 263–64 (2005) (explaining that state courts should consider "the way in which structural provisions of the state constitution work to produce an appropriate balance of power internally, among state officials, for the purpose of best protecting the state citizenry from those officials rather than from their national counterparts. Consequently, state courts would probably need to devote careful attention, when construing structural provisions, to

sovereignty and ensure that the people can effectively provide an external check on the elected branches.[228] When a legislature encroaches on voters' broad rights, it violates this separation of powers principle because it takes away voters' ability to exercise an external check on governmental power. This concept is perhaps clearest in the context of direct democracy, where the voters have the exact same powers as the legislature to enact laws through initiatives.[229] But it applies with equal force to the elections that give legislators their authority. Although voters are not technically (or merely) another branch of state government, they are the ultimate authority pursuant to the various clauses that grant the right to vote and the overall structure of state constitutions. Therefore, another branch cannot encroach on voters' ability to exercise their rights. That is, the multilayered right to vote under state constitutions and the elevation of voters as the preeminent actor in state governance means that a legislature violates what amounts to a separation of powers ideal when it makes it harder for the electorate to exercise its rights.

There is no need for tiers of scrutiny, a means-end inquiry, or a balancing test between the rights of voters and the interests of the legislature in this analysis; a state should not be able to justify an infringement on the voters' participatory interest in giving the legislature its legitimacy.[230] If the legislature is encroaching on the ability of the electorate to direct the government by curtailing access to the ballot, then the legislature has violated the separation of powers principle.[231] The theory therefore provides another layer of protection to voters and another potential cause of action to litigants. Tiers of scrutiny might be fine when an individual

state-specific considerations of text and history, even when the provisions are in some respects identical to parallel features of the U.S. Constitution").

228. Marshfield, *supra* note 15, at 563.

229. Johnstone, *supra* note 127, at 149 ("Where legislatures work under initiative enabling provisions in state constitutions, or where state constitutions are silent, a structural parity principle suggests the initiative power should remain on an equal footing with the legislature's power.").

230. *Id.* at 144 ("Terming the initiative a right rather than a power takes the Court into an ill-fitting strict scrutiny analysis.").

231. *Cf.* Bulman-Pozen & Seifter, *supra* note 9, at 1893 (advocating for "proportionality" review, which "is both a general principle demanding justifications for government intrusions on rights and a specific doctrinal approach to constitutional adjudication"); *cf.* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 13–15 (2015) (finding that the President has the exclusive power to recognize other nations and that Congress's infringement of that right violated the separation of powers).

voter claims that a law infringes upon their own ability to exercise the franchise. However, when a law curtails the group right of electoral participation, separation of powers principles should apply.

The analogy to state separation of powers goes beyond a simple recognition that state constitutions confer an individual right to vote. It places the multilayered right to vote within the structural framework of state constitutional design and reveals why deference to legislatures in election rules is improper.[232] It therefore helps to reconcile the broad conferral of the right to participate with a legislature's more limited power to regulate the election process, showing why the voters must win if a legislature's action amounts to an encroachment of the voters' power to direct the government.

Of course, there is still a role for Madisonian-style separation of powers even under state constitutions. The branches of state government can check each other's power. Placing authority solely within the electorate can lead to the tyranny of the majority and the subjugation of minority rights. State separation of powers principles that empower the electorate to engage in external oversight of the elected branches can co-exist with Madisonian separation of powers ideals. As Professors Bulman-Pozen and Seifter note, "In the state constitutional landscape, individuals are never entirely independent actors; they are citizens in the republican tradition, responsible for the public welfare as well as their own."[233] That said, under state constitutional design, voters are paramount for the rules that determine democratic representation. A legislature has authority as the body of duly elected representatives, but it does not have unfettered authorization to curtail the power of the voters to give the legislature its legitimacy—even when state constitutions expressly say that legislatures may enact election rules. The conferral of this specific authority cannot outweigh the structural component of state constitutions that elevate the status of voters.

The legislature still has the authority to enact all sorts of laws that regulate society given the various responsibilities that state constitutions confer. But the multilayered right to vote under state constitutions limits the legislature *for rules about the administration of an election* because of the fear that

232. *See* Douglas, *(Mis)Trusting States*, *supra* note 25, at 553.

233. Bulman-Pozen & Seifter, *supra* note 9, at 1863.

the legislature will enact laws that skew representation. This theory goes hand in hand with the concern about entrenchment, or the idea that politicians will pass rules to keep themselves in power.[234] In this area, which is foundational to the legitimacy of government, the legislature must yield to the voters.

Analogizing to separation of powers principles when lawmakers enact rules that impede voter access does not mean that voters are co-equal to the other branches of government. Because those branches derive their legitimacy from voters, the elected branches are necessarily subordinate. At the same time, many state constitutions give their legislatures the authority to enact rules to regulate the election process. A recognition that voters have special status under state constitutions means that the legislature cannot unduly interfere with voters' ability to exercise their powers even when the legislature acts pursuant to its constitutional authority to dictate rules for an election. The legislature cannot exist without the "people" fairly electing it, so it has no authority to infringe upon the rights of the entity that gives it power. A separation of powers analogy can therefore reconcile the multilayered right to vote with the delegation of authority to legislatures to set election rules: if the law takes away the ability of voters to direct their government through meaningful participation, then the electorate must prevail.

The recognition of the multilayered right to vote under state constitutions and the use of separation of powers principles to effectuate that right against legislative encroachment is complementary to, but goes beyond, the democracy principle that Professors Bulman-Pozen and Seifter identify.[235] The democracy principle, with its correct focus on popular sovereignty, would seem to favor majority outcomes. But state constitutions also value voters who choose losing candidates because the multilayered right to vote is concerned with the ability of the entire electorate to participate. A separation of powers analogy, which focuses on whether the legislature is overstepping its bounds as compared to another governmental actor, fully recognizes the way in which state constitutions favor all voters, regardless of the representation that results from voters' choices.

State legislatures therefore should not be able to justify an election rule that infringes upon the participatory interest of

234. *See* Issacharoff & Pildes, *supra* note 34, at 643.

235. *See* Bulman-Pozen & Seifter, *supra* note 9, at 1864.

the electorate through a typical means-end analysis. But there is still an open question as to when exactly a legislature has encroached upon the electorate's ability to participate. This inquiry is dependent on the facts of the specific rule. The key issue is whether the law makes it meaningfully harder for an identifiable segment of the electorate to cast their ballot. Any rule might make the process of voting more challenging for some people. For instance, some voters might find it difficult to visit a polling location or drop off their mailed ballot, so courts must develop a threshold that still allows states to regulate elections. The individual rights framework with its means-end analysis might be more appropriate for these individual harms. When a rule goes beyond mere inconvenience to a few people and instead impinges upon an identifiable segment of the electorate's ability to participate, the separation of powers analogy becomes more useful.

The elevated status of voters under state constitutions reinforces the idea that legislatures are subordinate to "the people." One way to ensure that the people remain the legitimizing force for democratic governance is for courts to strike down laws that infringe on the state constitutional protection of the electorate's participation in democracy through this separation of powers analogy.

C. *The "Trunk" that Holds Up the Branches*

If courts use separation of powers principles to scrutinize election laws that unduly impact voters' ability to exercise their state constitutional rights or that infringe upon voters' elevated status, then is the electorate essentially a fourth "branch" of government?

Although most scholars agree that there are three branches of government—legislative, executive, and judicial—some observers have suggested that various institutions constitute a fourth branch.[236] The ballot initiative, one commentator

236. *See* Peter Schrag, *The Fourth Branch of Government? You Bet.*, 41 SANTA CLARA L. REV. 937, 943 (2001) (suggesting initiative as the fourth branch); DOUGLAS CATER, THE FOURTH BRANCH OF GOVERNMENT vii (1959) (suggesting the "press" as the fourth branch); KEVIN B. SMITH & MICHAEL J. LICARI, PUBLIC ADMINISTRATIONS: POWER AND POLITICS IN THE FOURTH BRANCH OF GOVERNMENT xi (2006) (suggesting administrative agencies as the fourth branch); Scott Shane & Ron Nixon, *U.S. Contractors Becoming a Fourth Branch of Government*, INT'L HERALD TRIB., Feb. 4, 2007, *available at* https://www.nytimes.com/2007/02/04/world/americas/04iht-web.0204contract.4460796.html [https://perma.cc/BP9H-LKML] (suggesting private contractors with government as the fourth branch).

argued, has become a fourth branch, especially in states that use it often such as California, because "the process, once regarded as something of an exceptional safety valve, something outside the conventional political process, has become part of it."[237] Professor Ethan Leib advocated for the creation of a "Popular Branch" as a fourth branch of government, which would consist of a citizens' assembly that would deliberate and draft laws.[238] Professor Bruce Ackerman suggested a "special branch of government . . . as a distinct part of the system of checks and balances" that could "provide a mechanism to ensure the continuing force of its ideal of democracy despite the predictable efforts by reigning politicians to entrench themselves against popular reversals at the polls."[239] Scholars have recognized that other countries often include a "fourth" branch of government, such as electoral or human rights commissions.[240]

As the prior analysis revealed, state constitutions already include principles that elevate the status of voters to something akin to their own branch of state government. The recognition of the ultimate authority of voters derives from the very idea of democracy itself. As Alexander Meiklejohn explained, "Rulers and ruled are the same individuals."[241] He also "refer[red] to the electorate as the fourth branch of government."[242] The Declaration of Independence says that a government derives its "just powers from the consent of the governed."[243] And state constitutions explain that political power is inherent in the people.[244] As the sovereign power in every state, the people, not

237. *See* Schrag, *supra* note 236; *see also Democracy By Initiative: Shaping California's Fourth Branch of Government*, CTR. FOR GOVERNMENTAL STUD. 22 (1992).

238. Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359, 364, 404 (2002).

239. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 718 (2000).

240. *See* Neil Modi, *The Fourth Branch, Separation of Powers, and Transformative Constitutionalism*, 25 OR. REV. INT'L L. 49, 54 (2024); Mark Tushnet, *Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries*, 70 U. TORONTO L.J. 95, 95 (2020); Michael Pal, *Electoral Management Bodies as a Fourth Branch of Government*, 21 REV. CONST. STUD. 85, 85 (2016).

241. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 12 (1948).

242. Stephen Bates, *Meiklejohn, Hocking, and Self-Government Theory*, 26 COMM. L. & POL'Y 265, 301 (2021) (citing Alexander Meiklejohn, *Freedom and the People*, NATION, Dec. 12, 1953, at 500, 501).

243. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

244. *See supra* Section I.B.3.

the elected branches of government, are the ultimate political authority.[245] Legal historian Christian Fritz explained that

> Long after 1787, the principle that justified the Revolution, that the people were sovereign, played a dominant role in the drafting of American constitutions. The principle of a collective sovereign defined the relationship of the people to their governments. A widespread understanding persisted in America that the people controlled constitutions and not the other way around.[246]

A theory that recognizes the people's ultimate control gives greater force to the idea that voters are their own special entity of state governance.[247]

This formulation also shows why the state court practice of "lockstepping," or construing the state constitution to include merely the same protections as the U.S. Constitution, is contrary to state constitutional design.[248] The U.S. Constitution does not have the same focus on the voters as do state constitutions. State constitutions textually and structurally elevate the status of voters as not just another branch but as a superior entity. State courts should recognize this animating feature of state constitutionalism. As Professor G. Alan Tarr has written, "the system of dual constitutionalism was originated to create a 'double security' for rights, and that security would be lost if states abdicated their responsibility to interpret their declarations of rights."[249] A state constitutional

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245. *See, e.g.*, MASS. CONST. pt. 1, art. V ("All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.").

246. CHRISTIAN FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 28 (2008).

247. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental").

248. *See, e.g.*, Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005).

249. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 181 (1998); *see also* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 276 (2006) ("[T]he greater flexibility of state constitutions permitted more frequent opportunities to

separation of powers analogy shows both that the electorate itself is the most important actor for state governance and that legislatures cannot pass laws that impact the ability of the electorate to freely express itself.

Of course, voters are not just another branch. Calling the electorate a co-equal branch with the legislature or executive fails to recognize the foundational importance of voters in state governance. It is simply a useful analogy to demonstrate how deference to legislatures in election rules is improper. If anyone should enjoy deference, it should be the entire electorate in its unfettered ability to direct the government.

If we are going to use a tree metaphor, then the electorate as a whole is more like the trunk or the roots that hold the other branches up.[250] The branches still have power, but none that can outweigh the body that gives them their authority.

III. APPLYING THE THEORY

This Part provides some detail on how state courts could apply a separation of powers analogy to the electorate as a whole. It details a possible test grounded in the principle of retrogression: given the importance of voters to democracy, state constitutions implicitly prohibit state legislatures from enacting a law that has the effect of reducing participation. As Professors John Jeffries and Daryl Levinson define it, the "Constitution becomes a ratchet, allowing change in one direction only."[251] In the state voting rights context, a plaintiff should have an evidentiary burden of showing that a new law will reduce voter turnout, and a state could challenge that evidence to defeat a lawsuit. But a state should not be able to offer a good enough reason to justify that disenfranchisement.

A. *Standing*

As a preliminary matter, courts will ask who can bring a claim that invokes a separation of powers analogy. After all, if a new law harms the electorate or "the people," then does it simply impose a generalized grievance that everyone feels,

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reconsider the logic and consequences of various institutional arrangements during the past two centuries, and the approach followed by state constitution makers is entitled to be viewed as the better expression of the accumulated wisdom and experience of American constitution makers.").

250. Thanks to Richard Briffault for suggesting this helpful analogy.

251. John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211, 1212 (1998).

negating standing for anyone?[252] As Professor Steven Mulroy explains, "Electoral violations by their nature cause widespread harm, making them paradoxically more important to litigate but simultaneously harder to clear the standing doctrine hurdle of avoiding 'generalized grievances.'"[253]

The resolution of this issue should be quite simple: any voter who suffers a tangible harm from a law should be able to assert a claim on behalf of the entire electorate and argue that the legislature is exceeding its constitutional powers.[254]

In *Flast v. Cohen*,[255] the U.S. Supreme Court held that a taxpayer has standing to challenge a legislative act that the taxpayer alleges violates the Establishment Clause because one goal of the Establishment Clause is to limit Congress's taxing and spending power so as not to allow government establishment of religion.[256] "The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power."[257] Similarly, a voter in a state case invoking the separation of powers analogy would allege that the legislature's action violates the various provisions of the state constitution that protect all voters.

As Professor Mulroy asserts,

> The various rationales for having a standing doctrine in the first place counsel for a more relaxed approach [to election law cases]. When voters, candidates, campaigns, or Electors sue over voting and election rules, they generally have a sufficient

252. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447, 487 (1923) (holding that a taxpayer does not have standing to challenge the constitutionality of a statute); United States v. Richardson, 418 U.S. 166, 175 (1974) (finding that a taxpayer asserts only a generalized grievance and therefore does not have standing when challenging an agency's accounting and reporting procedures).

253. Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 14 (2021).

254. *See, e.g.*, League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 778 (Ind. 2010) (Boehm, J., dissenting) ("I believe all citizens have the standing to attack a statute that unconstitutionally denies any voter the right to exercise his or her electoral franchise. We all have an interest in an election that is lawful, and the right to vote is meaningful only if others of like mind are also entitled to vote according to the Constitution.").

255. 392 U.S. 83 (1968).

256. *Id.* at 105–06.

257. *Id.*

> stake in the outcome to adequately develop the factual record and the law.[258]

Similarly, Professor Erwin Chemerinsky argues in favor of voter standing when voters bring a claim that incumbents are abusing their offices in an attempt to stay in power.[259] After all, he explains, abuse of incumbency "strike[s] at the very heart of a democratic society."[260] A voter's claim on behalf of the electorate under the multilayered right to vote essentially invokes the same idea: a law that reduces participation is often intended to help incumbents keep their seats in the next election. As the Ohio Court of Appeals noted, "Where harm is concrete, although widely shared, courts have found injury in fact, particularly when [a] 'large number of voters suffer interference with voting rights conferred by law.'"[261]

Of course, any standing inquiry will have to follow state court standing rules, which are often broader than federal standing doctrine.[262] Indeed, some state courts recognize "public interest standing," or the ability of anyone to bring a lawsuit given its "public value."[263] A legislative enactment that encroaches upon the electorate's right to fully participate in an election implicates numerous clauses in state constitutions—provisions that exist to protect voters—meaning that voters have standing to bring these challenges.

B. *The Substantive Standard*

One way for a plaintiff to invoke the theory of a multilayered right to vote, along with the analogy to separation of powers principles, is to offer empirical evidence that a new law will reduce electoral participation. If a plaintiff can demonstrate through direct evidence, simulations, or otherwise that an election rule will have the effect of lower turnout, then the legislature has encroached upon the electorate's power to direct the government. This concept is similar to the non-

258. *See* Mulroy, *supra* note 253, at 67.

259. Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 OHIO ST. L.J. 773, 774 (1988).

260. *Id.*

261. Ohio Democratic Party v. LaRose, 159 N.E.3d 852, 865 (Ohio Ct. App. 2020).

262. *See* Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003, 1006 (2001) (noting that "[u]nencumbered by constitutional constraints, state courts and legislatures often relax the background rules of standing").

263. *See* M. Ryan Harmanis, Note, *States' Stances on Public Interest Standing*, 76 OHIO ST. L.J. 729, 732 (2015) (critiquing the doctrine of public interest standing).

retrogression principle inherent in the regime that used to govern cases under Section 5 of the Voting Rights Act before the Court curtailed Section 5 in *Shelby County v. Holder*.[264] As the Supreme Court explained when Section 5 was still alive, "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[265] The same standard could apply to infringements of the multilayered right to vote under state constitutions: a legislature encroaches upon the right of the electorate to direct its government when the law will lead to a retrogression of the ability of voters to participate. Professor Dan Tokaji suggested a similar formulation for cases under Section 2 of the Voting Rights Act, which state courts could apply to the entire electorate: "Plaintiffs must show that the challenged standard, practice, or procedure causes a disproportionate burden on members of a protected class that an alternative standard, practice, or procedure would avoid."[266]

Federal courts often applied a non-retrogression test in the context of minority voting strength, showing that these questions are capable of judicial resolution.[267] The standard provides a relatively easy-to-administer metric that plaintiffs would have to satisfy to win their case. Of course, as with any empirical measure, the harder question is how to define the test, including which elections to use as the baseline and the strength of the evidence needed. Courts can adjudicate those matters on a case-by-case basis. For example, a court might say that a plaintiff must measure the effect of a new law as compared to the previous two or three general elections to offer a meaningful baseline. If the new voting rule would make it harder to vote or would reduce turnout, then the court should strike down the law as invalid for violating the multilayered right to vote, especially if plaintiffs can also offer an alternative rule that would help the state achieve its goals without that disenfranchisement.

Courts should, of course, make the comparison as consistently as possible given the underlying data, with a

264. 570 U.S. 529 (2013).

265. Beer v. United States, 425 U.S. 130, 141 (1975).

266. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 474 (2015).

267. *See* Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 757 (2016) (noting that courts have used retrogression and arguing for its incorporation in the standard for Section 2 of the Voting Rights Act).

particular focus on the appropriate baseline. Presidential elections have the highest turnout,[268] so an assessment of the likely effects of a law—if being implemented in a presidential election year—should use previous presidential election turnout data in the state. Statewide turnout is the proper comparator for a new state law that is applied to the entire state. Averaging the turnout from the previous two or three elections would offer even more clarity on the prior turnout levels and therefore the potential retrogressive effect of the law. Federal judges—at least those in Section 5–covered jurisdictions—once applied the non-retrogression principle under the Voting Rights Act, so state judges in those places have a body of law to draw upon to answer these questions. Turnout effects in other states with a similar law could also provide the court with useful information. For instance, to rebut a plaintiff's assertion of retrogression, a state might point to the fact that voter turnout has not dropped in a different state since it implemented a similar law. The parties can litigate these evidentiary disputes, with experts providing the court with relevant data.

Importantly, states should not be able to rebut a finding of retrogression by pointing to a legitimate—or even compelling—governmental interest. Opening that door would bring back the current, harmful jurisprudence, where states enjoy extreme deference in their voting rules.[269] A state could defend a lawsuit by challenging the plaintiff's evidence of retrogression, demonstrating how the law would not disenfranchise voters. A battle of experts would ensue on the effect of a new voting rule. If the plaintiff can show, through competent proof, that the law will retrogress voting rights, and if the state cannot adequately rebut that evidence, then the remedy is for states to find a way to achieve its goals—fraud prevention, election efficiency, and the like—in a way that does not disenfranchise people. The test is therefore a one-way ratchet: states can expand participation but may not diminish it. As Professor Derek Muller notes, in identifying a Democracy Ratchet in various areas of election litigation, "[a] legislature can expand such opportunities, but courts scrutinize cutbacks on such opportunities with deep

268. *National Turnout Rates 1789-Present*, U.S. ELECTIONS PROJECT, https://www.electproject.org/national-1789-present [https://perma.cc/F3XA-A7YW].

269. *See supra* Section I.A.

skepticism—deeper than had no such opportunity ever existed."[270]

A one-way ratchet makes sense for voter participation based on the Lockean ideal of democracy that the government is legitimate based on the consent of the governed.[271] As Professors John Jeffries and Daryl Levinson point out, "Ratcheting change in one direction is a coherent legal strategy if and only if one knows which way to go . . . . Unless and until there has been a determination that the specified direction is normatively desirable, mandating non-retrogression would be analytically incoherent and substantively pointless."[272] The normatively desirable goal here is universal suffrage for all eligible voters. In a democracy, the people are supreme and select their leaders through free and fair elections. We should therefore strive to create a holistic, inclusive electorate to effectuate the goals of a democracy, thereby giving the government true legitimacy. We should ratchet up toward greater voter participation.

The theory of non-retrogression, by its very nature, takes the current election system as-is and uses it as a baseline. That approach could be problematic for at least two reasons, but neither should counsel against adopting this test. First, it might create a disincentive for legislatures to expand voter access, knowing they can never go back. That's a risk that seems worth it given that voters will continue to demand easier access, and in any event, our history exhibits a march toward greater participation through numerous voter expansions, including women's suffrage, lowering the voting age, and the Voting Rights Act, to name a few. Second, applying the theory robustly could create tons of litigation given that some states make it harder to vote than others. Plaintiffs might invoke the theory to challenge existing laws and demand maximization of voter access or even universal (compulsory) voting.[273] The logical implication of the theory may well be that, because voters are paramount, state constitutions contemplate universal suffrage. There are, however, good prudential

270. Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 453 (2019) (scrutinizing the ways in which courts use a Democracy Ratchet and suggesting that its best use is "as an evidentiary device and a readily available remedy for courts fashioning relief").

271. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 358 (2023).

272. Jeffries, Jr. & Levinson, *supra* note 251, at 1215.

273. *See* E.J. DIONNE & MILES RAPOPORT, 100% DEMOCRACY: THE CASE FOR UNIVERSAL VOTING (2022).

reasons to limit the initial use of the theory to new voting laws that restrict voter access, including the federalism principle that states can experiment with different regimes so long as they do not infringe upon voters' rights.[274] One need not take the argument to its logical conclusion to accept that the multilayered right to vote limits legislatures, state executives, or other governmental actors from imposing new harmful voter restrictions.

The theory is also not meant to replace other challenges to voting rules, such as lawsuits under the Equal Protection Clause or the Voting Rights Act. Voters can—and should—still bring claims that a law infringes on their individual rights. The theory simply adds another tool in the toolbox for voters to use, which is especially helpful because courts have been stingy in protecting voters in those other contexts.

Of course, states must pass election rules; recognizing the force of the multilayered right to vote is not to suggest that legislatures are hamstrung from regulating an election. It does mean, however, that legislatures cannot rest on their authority to root out election fraud or cite easy election administration when doing so infringes upon the ability of "the people" to have the ultimate say in democratic governance. States will have to ensure that a new law will not create a retrogressive effect. As Professor Robert Williams notes, quoting commentary from 1892, "'one of the most marked features of all recent State constitutions is the distrust shown of the legislature,'" and the restriction of legislative power "reflects one of the most important themes in state constitutional law."[275]

The nature of the multilayered right to vote and the electorate-as-branch analogy means that this theory works best for claims of vote denial or participatory harms. That is, given that the multilayered right to vote promotes voter participation, a claim resting on the theory applies most directly to infringements on the right to participate freely and equally in an election. The theory could also apply to claims of partisan gerrymandering, though that problem is more about representational harm—the value of one's vote—as opposed to

274. *See* New St. Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

275. Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 201 (1983) (quoting Amasa M. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 109, 109 (1892)).

voter turnout.[276] Several state courts have struck down a legislature's partisan gerrymander as violating the state's constitution, often focused on the state constitution's equal protection clause or free elections clause.[277] The state separation of powers theory, which considers the electorate as a pseudo-branch, can supplement these findings when a legislature enacts a map that aggrandizes power to itself at the expense of the voters. Of course, courts would still have to adopt a test for determining when the legislature has encroached upon the electorate's ability to govern itself through a fair map; it is unclear whether partisan gerrymandering directly lowers turnout, so the retrogression principle would be harder to apply.[278] Scholars have proposed numerous metrics to demonstrate a map's unfairness.[279] For the multilayered right to vote, a test that focuses on entrenchment—where a

276. *See generally* Samuel S.-H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019) (reviewing partisan gerrymandering under state constitutions). As Professors Nicholas Stephanopoulos, Eric McGhee, and Christopher Warshaw have found, the 2020 redistricting cycle exhibited non-retrogression of minority-ability districts in states formerly covered under Section 5 of the Voting Rights Act. Nicholas Stephanopoulos, Eric McGhee & Christopher Warshaw, *Non-Retrogression Without Law*, 2023 U. CHI. LEGAL F. 267, 284–305 (2024). That is, even without the protections of the Voting Rights Act, most states' redistricting plans in the 2020 cycle did not reduce the number of districts where minority voters have a meaningful opportunity to elect their candidates of choice. The authors suggest that the status quo bias of many mapmakers may have driven this result. *Id.* at 301, 305.

277. *See In re* 2021 Redistricting Cases, 528 P.3d 40, 92 (Alaska 2023) ("[W]e expressly recognize that partisan gerrymandering is unconstitutional under the Alaska Constitution."); League of Women Voters v. Commonwealth, 178 A.3d 737, 814–17 (Pa. 2018) (invalidating a partisan gerrymander under the state constitution's Free and Equal Elections Clause); Harper v. Hall, 881 S.E.2d 156, 161 (N.C. 2022), *reh'g granted*, 882 S.E.2d 548 (N.C. 2023), *withdrawn*, 886 S.E.2d 393 (N.C. 2023); *see also* Jonathan Cervas, Bernard Grofman & Scott Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U. N.H. L. REV. 421, 426 (2023).

278. *Cf.* Bernard L. Fraga, Daniel J. Moskowitz & Benjamin Schneer, *Partisan Alignment Increases Voter Turnout: Evidence from Redistricting*, 44 POL. BEHAV. 1883 (2022) (finding "turnout increases for individuals assigned to districts aligned with their partisanship as compared to individuals in misaligned districts"); Aryanna Hyde & Edwin Santana, *Gerrymandering, Turnout, and Lazy Legislators*, MIT ELECTION DATA & SCI. LAB (Sept. 3, 2021) (finding mixed results on the turnout effects of a politician-dominated process of drawing district lines).

279. *See, e.g.*, Nick Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 850 (2015) (identifying a new metric for partisan gerrymandering, the "efficiency gap," which is "the difference between the parties' respective wasted votes . . . divided by the total number of votes cast").

legislature passes a map that will allow the majority party to stay in power even if it receives fewer votes—would make the most sense. That harm would demonstrate that the legislature is aggrandizing its power to immunize itself from the voters who want to vote the majority out. Further, the theory could apply to racial gerrymanders as an additional tool beyond Section 2 of the Voting Rights Act and the federal Equal Protection Clause. A law that dilutes the strength of minority voters also obviously infringes on a subset of the electorate's ability to direct its government. That said, courts should not invoke the theory in a way that bakes in a prior gerrymander just because the new map does not retrogress fair representation even further.[280]

The theory could also apply to a legislature that seeks to overturn the results of a valid presidential election in a state, which President Donald Trump sought in 2020.[281] No state legislature attempted this maneuver, of course, but if one had, lawsuits surely would have followed. The state legislature would rest upon its authority under the U.S. Constitution to determine the "manner" of appointing electors.[282] As the U.S. Supreme Court recently explained in *Moore v. Harper*—the "independent state legislature" case—even when state legislatures act pursuant to the authority of the U.S. Constitution, they must do so consistent with the limits of the state constitutions that created them.[283] The multilayered right to vote from state constitutions and its elevation of the electorate as a pseudo-branch of government offers a strong theory to curtail a state legislature's power grab in this context. A state legislature cannot undo the will of the voters and declare a different winner of the state's presidential electors when doing so would infringe upon the voters' rights to engage

280. *See* Robert Yablon, *Gerrylaundering*, 97 N.Y.U. L. REV. 985, 1013 (2022); *see, e.g.*, Carter v. Chapman, 270 A.3d 444, 484 (Pa. 2022) (Wecht, J., concurring) ("While historical practices might be a helpful starting point for a court to employ when it comes to scrutinizing political subdivisions, by no means do they create what one *Amicus* Participant cleverly chided as 'cartographic stare decisis.'").

281. *See* Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO (Nov. 21, 2020), https://www.politico.com/news/2020/11/21/trump-state-legislatures-overturn-election-results-439031 [https://perma.cc/F445-V2SK].

282. U.S. CONST. art. II, § 1.

283. Moore v. Harper, 600 U.S. 1, 36–37 (2023).

in self-governance. Thus, the theory could apply to post-election attempts to change election results.[284]

Ultimately, however, because the voter protections in state constitutions are largely about participation—the express conferral of the right to vote, the promise of a secret ballot, the maintenance of residency while away from the state, and the like—the theory applies most directly to the myriad voter restrictions that states may impose. The key is to move away from deference to state legislatures through a means-ends analysis and instead give courts a robust tool to strike down a law that retrogresses the ability of the electorate to participate in the election.

C. *Specific Examples Regarding Voter Participation*

Many states have responded to the frenzy of today's elections and the unfounded assertions of massive fraud by enacting various laws that make it harder for some people to participate. From voter ID laws to cutbacks on early voting to limits on vote-by-mail, legislatures have rested on their authority to regulate elections, as well as their knowledge that courts are not likely to question their rules, to impose numerous voter restrictions. Courts have not been up to the task of policing these laws given U.S. Supreme Court jurisprudence, which largely defers to states' rules in spite of the burdens placed on voters. Many state courts have followed this restrictive approach, deferring to legislative judgments by using a means-ends analysis that allows states to justify their laws with generalized assertions. The multilayered right to vote and the separation of powers analogy can have the biggest effect in these cases. Of course, if judges are not already willing to recognize that their state constitutions offer more robust protection as compared to the U.S. Constitution, then no new theory is likely to convince them to alter their approach. Careful judges, however, will see that state constitutions provide more than just additional clauses that protect voters and instead offer an entirely different concept that focuses on the electorate's participatory role in

284. A subsidiary question is whether this theory effectively curtails a legislature's impeachment power because removing someone from office is essentially undoing the will of the voters. If the legislature is acting pursuant to another specific grant of authority from the state constitution that allows for impeachment, then courts could test whether the legislature's actions fit that standard separate from the multilayered right to vote. Impeachment, after all, does not prospectively limit voter participation in future elections. A fuller exploration of this question is left for future analysis.

state constitutional design. This Section considers some of the recent cases in which state courts upheld voter restrictions and explains how the cases would come out differently—and in favor of voters—under the multilayered right to vote and electorate-as-pseudo-branch analogy.

Numerous state courts have considered the validity of voter ID laws in their states, especially after the U.S. Supreme Court refused to invalidate Indiana's voter ID law in 2008.[285] In the follow-on case in state court, the Indiana Supreme Court upheld the law, largely following the U.S. Supreme Court's reasoning.[286] The court analyzed the reasonableness of the requirement and asked whether the benefits outweighed the burdens of the law:

> The burdens occasioned by the Voter ID Law serve numerous substantial interests relating to the use of technology to modernize and to protect the integrity and reliability of the electoral process. We find that the requirements of the Indiana Voter ID Law, while enhancing the procedural burdens associated with the voting process, are not sufficiently unreasonable.[287]

Additionally, the court explicitly deferred to the legislature's judgment, saying that the law represented "a legitimate exercise of legislative discretion warranting our deference."[288]

Construing the law under the multilayered right to vote would have produced a different outcome. Instead of asking whether the legislature had a good enough reason to impose the requirement and comparing the state's need for the law with the burden it imposed, the court should have determined whether the law would reduce voter participation. If so, then the court should have struck down the law. The court acknowledged that there might be a burden on some voters—and left the door open to a future as-applied challenge—but it still upheld the rule based on the legislature's judgment.[289] The

285. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202–04 (2008).

286. League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010).

287. *Id.* at 768–69.

288. *Id.* at 772 ("Given the scope of the undertaking embraced in the Voter ID Law's efforts in enhancing the integrity of the electoral process and its attempt to tailor its operation to a significant variety of circumstances, we conclude that the possible absence of precise congruity in application to all voters represents a legitimate exercise of legislative discretion warranting our deference.").

289. *Id.* at 768–69.

multilayered right to vote, however, does not permit the legislature to have a good enough reason to disenfranchise voters. As the dissent in the Indiana Supreme Court case put it, "A statute that wrongly denies any group of citizens the right to vote harms us all, and therefore may properly be challenged as invalid in its entirety, not merely as to those directly affected."[290]

Georgia's voter ID litigation also exhibited the wrong approach. The Georgia Supreme Court upheld the state's voter ID law, finding that it did not violate the state constitution because the legislature may enact laws to regulate the election process.[291] "Although the right to vote guaranteed by our Constitution cannot be absolutely denied or taken away by legislative enactment, the legislature has the right to prescribe reasonable regulations as to how these qualifications shall be determined."[292] The court also refused to construe its state Equal Protection Clause, in combination with all of the other more explicit protections for voters, as providing greater protection than the federal Equal Protection Clause.[293] That formulation gives the legislature too much leeway and introduces a means-end analysis that allows a state to justify burdening the right to vote. Instead, the court should have asked whether the voter ID law would deprive people of the ability to vote and thereby reduce voter participation. If the answer is yes, then the law is unconstitutional because it violates state separation of powers principles given the legislature's encroachment on the electorate's ability to govern itself. The state should not be able to provide a good enough reason to disenfranchise valid voters.

The Wisconsin Supreme Court also upheld that state's voter ID law with faulty logic that failed to recognize the primacy of voters under the state constitution.[294] The court acknowledged that the voter ID law would result in some voters losing their right to vote.[295] The court then equated that disenfranchisement with a voter who shows up to their polling place after the polls have closed or who arrives at the wrong

290. *Id.* at 777 (Boehm, J., dissenting).

291. Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 72 (Ga. 2011).

292. *Id.* (internal quotation marks omitted).

293. *Id.* at 74 (stating that "the Georgia clause is generally 'coextensive' with and 'substantially equivalent' to the federal equal protection clause, and that we apply them as one").

294. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 311 (Wis. 2014).

295. *Id.*

polling location, claiming that the election rules are all mechanisms to regulate the manner of voting that are within the legislature's purview.[296] But the court did not consider the way in which the legislature was imposing a *new* law that would make voters worse off. If the legislature restricted the polling hours or reduced the number of polling locations, and if a plaintiff could show empirically that those changes would reduce turnout, then a court should invalidate those new laws under state separation of powers principles. In that instance, the legislature would be giving itself too much power to shape the electorate—a pseudo-branch of government whose rights outweigh those of the legislature.

The debates on voter ID laws are ongoing. In 2024, the Kentucky legislature considered (but did not pass) a bill to remove university student identification cards as valid IDs for voting.[297] The state first enacted a voter ID law in 2020 and had included student IDs as permissible IDs for voting in that bill.[298] The allowance of student identifications for voting was a compromise between those who favored a strict voter ID law and those who opposed it.[299] Removing student IDs surely would have lowered voter participation among this group of voters. Had the bill passed, a plaintiff could use data on the law's turnout effect to successfully challenge it under Kentucky's constitution.

The theory applies with equal force to other election rules that affect voter participation, not just voter ID laws. Plaintiffs challenged a Michigan law that required voters to show a specific form of "proof of residency" to register to vote within fourteen days of an election; the Michigan Constitution says that voters who register during that window must show "proof of residency" and the legislature defined that term to specify the kinds of documents a voter must provide.[300] The plaintiffs offered evidence to show that the legislature's definition of "proof of residency," by limiting which documents a voter could show, "has prevented, and may prevent, individuals who are qualified to vote from registering in the 14-day period."[301] But the Michigan Court of Appeals upheld the law, finding that the

296. *Id.*

297. *See* S.B. 80, 2024 Gen. Assemb., Reg. Sess. (Ky. 2024).

298. *See* Joshua A. Douglas, *"How the Sausage Gets Made": Voter ID and Deliberative Democracy*, 100 NEB. L. REV. 376, 395–96 (2021).

299. *Id.*

300. Promote the Vote v. Sec'y of State, 958 N.W.2d 861, 878 (Mich. 2020).

301. *Id.*

legislature had listed a "broad array of common, ordinary types of documents that are available to persons of all voting ages" as acceptable proofs of residency.[302] Therefore, the law "does not unduly burden the right to register to vote in the 14-day period."[303] That conclusory finding glossed over the key piece of evidence the plaintiffs presented: even with a so-called broad list of permissible documents allowed, the law would still prevent many voters from registering during the fourteen-day window before the election. The court admitted that the law would lead to some disenfranchisement but refused to invalidate it, saying that the legislature was simply "supplementing" the state constitution's requirement.[304] The court also mimicked the U.S. Supreme Court's deferential *Burdick* test, stating that "[t]he burden of long lines, which results in people having to wait longer to register to vote, is not a severe burden. Long lines are certainly an inconvenience, but a burden must go beyond mere inconvenience to be severe."[305] Moreover, the court credited the legislature's desire to prevent voter fraud,[306] even though the legislature did not offer any evidence of existing fraud or demonstrate how its law would prevent fraud.[307] The court deferred to the legislature's rule, despite the fact that the legislature failed to demonstrate an actual need for the law, while discounting the real harm that voters would face. That approach is backward. Voters, not the legislature, should have primacy in the constitutional analysis. If a law will create a real-world, tangible harm on voters—if it will retrogress the ability of voters to participate—then a court should strike it down.

Several state courts issued restrictive rulings on voting rights during the 2020 pandemic election, again crediting a legislature's desire to run the election as it sees fit, even in the face of disenfranchisement.[308] The Maine Supreme Court, for

302. *Id.* at 879.

303. *Id.*

304. *Id.*

305. *Id.* at 885.

306. *Id.*

307. *Id.* (opining not on the actual evidence presented by the legislature but on the legislature's theoretical consideration that "it was less likely that those persons who register to vote in the 14-day period with a current Michigan driver's license or identification card would be committing fraud than those who register without one").

308. *See, e.g.*, League of Women Voters of Mich. v. Sec'y of State, 959 N.W.2d 1, 12 (Mich. 2020) (rejecting an absentee balloting deadline and noting that its decision "follow[s] the view that courts should typically defer to the Legislature in making

example, rejected a challenge to the state's absentee balloting deadline, which required election officials to receive all mail-in ballots by the time the polls closed, despite the unique nature of that year's election when absentee voting surged.[309] The court focused mostly on U.S. Supreme Court cases and approved of the secretary of state's desire "to facilitate an equitable and orderly election, the need for sufficient time to count ballots, entertain challenges, initiate any necessary ranked-choice voting tabulations, and certify results before other statutory deadlines arrive."[310] The court explicitly said that it would defer to the legislature's judgment: "declaring the statute to be unconstitutional rather than deferring to both the Legislature's judgment in enacting the statute and the Secretary's thorough cure procedures [for rejected ballots] is not the appropriate remedy."[311] Similarly, the Minnesota Supreme Court rejected a challenge to a law that restricted an individual from delivering more than three marked ballots, which created a significant problem for many voters during the pandemic with the rise of absentee voting.[312] The court found that the law would impose only a "modest burden" on the right to vote and that the state had "compelling interests in orderly elections and procedures that preserve the integrity of the election process."[313] But the state's interest, compelling or otherwise, should not drive the analysis. Both the Maine and Minnesota Supreme Courts followed a flawed approach because they credited the legislatures' rules while discounting the more important question of whether the laws, as implemented, would reduce voter turnout. These cases are slightly different from a lawsuit that challenges a brand-new rule because the laws in question were in effect for prior elections. But the courts should have considered the unique circumstances of the pandemic in 2020 to determine if the laws would reduce voter turnout as compared to prior years due to the extra hurdles voters faced

policy decisions" about election administration); Democratic Senatorial Campaign Comm. v. Pate, 950 N.W.2d 1, 7 (Iowa 2020) ("All election laws involve some burdens. There is the burden of filling out a ballot correctly. The burden of going to a polling place. The burden of requesting an absentee ballot correctly. In this proceeding, we are not persuaded that the obligation to provide a few items of personal information on an absentee ballot application is unconstitutional, thereby forcing us to rewrite Iowa's election laws less than a month before the election.").

309. All. for Retired Ams. v. Sec'y of State, 240 A.3d 45, 51 (Me. 2020).

310. *Id.* at 53 (internal quotation marks omitted).

311. *Id.* at 55.

312. DSCC v. Simon, 950 N.W.2d 280, 296 (Minn. 2020).

313. *Id.*

specifically in the 2020 election. A law that jurisdictions validly used in prior elections might infringe voters' rights in later elections given societal changes; courts should apply the elevated state constitutional protection for voters as prohibiting retrogression, whatever its cause.[314]

Of course, if a plaintiff cannot present evidence of harm to voters and cannot demonstrate that a law will result in lower turnout, then the state should win the case. A plaintiff's evidentiary burden is significant and will protect a state from constantly having to re-write its election code. In Ohio, plaintiffs challenged a rule that required voters to request absentee ballots either in person or via mail, asking the court to require the state also to accept electronic submissions.[315] However, the plaintiffs

> offered no evidence of even one person over [the past thirteen years] who was precluded from voting—or even from applying for an absentee ballot—because of the application methods specified by the [state]. And they offered no evidence whatsoever that they will be precluded from voting in the upcoming elections either.[316]

The voters rightfully lost the case.[317] The state should prevail if a plaintiff cannot satisfy its evidentiary burden of showing that a law will reduce voter participation.

The multilayered right to vote focuses on the most important actors in our constitutional system: the voters. A court should invalidate a law whenever a legislature encroaches upon the electorate's ability to direct the government. That occurs most often when a legislature passes a law that will make it harder to vote. Courts should not ask whether the legislature has a good enough reason to disenfranchise voters; there should be no

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314. As the U.S. Supreme Court explained in another context, "[T]raditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." Shaffer v. Heitner, 433 U.S. 186, 212 (1977) (internal citations omitted).

315. Ohio Democratic Party v. LaRose, 159 N.E.3d 852, 858–59 (Ohio Ct. App. 2020).

316. *Id.* at 874.

317. The court also noted that the state had an important interest "in maintaining the integrity and efficiency of its election systems." *Id*. That analysis, however, should be irrelevant for the claim under the multilayered right to vote. The court was correct in its conclusion simply because the plaintiffs failed to show a tangible harm from the law.

deference to legislatures in this setting. Instead, legislatures should find ways to regulate the manner of an election without disenfranchising valid voters.

CONCLUSION

The U.S. Supreme Court has too readily deferred to state politicians in their voting rules and many state courts have followed the Justices' lead.[318] A holistic review of state constitutions, however, shows that state founding documents protect the ideal of voter participation in multiple ways. Put together, these state constitutional provisions require the electorate to have the most important voice in state governance. As Professor Robert Williams wrote, "State constitutions owe their legal validity and political legitimacy to the state electorate, not to 'Framers' or state ratifying conventions, as is the case with the federal Constitution."[319] The Kentucky Court of Appeals long ago noted that

> It is conceded by all that the people are the source of all governmental power; and, as the stream cannot rise above its source, so there is no power above them. Sovereignty resides with them, and they are the supreme law-making power. Indeed, it has been declared in each of the several constitutions of this state that "all power is inherent in the people;" and this is true, from the very nature of our government.[320]

Courts should recognize the electorate as tantamount to a branch of state government, albeit one that has primacy over any other governmental actor. State constitutions elevate the importance of voter participation in state governance. A rule that makes it harder for the electorate to participate in choosing its leaders is unconstitutional under state separation of powers principles.

318. *See supra* note 28 and accompanying text.
319. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 44 (2023).
320. Miller v. Johnson, 18 S.W. 522, 523 (Ky. Ct. App. 1892).