The Right to Vote Under State Constitutions

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This Article provides the first comprehensive look at state constitutional provisions explicitly granting the right to vote. We hear that the right to vote is "fundamental," the "essence of a democratic society," and "preservative of all rights." But courts and scholars are still searching for a solution to the puzzle of how best to protect voting rights, especially because the U.S. Supreme Court has underenforced the right to vote. The answer, however, is right in front of us: state constitutions. Virtually every state constitution includes direct, explicit language granting the right to vote, as contrasted with the U.S. Constitution, which mentions voting rights only implicitly. Yet those seeking to protect the right to vote have largely ignored the force of state constitutions, particularly because many state courts "lockstep" their state constitutional voting provisions with the narrow protection the U.S. Supreme Court has afforded under the Fourteenth Amendment's Equal Protection Clause. This mode of analysis curtails the broader explicit grant of voting rights in state constitutions.

This Article explains why the lockstepping approach is wrong for the right to vote and advocates for courts to use a state-focused methodology when construing their state constitutions. It does so through the lens of recent voter ID litigation, showing how the outcome of state constitutional challenges to voter ID laws turns on whether the reviewing state court faithfully and independently applies the state constitutional provision conferring voting rights. The textual and substantive differences between U.S. and state constitutional voting-rights protections requires a state-focused methodology for state constitutional clauses that grant the right to vote. Article I, Section 2

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of the U.S. Constitution points directly to state qualification rules to determine voter eligibility. State constitutions explicitly confer voting rights, while the U.S. Constitution merely implies the right to vote through negative language. In addition, the right to vote deserves the most robust protection possible, which is generally provided within state constitutions. The Article proposes a test for state courts to use when construing their constitutional voting rights clauses: a court should hold a law that adds an additional voter qualification beyond what the state constitution allows to be presumptively invalid; accordingly, courts should require a state to justify burdens on the right to vote with specific evidence tied to the legislature's authority under the state constitution. Finally, an Appendix presents a chart illustrating all fifty state constitutions and the language they employ for the right to vote.

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I. INTRODUCTION

What is the right to vote? This question has befuddled courts,[1] law professors,[2] historians,[3] and policymakers[4] for years. We hear that the right to vote is "fundamental,"[5] the "essence of a democratic society,"[6] and "preservative of all rights."[7] We know that voting is sacred. Yet we are still searching for a solution to the puzzle of how best to protect voting rights.

The answer, however, is right in front of us: state constitutions. Virtually every state constitution confers the right to vote to its citizens in explicit terms.[8] Moreover, the U.S. Constitution directs the inquiry over voter eligibility to state sources.[9] As Justice Scalia recently declared, the Elections Clause of the U.S. Constitution "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[10] Voter eligibility rules are left instead to the states. But state courts, much like federal courts, have largely underenforced the right to vote because they have too closely followed federal court voting-rights jurisprudence. A renewed focus on the

1. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (entailing four separate opinions with no majority).

2. *See, e.g.*, Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007); Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289 (2011); John M. Greabe, *A Federal Baseline for the Right to Vote*, 112 COLUM. L. REV. SIDEBAR 62 (2012); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345 (2003); Richard H. Pildes, *What Kind of Right is the "Right to Vote"?*, 93 VA. L. REV. IN BRIEF 45 (2007).

3. *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE (2009).

4. *See, e.g.*, Jeremy W. Peters, *Waiting Times at Ballot Boxes Draw Scrutiny*, N.Y. TIMES, Feb. 4, 2013, http://www.nytimes.com/2013/02/05/us/politics/waiting-times-to-vote-at-polls-draw-scrutiny.html (explaining the efforts of President Obama, members of Congress, and state legislatures to reform the U.S. electoral system).

5. *E.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966); *see also* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008); Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378–79 (2001).

6. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

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

8. *See infra* Part II.B.

9. *See* U.S. CONST. art. I, § 4.

10. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2250 (2013).

power of state constitutions provides the answer for how best to protect the fundamental right to vote.

The year 2012 may go down as the year of voter ID. Courts considered various aspects of challenges to new requirements that voters show a photo identification to vote in Pennsylvania,[11] Wisconsin,[12] Tennessee,[13] Texas,[14] and South Carolina.[15] The Department of Justice gave its approval to New Hampshire's voter ID law[16] but put Mississippi's voter ID law on hold.[17] And voters in Minnesota rejected a constitutional amendment that would have added a voter ID requirement to the state's election regulations.[18] In 2013, North Carolina enacted a strict voter ID law, which was immediately subject to lawsuits in both federal and state courts.[19]

Several state courts have considered challenges to voter ID laws under their state constitutions, yet they have diverged markedly in their analyses. The Pennsylvania court rejected the plaintiffs' argument that the state's voter ID requirement violated the

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11. *See* Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15) (denying petitioner's application for preliminary injunction of photo ID requirements), *vacated*, 54 A.3d 1 (Pa. 2012).

12. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12) (declaring photo ID requirements unconstitutional under WIS. CONST. art. III, §§ 1 & 2), *cert. granted*, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6) (granting petitioner's application for temporary injunction of photo ID requirements), *cert. granted*, No. 2012AP557–LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012).

13. *See* City of Memphis v. Hargett, No. M2012–02141–COA–R3–CV, 2012 WL 5265006 (Tenn. Ct. App. Oct. 25, 2012) (upholding voter ID law), *aff'd*, 2013 WL 5655807 (Tenn. Oct. 17, 2013).

14. *See* Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (denying preclearance under Section 5 of the Voting Rights Act), *vacated and remanded*, 133 S. Ct. 2886 (2013).

15. *See* South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (granting preclearance under the Voting Rights Act for elections after the 2012 election).

16. *See* Terry Frieden, *Justice Department OKs New Hampshire Voter ID Law*, CNN (Sept. 5, 2012, 5:04 PM), http://www.cnn.com/2012/09/05/justice/new-hampshire-voter-id/index.html.

17. *See* Emily Le Coz, *Mississippi Voter ID Law Put on Hold for Election Following Federal Review*, HUFFINGTON POST (Oct. 2, 2012, 6:29 PM), http://www.huffingtonpost.com/2012/10/03/mississippi-voter-id-law_n_1934121.html.

18. *See* Jim Ragsdale, *Voter ID Drive Rejected*, MINN. STAR TRIB. (Nov. 7, 2012, 9:13 AM), http://www.startribune.com/politics/statelocal/177543781.html.

19. *See* Complaint, N.C. State Conference of the NAACP v. McCrory, 2013 WL 4053231 (M.D.N.C. Aug. 12, 2013) (No. 1:13-cv-658), *available at* http://thenation.s3.amazonaws.com/pdf/NAACP_v_McCrorry_Complaint.pdf; Complaint, Currie v. North Carolina, No. 13-cv-1419 (N.C. Super. Ct. filed Aug. 13, 2013), *available at* http://www.southerncoalition.org/wp-content/uploads/ 2013/08/Currie-v-NC.pdf.

Pennsylvania Constitution,[20] but two Wisconsin trial courts came to the opposite conclusion, invalidating that state's law under the Wisconsin Constitution.[21] Yet the two states' constitutions are virtually identical. Pennsylvania's Constitution provides that "[e]very citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections."[22] Wisconsin's Constitution says that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[23] The voter ID requirements in these states were indistinguishable. What, then, explains the differing treatment from the state courts?

The key distinction is the amount of deference the state courts gave to federal constitutional interpretation of the right to vote when construing their respective state constitutions. The Pennsylvania court used an approach known as "lockstepping," determining that Pennsylvania's grant of voting rights is coextensive with—and limited by—federal jurisprudence.[24] By contrast, the Wisconsin courts gave the Wisconsin Constitution independent force, deciding that it provides greater protection to the right to vote than does federal law.[25]

In fact, unlike virtually every state constitution, the U.S. Constitution does not actually confer the right to vote on anyone.[26] Instead, the right to vote stems from the general language of the Fourteenth Amendment's Equal Protection Clause and the negative mandates on who the government may *not* disenfranchise.[27] State constitutions, on the other hand, provide in explicit terms that citizens

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20. *See* Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15), *vacated*, 54 A.3d 1 (Pa. 2012).

21. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12), *cert. granted*, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6), *cert. granted*, No. 2012AP557–LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012). As discussed below, subsequent to the 2012 election, a Wisconsin Court of Appeals reversed the trial court and upheld the voter ID law under the Wisconsin Constitution. *See* League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 834 N.W.2d 393 (Wis. Ct. App. 2013); *see also infra* notes 169–73 and accompanying text.

22. PA. CONST. art. VII, § 1.

23. WIS. CONST. art. III, § 1.

24. *See Applewhite*, 2012 WL 3332376, at *7, *16–19.

25. *See League of Women Voters*, 2012 WL 763586, at *2; *Milwaukee NAACP*, 2012 WL 739553, at *2.

26. *See infra* Part II.A.

27. U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVI.

enjoy the right to vote.[28] But state courts use various interpretative methods to construe state constitutional grants of individual liberties, including voting rights.[29] Courts that lockstep their state constitutions with the more limited rights inferred within the U.S. Constitution derogate the fundamental and foundational right to vote.

This Article details the scope of voting rights under state constitutions, an overlooked source of the right to vote. It does so through the lens of recent voter ID litigation, providing a framework of analysis for courts facing state constitutional disputes over voter ID laws. The Article contends that litigants should look to state courts to challenge restrictive voter qualification laws and that state courts should give independent force to their explicit provisions conferring the constitutional right to vote.

Part II describes the constitutional underpinning of the right to vote under both the U.S. Constitution and all fifty state constitutions. All but one state constitution includes direct language granting voting rights, as contrasted with the U.S. Constitution, which confers the right to vote only implicitly. Part III discusses the two main interpretative lenses through which state courts construe individual liberties under their constitutions: either a lockstep approach, or a state-focused methodology, such as interstitial or primacy. When a state court locksteps, it simply follows federal jurisprudence for the analogous right without considering whether the state protection is more robust. By contrast, a state-focused methodology, such as primacy, first considers the state constitution to determine if it protects the right in question, only later invoking the "federal floor" of federal court jurisprudence if the state constitution is insufficient. Part IV explains why the lockstepping method is wrong for analyzing the right to vote and advocates for courts to use the primacy approach instead. That Part highlights how Article I, Section 2 of the U.S. Constitution points to state qualification rules to determine voter eligibility. Part IV then illustrates why the textual differences between the federal and state constitutions counsel against lockstepping and in favor of primacy. Finally, Part IV contends that primacy is best suited to protect voting as the most important, foundational right in our democracy. Part V provides a workable test for state courts to use when construing state constitutions: courts should deem a law that adds an additional voter qualification beyond what the state constitution allows to be presumptively invalid. Courts

28. *See infra* Part II.B.

29. *See infra* Part III.

should therefore require states to justify burdens on the right to vote with specific evidence tied to the legislature's authority under the state constitution. Part VI concludes. Finally, an Appendix presents a chart illustrating all fifty state constitutions and the language they employ for the right to vote.

II. CONSTITUTIONAL PROVISIONS ON THE RIGHT TO VOTE

There are two sources of constitutional rights: the U.S. Constitution and state constitutions. Because the former is the "Supreme Law of the Land," it provides the "floor" of individual rights.[30] State constitutions, on the other hand, can grant more robust rights. The U.S. Constitution merely implies the right to vote, while almost all state constitutions explicitly enumerate this right. Because the right to vote provides the foundation of our democracy,[31] we must understand comprehensively the differing scope of federal and state constitutional protection. This Part provides details on how both the U.S. Constitution and each of the fifty state constitutions treat the right to vote.

A. The Lack of a Specifically Enumerated Federal Right to Vote

The U.S. Constitution does not provide an explicit individual right to vote. This might seem surprising given that voting is one of our most cherished rights.[32] But the U.S. Constitution confers only "negative" rights, or prohibitions on governmental action, as opposed to specifically stated grants of individual liberties.[33] The federal right to vote is emblematic of this approach.

The U.S. Constitution mentions individual voting rights seven times—in Article I, Section 2 and in the Fourteenth, Fifteenth, Seventeenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth

30. *See generally* Michigan v. Long, 463 U.S. 1032, 1068 (1983) (noting that a state constitution may afford greater protections than the U.S. Constitution).

31. *See* Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964).

32. *See* Douglas, *supra* note 5, at 144–45.

33. *See, e.g.*, Cynthia Soohoo & Jordan Goldberg, *The Full Realization of Our Rights: The Right to Health in State Constitutions*, 60 CASE W. RES. L. REV. 997, 1005 (2010):

> The Bill of Rights, which lays out the shared rights of all individuals in the United States, has been described as granting only negative civil and political rights. These rights are commonly understood to give individuals protections against government invasions of their rights as opposed to requiring that the government provide them with any specific benefits or protections.

See also id. at 1006 (discussing recent scholarly debate on whether the U.S. Constitution grants affirmative rights).

Amendments—but none of those provisions actually grant a right to vote to U.S. citizens.[34] Article I, Section 2 provides that, in electing members of the House of Representatives, "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[35] That is, the U.S. Constitution does not provide the qualifications for voters itself but instead delegates that responsibility to the states. The Seventeenth Amendment has the same language for the election of U.S. Senators.[36] The Fourteenth Amendment's "Reduction in Representation" Clause provides that if a state denies the right to vote to eligible citizens (except based on participation in a rebellion or other crime), the state loses representation in its Congressional delegation.[37] This clause does not provide citizens the right to vote as an explicit liberty but instead details a potential penalty states will suffer if they deny that right.[38] The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments all speak in passive voice, providing that the right to vote "shall not be denied" according to race (Fifteenth),[39] sex (Nineteenth),[40] ability to pay a poll tax (Twenty-Fourth),[41] or age (Twenty-Sixth).[42] Importantly, none of these provisions declare that U.S. citizens actually enjoy the right to vote. Instead, each one delegates the determination of voting qualifications to the states or explains reasons why the government (state or federal) cannot *deny* the right of suffrage. It is no wonder, then, that the U.S. Supreme Court declared that "the [U.S.] Constitution 'does not confer the right

34. *Cf.* Laurence H. Tribe, Erog v. Hsub *and Its Disguises: Freeing* Bush v. Gore *from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 208 (2001) (contrasting the fact that "nothing in the U.S. Constitution mentions a 'right to vote' in a presidential election" with the U.S. Supreme Court's statement in *Bush v. Gore* that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental"). There have been frequent calls to amend the U.S. Constitution to include an explicit grant of the right to vote, but these proposed amendments so far have not had much traction. *See, e.g.*, H.R.J. Res. 44, 113th Cong. (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113hjres44ih/pdf/BILLS-113hjres44ih.pdf.

35. U.S. CONST. art. I, § 2.

36. *Id.* amend. XVII.

37. *Id.* amend. XIV, § 2.

38. *But see* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 188–89 (2012) (suggesting that this clause actually grants the right to vote).

39. U.S. CONST. amend. XV.

40. *Id.* amend. XIX.

41. *Id.* amend. XXIV.

42. *Id.* amend. XXVI.

of suffrage upon any one,' . . . and . . . 'the right to vote, per se, is not a constitutionally protected right.' "[43]

Given all of these textual sources of the right to vote—albeit negatively implied—it might seem surprising that the U.S. Supreme Court has located the right to vote not in any of these provisions, but rather in the Fourteenth Amendment's Equal Protection Clause.[44] The Court settled on this basis for conferring voting rights in a series of 1960s cases under the Warren Court. Subsequent Supreme Court jurisprudence narrowed the scope of the federal protection of voting rights by giving states significant leeway to enact election regulations that do not impose a "severe" burden on the voting process.[45]

Early Supreme Court precedent called the right to vote "fundamental" but did not locate that right in any particular constitutional provision.[46] The genesis of modern Equal Protection Clause voting-rights jurisprudence comes from *Baker v. Carr*, a 1962 case in which the Supreme Court declared that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution."[47] A few years later, the Court reiterated the fundamental nature of this right while explaining the scope of the right's protection:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[48]

The Court, however, still did not cite a specific constitutional provision in its analysis. Instead, the right to vote seemed to emanate from the "essence of a democratic society."[49]

Future cases placed the right to vote squarely within the Fourteenth Amendment's Equal Protection Clause. For example, in

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43. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) (internal citations omitted) (quoting Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874)); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973)).

44. Bush v. Gore, 531 U.S. 98, 105 (2000); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); *see* AMAR, *supra* note 38, at 186 ("By reading the equal-protection clause to encompass voting rights, the Warren Court severed this text from its enacting context and ignored the decisive understandings of the American people when they ratified these words.").

45. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992) (explaining that "severe" restrictions on the right to vote deserve increased scrutiny).

46. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370–71 (1886).

47. 369 U.S. 186, 208 (1962).

48. *Reynolds*, 377 U.S. at 555.

49. *Id.*

Harper v. Virginia Board of Elections, the Court acknowledged that although the U.S. Constitution does not specifically grant a right to vote in state elections, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[50]

But the Court later pulled back from robustly recognizing a federal right to vote by analyzing restrictions of that right through a lenient balancing test. Two cases in particular, *Anderson v. Celebrezze* and *Burdick v. Takushi*, provide the framework for considering federal constitutional challenges to state voting regulations.[51] Known as the *Burdick* "severe burden" test, courts first determine whether the state law in question imposes a severe burden on voters.[52] If it does, then the Court applies strict scrutiny review.[53] If the burden is less than severe, however, then the Court applies a lower, intermediate level of scrutiny, in which it balances the burdens the law does impose against the state's valid interests.[54] The Equal Protection Clause provides the background, prohibiting states from treating one group of voters differently from others. If the state's interests outweigh the burden on voting, then the state law is valid, despite the fact that it nevertheless restricts a so-called fundamental right.[55] At the federal level, in other words, some state impediments to voting are constitutionally permissible.

Thus, federal courts analyzing restrictions on voting have narrowed the protection of the right to vote through *Anderson* and *Burdick*'s gloss on the Fourteenth Amendment's Equal Protection Clause. Judicial inquiry focuses on whether the regulation improperly affects the structure of the election process as opposed to considering whether it violates the individual right to vote per se.[56] Of course, a

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50. 383 U.S. 663, 665 (1966).

51. Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 793 (1983).

52. *Burdick*, 504 U.S. at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992)); *Anderson*, 460 U.S. at 793.

53. *Burdick*, 502 U.S. at 433–34.

54. *Id.* at 434 (citing *Anderson*, 460 U.S. at 788); *see also id.* at 433 ("[T]he mere fact that a State's system 'creates barriers . . . does not of itself compel close scrutiny.' " (quoting Bullock v. Carter, 405 U.S. 134, 143 (1972))); *Anderson*, 460 U.S. at 788–89 (stating that courts are to determine the constitutionality of a provision "[o]nly after weighing all . . . factors").

55. *See generally* Douglas, *supra* note 5, at 174 (discussing how the use of the severe burden test suggests that the Court does not always consider the right to vote to be a "fundamental right").

56. *See* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 523–24 (2004) (identifying the "structural harm" inherent in voting-rights claims); Pamela S. Karlan, *Nothing Personal: The Evolution of the*

court likely would not sanction a wholesale denial of the right to vote.[57] But the Court's Equal Protection Clause voting-rights jurisprudence sanctions greater voting restrictions than might be available if there was an explicit right to vote in the U.S. Constitution.[58]

The federal right to vote is underenforced under the *Burdick* severe burden Equal Protection Clause test because it makes establishing a violation too difficult for plaintiffs.[59] If the right to vote is a "fundamental right" and the "essence of a democratic society,"[60] then legal doctrine should not give so much deference to states' imposition of voter qualification rules, and courts should not hold plaintiffs to such a high evidentiary burden.[61] Plaintiffs seeking to vindicate their rights in the face of a voting regulation must present specific evidence demonstrating a severe burden, although it is unclear what kinds of burdens suffice or what makes a particular burden severe.[62] Moreover, the Court has rejected wholesale facial challenges to state election-administration laws, requiring piecemeal, as-applied litigation in which a plaintiff must narrow the claim to challenge only how the law operates with respect to that particular plaintiff, regardless of its broader effects on the electorate as a whole.[63] This also means that, even if the plaintiff wins, the protection reaches merely that specific voter or that particular instance.[64] This

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Newest Equal Protection from Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1346 (2001) ("The Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted.") (footnote omitted).

57. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote can[not] be denied outright . . . ." (citing Guinn v. United States, 238 U.S. 347 (1915) (resting decision on Fifteenth Amendment))).

58. *See* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 572 (2004) ("Our structural democracy deficit reflects the fact that our pervasive popular beliefs about universal suffrage are still not embodied in affirmative constitutional language.")

59. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 98 (2009) ("Yet even the broadest of these [voting] protections, the Equal Protection Clause, has not been fully enforced by the Supreme Court.").

60. *Reynolds*, 377 U.S. at 555.

61. *See* Douglas, *supra* note 5, at 151–60 (discussing the Court's decisions that cut against the idea of the right to vote as being a fundamental right).

62. *See, e.g.*, Hasen, *supra* note 59, at 100 (lamenting the "anti-plaintiff, pro-state evidentiary standard" from recent election-law cases).

63. *See generally* Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 681 (2009) (discussing the Court's rejection of facial claims in recent cases such as *Crawford*).

64. *Id.* at 682.

constricts the scope of federal voter protections because it impedes federal courts from issuing broader rulings that limit state curtailment of the right to vote.[65] Federal jurisprudence thereby cabins federal protection of voting rights.

For example, in *Crawford v. Marion County Election Board*, the Supreme Court upheld Indiana's voter ID requirement under a narrow view of federal constitutional protection of the right to vote.[66] Applying *Burdick*, the plurality declared that the voter ID law did not impose a "substantial burden" because the state was applying it to everyone.[67] The Court explained that " 'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious."[68] But the Court, in rejecting the plaintiff's facial challenge, failed to consider whether the law placed restrictions on *all* voters beyond what the Constitution allows. Instead, the Court merely suggested that an as-applied challenge for specific voters could succeed if a plaintiff could marshal enough evidence on how the law specifically burdened that voter. Thus, unlike some state courts' analyses under their state constitutions,[69] the Court did not determine explicitly whether the law denied the "right to vote."[70]

In sum, the U.S. Constitution does not grant the right to vote. It instead defines the right through a negative gloss, detailing the various reasons states cannot *limit* the franchise. The Supreme Court has latched onto the Equal Protection Clause to develop the constitutional test for the right to vote, balancing the burdens on voters with the state's interest in running an election. This narrows the protection for the right to vote. Finally, the U.S. Constitution points to state authority to determine who may vote, at least for

65. *Id.*

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

67. *Id.* at 198, 202–03.

68. *Id.* at 189–90 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

69. *See infra* Part IV.

70. Justice Scalia, in his opinion concurring in the judgment, declared that even if the law impacts people differently, there was a "single burden that the law uniformly imposes on all voters." *Crawford*, 553 U.S. at 205 (Scalia, J., concurring in the judgment). Because of the uniform impact, according to Justice Scalia, there was no overall deprivation of the right to vote. *Id.* The two dissenting opinions recognized the burden this voter ID law imposed on voters and therefore would have invalidated the law. *See id.* at 209 (Souter, J., dissenting) ("Indiana's 'Voter ID Law' threatens to impose nontrivial burdens on the voting right of tens of thousands of the State's citizens . . . ."); *id.* at 237 (Breyer, J., dissenting) ("[T]he statute is unconstitutional because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID.").

Congressional offices, through Article I, Section 2.[71] This clause is the only federal constitutional provision that actually tells us who may participate in our democracy. It is therefore important to understand fully how state constitutions construe the right to vote.

B. State Constitutional Grants of the Right to Vote

In contrast to the U.S. Constitution, all fifty states provide explicit voting protection for their citizens.[72] This Section sets out the scope of that right, detailing state constitutional provisions on voter qualifications.

Forty-nine states explicitly grant the right to vote through specific language in their state constitutions.[73] The text is typically couched in terms that a citizen "shall be qualified to vote,"[74] "shall be entitled to vote,"[75] or "is a qualified elector."[76] Most of these provisions directly define who is eligible to vote, such as that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[77] That is, state constitutions grant voting rights to all individuals who are citizens of

71. U.S. CONST. art. I, § 2; *see also id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . .").

72. *See* Jamin B. Raskin, *Is There a Constitutional Right to Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U. L. REV. 589, 612–13 (1999) ("The state constitutions clearly do, every one of them, grant a substantive right to vote. The documents set out qualifications for electors, and if you meet those qualifications, then you have a right to vote in those state elections.").

73. *See infra* Appendix. As discussed below, the only state constitution that does not include explicit language granting the right to vote is Arizona's.

74. *See, e.g.*, COLO. CONST. art. VII, § 1 ("shall be qualified to vote at all elections"); HAW. CONST. art. II, § 1 ("shall be qualified to vote in any state or local election"); N.M. CONST. art. VII, § 1 ("shall be qualified to vote at all elections for public officers").

75. *See, e.g.*, GA. CONST. art. II, § 1, ¶ II ("shall be entitled to vote at any election"); IOWA CONST. art. II, § 1 ("shall be entitled to vote at all elections"); MINN. CONST. art. VII, § 1 ("shall be entitled to vote in that precinct"); N.J. CONST. art. II, § 1, ¶ 3 ("shall be entitled to vote for all officers"); N.Y. CONST. art. II, § 1 ("shall be entitled to vote at every election"); N.C. CONST. art. VI, § 1 ("shall be entitled to vote at any election"); OR. CONST. art. II, § 2 ("is entitled to vote in all elections"); PA. CONST. art. VII, § 1 ("shall be entitled to vote at all elections"); S.D. CONST. art. VII, §§ 1, 2 ("shall be entitled to vote in all elections"); WASH. CONST. art. VI, § 1 ("shall be entitled to vote at all elections"); W. VA. CONST. art. IV, § 1 ("shall be entitled to vote at all elections"); WYO. CONST. art. VI, § 2 ("shall be entitled to vote at such election").

76. *See, e.g.*, IDAHO CONST. art. VI, § 2 ("is a qualified elector"); KAN. CONST. art. V, § 1 ("shall be deemed a qualified elector"); ME. CONST. art. II, § 1 ("shall be an elector"); MICH. CONST. art. II, § 1 ("shall be an elector"); MISS. CONST. art. XII, § 241 ("is declared to be a qualified elector"); MONT. CONST. art. IV, § 2 ("is a qualified elector"); NEB. CONST. art. VI, § 1 ("shall . . . be an elector"); OKLA. CONST. art. III, § 1 ("are qualified electors"); WIS. CONST. art. III, § 1 ("is a qualified elector").

77. WIS. CONST. art. III, § 1.

the United States, residents of the state for a certain period preceding the election, and over eighteen years old. Some state constitutions also authorize legislatures to set out rules for registering voters[78] or to provide for absentee balloting[79] or early voting.[80] Certain state constitutions deny voting rights to convicted felons or mentally incompetent persons.[81] Finally, a few state constitutions allow the state's legislature to enact other "necessary" voting procedures to root out fraud or protect the integrity of the election process.[82] But at bottom, state constitutions include specific language granting voting rights to the state's citizens.

Only Arizona's constitution does not explicitly grant the right to vote, instead stating that "[n]o person shall be entitled to vote . . . unless" the person meets the citizenship, residency, and age requirements.[83] This language still implicitly grants the right to vote, albeit in the reverse of all other states, because it provides who may *not* vote (no one unless they meet the state's eligibility requirements). Arizona also mimics the U.S. Constitution in discussing the right to vote in negative terms by prohibiting the denial of voting rights on the

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78. *See, e.g.*, KY. CONST. § 147 ("The General Assembly shall provide by law for the registration of all persons entitled to vote . . . ."); N.C. CONST. art. VI, § 3 ("Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law.").

79. *See, e.g.*, HAW. CONST. art. II, § 4 ("The legislature shall provide for the registration of voters and for absentee voting . . . ."); N.H. CONST. pt. I, art. 11:

> The general court shall provide by law for voting by qualified voters who . . . are absent from the city or town of which they are inhabitants, or who by reason of physical disability are unable to vote in person, in the choice of any officer or officers to be elected or upon any question submitted at such election.

80. *See, e.g.*, MD. CONST. art. I, § 2(b):

> The General Assembly shall have the power to provide by suitable enactment a process to allow qualified voters to vote at polling places in or outside their election districts or wards or, during the two weeks immediately preceding an election, on no more than 10 other days prior to the dates specified in this Constitution.

81. *See, e.g.*, KY. CONST. § 145 (excepting "[i]diots and insane persons" from the right to vote); N.J. CONST. art. II, § 1, ¶ 7 ("The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right.").

82. *See, e.g.*, DEL. CONST. art. V, § 1 ("[T]he General Assembly may by law prescribe the means, methods and instruments of voting so as best to . . . prevent fraud, corruption and intimidation threat."); MD. CONST. art. I, § 7 ("The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.").

83. ARIZ. CONST. art. VII, § 2 ("No person shall be entitled to vote . . . 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 as prescribed by law . . . ."). It is unclear why Arizona chose not to include an explicit grant of the right to vote; the constitutional history is murky on this point.

basis of sex.[84] Arizona's constitution further declares that elections must be "free and equal."[85] But as noted, Arizona is the lone exception; state constitutions are otherwise remarkably uniform in explicitly granting the states' citizens the right to vote.

As an added level of protection, twenty-six states include a provision in their constitutions stating that elections shall be "free," "free and equal," or "free and open."[86] Although the terms "free and equal" or "free and open" might seem amorphous, several state courts have construed this language as guaranteeing all eligible voters access to the ballot.[87] For example, the New Mexico Supreme Court explained that a state constitution's "free and equal" or "free and open" elections clause "connotes [that] all eligible voters should have the chance to vote."[88] As Kentucky's highest court long ago explained—in a passage that several other courts have cited[89]—a constitutional provision declaring elections to be "free and equal" is "mandatory": "It applies to all elections, and no election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so."[90]

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84. *Id.* art. VII, § 2.

85. *Id.* art. II, § 21.

86. *See infra* Appendix. These states are Arizona, Arkansas, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming.

87. *See, e.g.*, Chavez v. Brewer, 214 P.3d 397, 408 (Ariz. Ct. App. 2009) (concluding that the plaintiffs had stated a valid cause of action under the state constitution's "free and equal" provision based on voting machines not counting ballots properly); Neelley v. Farr, 158 P. 458, 467 (Colo. 1916) (noting that, under the "free and equal" clause in Colorado's Constitution, "[if a voter] is deterred from the exercise of his free will by means of any influence whatever, although there be neither violence nor physical coercion, it is not a free and equal election within the spirit of the Constitution") (internal citation and quotation marks omitted); Wallbrecht v. Ingram, 175 S.W. 1022, 1026–27 (Ky. 1915) (holding that an election in which some voters were denied the right to vote because of a ballot shortage was neither free nor equal); Gunaji v. Macias, 31 P.3d 1008, 1016 (N.M. 2001) ("[A]n election is only 'free and equal' if the ballot allows the voter to choose between the lawful candidates for that office . . . .").

88. *Gunaji*, 31 P.3d at 1016. For an extensive discussion of Pennsylvania's "free and equal" clause, see Matthew C. Jones, *Fraud and the Franchise: The Pennsylvania Constitution's "Free and Equal Election" Clause as an Independent Basis for State and Local Election Challenges*, 68 TEMP. L. REV. 1473 (1995). For a similar discussion of Montana's "free and open" provision, see Hannah Tokerud, Comment, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417 (2013).

89. *See Gunaji*, 31 P.3d at 1016 ("Kentucky has the most developed jurisprudence of any state on what that clause means in relation to ballot problems."); *see also Chavez*, 214 P.3d at 407–08 ("The Court of Appeals of Kentucky long ago announced that 'no election can be free and equal . . . if any substantial number of persons entitled to vote are denied the right to do so.' " (quoting *Wallbrecht*, 175 S.W. at 1026–27)).

90. *Wallbrecht*, 175 S.W. at 1026–27.

Finally, fifteen state constitutions mirror the U.S. Constitution in delineating voting rights through indirect, negative language declaring when the state may not infringe the right to vote on the basis of certain characteristics.[91] For example, New Mexico's constitution has an extensive list of reasons why the state may not deny voting rights, including on account of "religion, race, language or color, or inability to speak, read or write the English or Spanish languages."[92] The New Mexico Constitution also prohibits the state from requiring a poll tax to vote.[93] In addition to these fifteen states, other state constitutions provide more generically that "no power" may interfere with the right of free suffrage or that there shall be "no hindrance" on voting.[94]

Table 1: State Constitutional Provisions on the Right to Vote

State Constitutional Provision	Number of States
Explicit grant of the right to vote	49
Elections shall be "free," "free and equal," or "free and open"	26
Implicit grant of the right to vote through negative language	15

In sum, state constitutions go well beyond the U.S. Constitution in discussing the right to vote. In fact, most state constitutions have a separate article specifically dealing with elections and the franchise.[95] Unlike the U.S. Constitution, these state constitutional provisions explicitly grant the right to vote to all

91. *See* Appendix. These states are Arizona, California, Connecticut, Hawaii, Idaho, Minnesota, Montana, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee, Utah, West Virginia, and Wyoming. Eight of these fifteen states also include a "free and equal" or "free and open" clause; the states with both kinds of provisions are Arizona, Montana, New Hampshire, New Mexico, Oklahoma, Tennessee, Utah, and Wyoming. Seven states (all of these states besides Arizona) also explicitly grant the right to vote, meaning that they have all three provisions in their constitutions.

92. N.M. CONST. art. VII, § 3.

93. *Id.* art. VII, § 2.

94. *See, e.g.*, NEB. CONST. art. I, § 22 ("[T]here shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."); OKLA. CONST. art. II, § 4 ("No power . . . shall ever interfere to prevent the free exercise of the right of suffrage . . . ."); PA. CONST. art. I, § 5 (same); S.D. CONST. art. VII, § 1 (same); WASH. CONST. art. I, § 19 (same).

95. *See, e.g.*, GA. CONST. art. II ("Voting and Elections"); MONT. CONST. art. IV ("Suffrage and Elections").

citizens who meet simple qualification rules. Given that the U.S. Constitution actually points to state rules for voter eligibility,[96] there must be a renewed focus on these state constitutional grants of voting rights, especially in the context of increased state court litigation over voter ID laws. In particular, as discussed below, state courts should not interpret their constitutional provisions to be in lockstep with federal jurisprudence because the U.S. Constitution explicitly points to state voter eligibility rules for determining who is qualified to vote in federal elections. State court jurisprudence also should be more robust than federal law because state constitutions go further than the U.S. Constitution in specifically conferring voting rights. That is, a faithful understanding of federal and state constitutional structure and of the differences between how each document grants voting rights both counsel toward an approach that recognizes state constitutions' independent force.

III. STATE JUDICIAL METHODS OF INTERPRETING STATE CONSTITUTIONS

State courts construe state constitutional provisions regarding individual rights either under a lockstep approach or through a state-focused mechanism, such as the interstitial or primacy approaches.[97] When courts lockstep, they automatically adopt federal jurisprudence for the right at issue, declaring that state law goes only as far as federal law. Under an interstitial methodology, courts first consider the "federal floor" under the U.S. Constitution before then analyzing independently whether the state constitution provides greater protection. A primacy approach is the opposite of lockstep: it first considers the state constitution and relies on the U.S. Constitution only if state protection is not robust enough to vindicate the plaintiffs' rights. This Part outlines these methods and explains how courts have construed voting-rights provisions under each interpretive lens.

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96. U.S. CONST. art. I, § 2.

97. Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 879 (2007).

Some commentators have suggested that these categories are too rigid and formulaic. *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 47 (2005) (noting that while a few state courts deliberately choose to follow either the interstitial or primacy approaches, these courts "have rarely stuck to their methodological commitments"). Although it is true that there can be overlap between the various approaches—especially the nonlockstep methods—separating state constitutional interpretation into these groups is useful for understanding how state courts tackle these issues.

A. Lockstep

The U.S. Constitution reflects the federal floor of individual rights because the Supremacy Clause forbids state courts from providing less protection than what the U.S. Constitution guarantees.[98] When state courts lockstep, they follow the U.S. Supreme Court's lead in construing the scope of these individual rights.[99] In essence, state courts analyze the analogous rights in the state constitution as conferring the same level of protection as their federal counterparts.[100] The state right is thereby the same as the federal floor. This lockstepping approach is also known as "convergence."[101]

Commentators have suggested that this "absolute harmony" methodology is actually a "non-approach to state interpretation because it results in absolute deferential conformity with [U.S.] Supreme Court interpretations."[102] It does lead to uniformity on a particular question, though, as state courts that follow the lockstep approach will provide the exact same protection for the right as federal courts do under the U.S. Constitution.[103] But this is problematic when federal protection is insufficient, as is the case with voting rights.

Lockstepping is fairly common with regard to the right to vote.[104] A prominent example comes from the Pennsylvania voter ID

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98. U.S. CONST. art. VI, cl. 2; *see* Anderson & Oseid, *supra* note 97, at 875 ("All American citizens are guaranteed the protections of the United States Constitution. This guarantee is sometimes described as the federal floor. State courts must protect individual rights at the minimum level prescribed by the Federal Constitution as interpreted by the United States Supreme Court . . . .").

99. *See* Anderson & Oseid, *supra* note 97, at 875.

100. *Id.* at 880.

101. *See* Robert F. Utter & Sanford E. Pitler, Speech, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645 (1987) (discussing the "lock-step" approach to interpreting state constitutional provisions that have "federal analogs"); Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (contrasting the prevalence of "lockstepping" and "doctrinal convergence" in practice with the relative lack of academic exploration of lockstepping). Professor Williams suggests that there are actually four variations of lockstepping: "unreflective adoptionism," "reflective adoption," "prospective lockstepping," and prospective adoption of a U.S. Supreme Court "test." *Id.* at 1504–15.

102. Utter & Pitler, *supra* note 101, at 645 (internal quotation marks omitted).

103. *See* Anderson & Oseid, *supra* note 97, at 881 (discussing the advantages of lockstepping, including "national uniformity").

104. As one commentator notes, lockstepping is the prevailing norm for most state constitutional adjudication. *See* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002) (explaining that "systematic studies

litigation preceding the 2012 election.[105] Plaintiffs in that case challenged Pennsylvania's new voter ID requirement under the Pennsylvania Constitution, not the U.S. Constitution.[106] Specifically, the plaintiffs invoked both Article VII, Section 1 of the Pennsylvania Constitution, which discusses "[q]ualifications of electors" and provides that the state's citizens "shall be entitled to vote," and Article I, Section 5, which states that elections shall be "free and equal."[107] Presumably, the plaintiffs focused their argument on the Pennsylvania Constitution and did not invoke the Fourteenth Amendment's Equal Protection Clause because they wished to avoid an analysis under the U.S. Supreme Court's 2008 decision in *Crawford*,[108] which, as previously noted, upheld a similar Indiana law.

But that strategy failed. Although the Pennsylvania trial court discussed various Pennsylvania cases, it consistently fell back on *Crawford* for its substantive analysis. For example, in the section titled "Legal Standard for Challenge," the judge stated, "I start my analysis with the United States Supreme Court."[109] The court then spent several pages outlining in detail the *Crawford* decision.[110] The court's next step was to "employ[] the federal 'flexible' standard discussed in *Crawford*" to "reach the same conclusions the United States Supreme Court reached."[111] The court explained that if it had applied strict scrutiny instead of the more deferential standard from *Crawford*, then it "might reach a different determination."[112] The U.S. Supreme Court's decision in *Crawford*, therefore, paved the path for the Pennsylvania court's converging analysis under the Pennsylvania

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demonstrate that most state courts, when presented with the opportunity, have chosen not to depart from federal precedents when interpreting the rights-granting provisions of state constitutions"). For a discussion of Illinois's "limited lockstep" approach as well as an argument against its use, see James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63, 110–13, 119 (2012) (advocating straightforward analysis of the state constitutional provision at issue instead of relying on the "red herring" of comparison with the U.S. Constitution).

105. *See* Applewhite v. Commonwealth, No. 330 M.D.2012, 2012 WL 3332376, at *29 (Pa. Commw. Ct. Aug. 15) (following the U.S. Supreme Court's test from *Crawford* to uphold Pennsylvania's voter ID law and "employ[ing] the same standards applicable to federal equal protection claims" to evaluate the Pennsylvania Constitution's equal protection provision), *vacated*, 54 A.3d 1 (Pa. 2012).

106. *Id.* at *1.

107. *Id.* at *9; *see also* PA. CONST. art. I, § 5, art. VII, § 1.

108. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 204 (2008).

109. *Applewhite*, 2012 WL 3332376, at *16.

110. *Id.* at *16–20.

111. *Id.* at *29.

112. *Id.*

Constitution. Although the court did not explicitly state that it was lockstepping the scope of voting rights under Pennsylvania's Constitution with the U.S. Constitution, its mode of analysis placed the two protections of the right to vote in "absolute harmony."[113] This interpretation means that Pennsylvania's grant of voting rights in Article VII, Section 1 of its constitution is in lockstep with the U.S. Constitution's Equal Protection Clause—even though those two provisions are textually and substantively different. The U.S. Constitution does not explicitly grant the right to vote, while the Pennsylvania Constitution does, yet the court construed the two constitutions to be coextensive and therefore substantively identical. This suggests that the Pennsylvania Constitution's explicit grant of the right to vote is irrelevant, because the court simply followed the U.S. Constitution's lead even though it lacks the same substantive provision.[114] The Pennsylvania court, therefore, implicitly used the lockstep approach to reject the plaintiffs' challenge to the voter ID law by analyzing the state constitution's voting qualifications provision under the U.S. Supreme Court's interpretation of the Equal Protection Clause in *Crawford*.

The Indiana Supreme Court, in a follow-up to the *Crawford* decision, also construed its state constitutional grant of the right to vote to be in lockstep with the U.S. Supreme Court's interpretation of federal protection.[115] The Indiana Constitution provides that "[a]ll elections shall be free and equal"[116] and that "[a] citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election."[117] The Indiana Supreme Court held that the state's voter ID law was not a "substantive qualification to the right to vote" but instead was "merely regulatory in nature."[118] To reach this conclusion, the court explained that the U.S. Supreme Court had found persuasive that "Congress 'believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of

113. *See* Utter & Pitler, *supra* note 101, at 645 (describing the "absolute harmony" approach).

114. In a separate section of the opinion, the court acknowledged that it was construing the federal and Pennsylvania equal protection clauses to be "coextensive." *Applewhite*, 2012 WL 3332376, at *29. The federal and state equal protection clauses, however, are substantively similar, so it makes more sense to lockstep the state's provision with federal jurisprudence.

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

116. IND. CONST. art. II, § 1.

117. *Id.* art. II, § 2.

118. *League of Women Voters of Ind., Inc.*, 929 N.E.2d at 767.

elections is enhanced through improved technology.' "[119] That is, the Indiana Supreme Court relied on the U.S. Supreme Court's discussion of Indiana's voter ID law—even though the U.S. Supreme Court decided a *federal* constitutional challenge under the Equal Protection Clause and the Indiana Supreme Court was considering a differently worded and voting-specific Indiana constitutional provision.

Other state courts also have employed the lockstep approach for the right to vote, including in litigation not involving voter ID. For instance, the Alaska Supreme Court construed a statute that allocated candidate positions on ballots as a "direct burden on the right to vote instead of as an equal protection violation," but it still cited the U.S. Supreme Court's federal Equal Protection Clause standard from *Burdick v. Takushi* to determine the proper level of scrutiny and mode of analysis.[120] Similarly, the Colorado Supreme Court, without much discussion, refused to give its constitution's mandate that elections be "free and open" any greater protection than what the U.S. Constitution provides regarding political participation and association.[121]

Finally, many state courts lockstep their state equal protection clauses with the federal Equal Protection Clause.[122] For example, the Georgia Supreme Court rejected a challenge to that state's voter ID requirement under its equal protection clause by citing *Crawford*, explaining that "this Court has repeatedly stated that the Georgia [equal protection] clause is generally 'coextensive' with and 'substantially equivalent' to the federal equal protection clause, and that we apply them as one."[123] The Georgia court invoked the federal Equal Protection Clause's severe burden balancing test to uphold the law.[124] From a textual perspective, it might make sense to lockstep a state's equal protection clause to its federal counterpart because the language in each clause is virtually identical. In addition, both federal and state equal protection clauses have very similar substantive purposes: ensuring equality. A state court is therefore reasonably justified in using a lockstep methodology for a state's equal protection

119. *Id.* (quoting Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 193 (2008)).

120. Sonneman v. State, 969 P.2d 632, 637–38 (Alaska 1998) (citing Burdick v. Takushi, 504 U.S. 428 (1992)).

121. MacGuire v. Houston, 717 P.2d 948, 954–55 (Colo. 1986).

122. *See supra* Part II.A (discussing U.S. Supreme Court cases that locate the right to vote within the Equal Protection Clause of the Fourteenth Amendment).

123. Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 74–75 (Ga. 2011).

124. *Id.*

clause.[125] This approach, however, is quite different from using a lockstep analysis to deny a state's separate and differently worded voter qualification provision any independent force.[126]

In sum, even though virtually every state constitution contains a provision that explicitly grants the right to vote to its residents, many state courts do not construe those provisions to have any separate meaning from federal voting-rights jurisprudence under the U.S. Constitution. Instead, these state courts use the lockstep method to define the scope of the clauses in their constitutions, typically rejecting challenges to a state's practice in the process. This analysis, as discussed below, has an inherent dissonance, as state courts are lockstepping a *specific* and *explicit* voter qualification provision with federal court interpretation of the *implied* right to vote within the general language of the Equal Protection Clause. The result is often a derogation of citizens' state constitutional right to vote.[127]

B. Nonlockstep: State-Focused Interpretive Methods

Unlike a lockstepping analysis, some state courts recognize that their constitutions go further than the U.S. Constitution in conferring voting rights. The two main nonlockstep methodologies are the interstitial and primacy approaches.[128] While different in their

125. A state court, of course, also could decide to give its identically worded constitutional language greater force to provide more robust protection to its citizens.

126. The Georgia Supreme Court actually undertook an independent analysis for its constitutional provision on voter qualifications, without citing federal jurisprudence, but it still rejected the plaintiffs' argument. The court ruled that the voter ID law did not impose an additional voter qualification and was consistent with the Georgia Constitution's broad grant of authority to the legislature to regulate elections. *Democratic Party of Ga., Inc.*, 707 S.E.2d at 72 (citing GA. CONST. art. II, § 1, ¶ 1 ("Elections by the people . . . shall be conducted in accordance with procedures provided by law.")).

127. *See infra* Part IV.A (rejecting the lockstep approach because it fails to provide the best protection for the right to vote).

128. Some commentators have advocated for a third nonlockstep approach, which they call dual sovereignty, that looks at the federal and state constitutions as coequals and requires courts to analyze the rights protection of both in every case. *See* Anderson & Oseid, *supra* note 97, at 884 (describing an approach in which courts analyze both the state constitution and the U.S. constitution and choose the interpretation that provides the most protection for the right); Utter & Pitler, *supra* note 101, at 652 (advocating for the dual-sovereignty approach because it maximizes protection of individuals' constitutional rights and facilitates the development of a "principled, independent state jurisprudence"). "In essence, the court does not give deference to one direction over the other, it only relies on the constitution that provides the greatest protection." Anderson & Oseid, *supra* note 97, at 884. Few courts, however, have adopted the dual-sovereignty approach, and state constitutional theorists have largely discredited this methodology. *See, e.g.*, ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 54–56, 72–73 (2009) (explaining the Court's "dualist"

initial foci, they share a commonality of giving independent force to state constitutional protections of individual liberties, such as the right to vote. The difference is largely in whether a court looks to its state's constitution or the U.S. Constitution first; a court employing an interstitial approach will consider the state constitution only if the federal protection is insufficient, while a court invoking the primacy method will start with the state constitution.

1. Interstitial

A state court that uses the interstitial approach may consider both its state constitution and the U.S. Constitution to protect the individual right to vote.[129] A court following this method first analyzes how the U.S. Constitution and federal court precedent construe the right.[130] If the court determines that the "federal floor" does not adequately safeguard the right at issue, it will then decide whether the state constitution provides a more robust, independent source of rights protection.[131] That is, the court will consider the state constitution only if the U.S. Constitution is not broad enough to protect sufficiently the right in question.[132] In this way, the U.S. Constitution and its accompanying case law has the first shot at providing an interpretative lens under which the state court will consider the issue.[133] If, however, the "federal floor" is unsatisfactory, then the court will turn to the state constitution and conduct an independent inquiry.[134] State constitutional law becomes a "supplement[ ]" to federal constitutional protection.[135]

To determine when it is appropriate to look to the state constitution after first analyzing the federal protection, courts use a set of "neutral" criteria.[136] The factors courts consider include "textual differences, legislative history, preexisting state law, structural differences between state and federal constitutions, matters of particular local or state interest, state traditions or history, and

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conception of federalism but rejecting it as unhelpful in solving the central question of allocation of powers and unnecessary where administrative decentralization is an option).

129. Anderson & Oseid, *supra* note 97, at 881.

130. *Id.*

131. *Id.*

132. *Id.* at 881–82.

133. *Id.*

134. *Id.*

135. *See* Utter & Pitler, *supra* note 101, at 648–49.

136. *See* Anderson & Oseid, *supra* note 97, at 882.

particular attitudes of the state's citizens."[137] Federal constitutional protection thus enjoys a presumption of adequacy in state courts unless, under the neutral criteria, there is a reason to look to the state constitution.[138]

Michigan's voter ID litigation exemplifies the interstitial approach in the voting-rights context.[139] In that case, the Michigan House of Representatives asked the Michigan Supreme Court to issue an advisory opinion on the constitutionality of Michigan's voter ID requirement.[140] The court held that the voter ID law did not violate the Michigan Constitution's declaration that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin."[141] The court explained that, although the Michigan Equal Protection Clause is coextensive with the Fourteenth Amendment's Equal Protection Clause, the Michigan Constitution's nondiscrimination clause also protects "political rights."[142] In other words, the court first considered the U.S. Constitution and used a lockstep approach for the equal protection language.[143] However, the court recognized that, unlike the U.S. Constitution, the Michigan Constitution also protects "political rights," so it conducted a separate analysis under that clause.[144] Despite ultimately adopting the same severe burden test that federal courts use under the Equal Protection Clause, the Michigan court reached that conclusion not by lockstepping but by deciding under its independent analysis that *Burdick* also provided the best mechanism to interpret the state constitution.[145] That is, the court used the *Burdick* framework not

137. *Id.* (citing Utter & Pitler, *supra* note 101, at 649–50 n.120); *see also* Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1209 (D.N.M. 2010) ("A state court adopting this approach may diverge from federal precedent for three reasons: a flawed federal analysis, structural differences between state and federal government, or distinctive state characteristics." (quoting State v. Gomez, 932 P.2d 1, 7 (N.M. 1997))).

138. *See* Utter & Pitler, *supra* note 101, at 650.

139. *In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 463 (Mich. 2007).

140. *Id.* at 447–48.

141. MICH. CONST. art. I, § 2.

142. *In re Request for Advisory Op.*, 740 N.W.2d at 449, 459–60.

143. *Id.* at 452–53.

144. *Id.* at 459–63.

145. *Id.* at 463 n.90. This is an example of what Robert Williams calls "reflective adoption." *See* Williams, *supra* note 101, at 1506 (describing "reflective adoption" as "a state court decision acknowledging the possibility of different state and federal outcomes, considering the arguments *in the specific case* and, on balance, deciding to apply federal analysis to the state provision").

because it necessarily sought to follow federal jurisprudence but because it determined, pursuant to its independent analysis, that *Burdick* also provided the appropriate test under the state constitution.

Ultimately, the court upheld the constitutionality of the voter ID law, even under the "political rights" clause, because the Michigan Constitution delegates to the legislature the authority to "preserve the purity of elections" and "to guard against abuses of the elective franchise."[146] The court found that the law was proper under these provisions.[147] That is debatable as a factual matter—whether voter ID laws actually preserve the integrity of elections is a hotly contested question.[148] But the evidentiary decision in this particular case is separate from how the court understood the source of voter protections. The key question is whether state courts will give their state constitutional provisions independent force in the face of narrow federal court interpretations of voting rights in the U.S. Constitution. Through the interstitial approach, the Michigan Supreme Court did just that.

As another example, the New Mexico Supreme Court acknowledged that its constitution confers added protections to its citizens through its "free and open" elections clause.[149] New Mexico uses the interstitial approach,[150] and because there is no federal constitutional counterpart, the court fashioned its own state rule regarding the scope of that clause.[151] The court concluded that an election is "free and open" only "if the ballot allows the voter to choose between the lawful candidates for that office."[152] In some ways, the

146. *In re Request for Advisory Op.*, 740 N.W.2d at 463 (citing MICH. CONST. art. II, § 4).

147. *Id.*

148. *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 635 (2007) ("No systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date, but the best existing data suggests that a photo-identification requirement would do more harm than good."); Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 475 (2008) (noting that the "debate over photo identification laws remains far from any definitive conclusion"); *see also* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 186 (2009) (highlighting the lack of data on the impact of voter ID laws and examining the effect of voter ID laws on turnout).

149. Gunaji v. Macias, 31 P.3d 1008, 1015–16 (N.M. 2001) (quoting N.M. CONST. art. II, § 8).

150. State v. Gomez, 932 P.2d 1, 7–8 (N.M. 1997); *see also* Am. Ass'n of People with Disabilities v. Herrera, 690 F. Supp. 2d 1183, 1208 (D.N.M. 2010) ("The Supreme Court of New Mexico applies the interstitial approach to interpreting the New Mexico Constitution.").

151. *Gunaji*, 31 P.3d at 1016.

152. *Id.*

New Mexico approach is similar to the state-first primacy method discussed below, because the court did not consider explicitly the federal constitutional protection for the right to vote. But this is likely only because there is no obvious federal right similar to the state constitution's "free and open" provision. Facing only a state-created right, the court undertook only a state-focused analysis, even though as a general rule New Mexico follows the interstitial approach. This demonstrates how, although they often have different starting points, the nonlockstep interpretive methodologies are similar in the importance they place on state-conferred rights.

Ultimately, then, the interstitial approach is better at safeguarding voting rights than lockstepping because it at least leaves the door open for a separate interpretation under a more robust state constitution. But this methodology also might encourage a state court to adopt the narrower federal test as its own, as the Michigan court did in its voter ID decision. This is because the federal analysis, which comes first, might color the state interpretation. The next approach, however, gives state constitutions even more authority in protecting individual rights because it is not hampered with any explicit federal analysis.

2. Primacy

The primacy approach is, in essence, the exact opposite of the lockstep method. Instead of construing state constitutions to be in absolute harmony with the U.S. Constitution, state courts employing primacy start with the state constitution.[153] A court's analysis thus begins and usually ends with the state constitution, and the court considers the federal floor only if the state constitutional protection does not cover the right in question.[154] Federal constitutional interpretation is merely persuasive in primacy-based state

153. *See* Anderson & Oseid, *supra* note 97, at 885 ("A state court taking the primacy approach looks first to its own constitution."); *see also* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182–183 (1970):

> [W]here a state law unavoidably faces a serious claim of constitutional right, the basis for that claim in the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state. . . . . The customary assumption that the guarantees in the state constitution intend to protect the same interests against the same abuses as those in the federal Constitution, only phrased somewhat differently, is too facile . . . .

154. *See* Anderson & Oseid, *supra* note 97, at 885; *see also* Utter & Pitler, *supra* note 101, at 647.

jurisprudence, with no presumptive validity.[155] This method exemplifies "judicial federalism," in which state courts recognize 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."[156] "Thus," as commentators have explained, "primacy courts focus on the state constitution as an independent source of rights, rely on it as the fundamental law, and do not address federal constitutional issues unless the state constitution does not provide the protection sought."[157] Primacy therefore differs from the interstitial method in its analytical starting place: while an interstitial approach looks first to the U.S. Constitution, primacy begins with the state.

The Missouri Supreme Court, in its 2006 voter ID decision, set out the reasons for using this state-focused method quite nicely, contrasting the voter protection provisions in both the U.S. and Missouri Constitutions:

> The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart. Federal courts also have consistently held that the right to vote is equally fundamental under the United States Constitution. But, the right to vote in state elections is conferred under federal law only by implication, not by express guarantee.
>
> Moreover, the qualifications for voting under the federal system are left to legislative determination, not constitutionally enshrined, as they are in Missouri. *Compare* U.S. Const. art. I, sec. 2 (providing that "Electors" shall be equivalent to those for state positions) *with* Mo. Const. art. VIII, sec. 2 (establishing exclusive qualifications for voting in Missouri). *Compare also* U.S. Const. amend. XV (protecting right to vote from abridgment "on account of race, color or previous condition of servitude") *with* Mo. Const. art. I, sec. 25 (protecting right to vote from all "power, civil or military" that "interferes to prevent the free exercise of the right of suffrage").[158]

Thus, the Missouri court recognized that, although both the U.S. Constitution and the state constitution safeguard the right to vote, the broader state constitution provides an independent and explicit voting protection.[159] So construed, the voter ID law violated the Missouri Constitution's conferral to Missouri citizens of a "fundamental right to vote."[160] The court acknowledged that the U.S.

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155. Utter & Pitler, *supra* note 101, at 647.

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

157. Utter & Pitler, *supra* note 101, at 647.

158. Weinschenk v. State, 203 S.W.3d 201, 211–12 (Mo. 2006) (citations and footnote omitted).

159. *Id.* at 216 ("Here, the issue is constitutionality under Missouri's Constitution, not under the United States Constitution.").

160. *Id.* at 212–13 (citing MO. CONST. art. I, § 25).

Constitution still provides a floor of protection under the Fourteenth Amendment's Equal Protection Clause. Under that *Burdick* analysis, the voter ID law imposed a severe burden and would trigger strict scrutiny review.[161] But the court, while giving credence to the U.S. Constitution's more limited protection of voting rights, focused its analysis on the Missouri Constitution. Missouri's constitution goes beyond the federal floor, so even if the law were permissible under the U.S. Constitution, the court would invalidate it under the state constitution using the primacy methodology.

The 2012 Wisconsin voter ID litigation involved two trial court decisions that also exhibited the primacy approach, and both courts struck down the law under the state constitution.[162] Wisconsin's constitution provides that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."[163] A judge considering the constitutionality of Wisconsin's newly enacted voter ID law found that the law added an additional qualification to vote, contrary to the mandate of this constitutional provision.[164] Although acknowledging that the U.S. Constitution also speaks to the issue through the Equal Protection Clause, the court rejected the state government's reliance on *Crawford*, explaining that "this case is founded upon the Wisconsin Constitution which expressly guarantees the right to vote while *Crawford* was based upon the U.S. Constitution which offers no such guarantee."[165] The court therefore focused its analysis on Wisconsin's more robust voting-rights provision to invalidate the voter ID law.[166] The other trial court considering this law did not even mention the federal right to vote or cite a single federal court decision in finding that the voter ID requirement "abridge[s] the right to vote" in violation of the Wisconsin Constitution.[167] The court explained that

161. *Id.* at 216.

162. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586 (Wis. Cir. Ct. Mar. 12), *cert. granted*, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Ct. Mar. 6), *cert. granted*, No. 2012AP557–LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012).

163. WIS. CONST. art. III, § 1.

164. *Milwaukee NAACP*, 2012 WL 739553.

165. *Id.* pt. X.

166. *Id.* pts. VIII–IX.

167. *League of Women Voters*, 2012 WL 763586, pts. I–II:

> [The Wisconsin Constitution] is unambiguous, and means exactly what it says . . . . *Every* United States citizen 18 years of age or older who resides in an election district in Wisconsin is a qualified elector in that district, unless excluded by

"[t]he government may not disqualify an elector who possesses those qualifications [to vote as listed in the Wisconsin Constitution] on the grounds that the voter does not satisfy additional statutorily-created qualifications not contained in Article III [of the Wisconsin Constitution], such as photo ID."[168] The Wisconsin Constitution's explicit voting-rights provision provided the only right the court needed for its analysis.

The Wisconsin Court of Appeals subsequently reversed one of the cases, rejecting the plaintiff's facial challenge to the voter ID law in light of the "concessions" the plaintiff made regarding the legislature's authority to enact voter registration requirements.[169] The appeals court, relying solely on the Wisconsin Constitution,[170] ruled that a voter ID law is not an "additional qualification" because it is simply a means for the legislature to identify those who had registered to vote.[171] However, the court left open the possibility that plaintiffs might succeed in an as-applied challenge if there was enough evidence that the voter ID requirement imposed too heavy of a burden on the state constitutional right to vote.[172] It also acknowledged that the appeal of the other trial court decision invalidating Wisconsin's voter ID law might be different because the plaintiffs in that case had made fact-based arguments.[173]

As the Wisconsin appellate decision reveals, undertaking a state-first primacy analysis does not necessarily spell the doom of a voter ID requirement. The Tennessee Supreme Court recently upheld the state's voter ID law through a primacy approach.[174] The court first declared that the state had a compelling interest in preserving "the

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duly enacted laws barring certain convicted felons or adjudicated incompetents/ partially incompetents.

168. *Id.* pt. I.

169. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 834 N.W.2d 393, ¶ 3, at 396 (Wis. Ct. App. 2013).

170. *Id.* ¶ 7 n.2, at 397 ("[W]e make note of, but see no reason to discuss further, the United States Supreme Court's split opinion addressing a facial challenge, under the federal constitution, to an Indiana law requiring photo identification to vote.").

171. *Id.* ¶¶ 55–57, at 407. This holding reveals that employing a primacy approach still allows states to impose election regulations, especially when a court narrowly construes the state constitution's grant of the right to vote. Whether the Wisconsin appellate court was correct in its substantive analysis regarding the scope of the constitutional provision is subject to question, especially because the U.S. and Wisconsin Constitutions are quite different with respect to granting the right to vote. Ultimately, however, the Wisconsin Supreme Court will likely have the final say on this issue.

172. *Id.* ¶ 7 n.2, at 397.

173. *Id.*

174. City of Memphis v. Hargett, No. M2012-02141-SC-R11-CV, 2013 WL 5655807 (Tenn. Oct. 17, 2013).

integrity of the election process" and that the law achieved that goal even if there was no actual evidence of voter fraud.[175] The court then decided that, under Tennessee's constitution, a voter ID law was not an additional "qualification" because it is "more properly classified as a regulation pertaining to an existing voting qualification."[176] Although this proposition is debatable as an interpretive and evidentiary matter,[177] it at least rests solely on the Tennessee Constitution and Tennessee case law. The court's reasoning was too conclusory on this point—simply declaring without much explanation that the voter ID law did not impose an additional qualification—but its approach was sound in that it focused on its own state-specific analysis as opposed to relying on federal interpretation. Part IV of this Article explains why the court was wrong as a substantive matter,[178] but the court's methodology was proper because it left room for the Tennessee Constitution to provide more robust protection to the right to vote than is permissible under current federal jurisprudence.[179]

An independent and adequate state constitutional interpretation of voting protections, furthermore, avoids possible oversight by the U.S. Supreme Court. This is because there is no federal issue at stake so long as the scope of the state right does not

175. *Id.* at *11–12.

176. *Id.* at *16.

177. *See, e.g.*, Weinschenk v. State, 203 S.W.3d 201, 211–12 (Mo. 2006) (invalidating the Missouri voter ID law as infringing Missouri citizens' right to vote under the Missouri Constitution); Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553, pts. VIII–IX (Wis. Cir. Ct. Mar. 6) (finding that the voter ID law added an additional qualification to vote contrary to the express grant of the right to vote in the Wisconsin Constitution), *cert. granted*, No. 2012AP557–LV, 2012 WL 1020254 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012).

178. *See infra* Part IV.C (arguing that a voter ID law is an additional qualification to vote).

179. At least two other state supreme courts also have employed the primacy approach in a voting-rights challenge.

The Maryland Supreme Court gave its state constitution's "right of suffrage" provision independent scope, separate from any federal constitutional analysis, in a case involving Maryland's practice of switching voters to "inactive" status and then removing them from the voter registration list after a period of inactivity. Md. Green Party v. Md. Bd. of Elections, 832 A.2d 214, 221–22 (Md. 2003). The court declared that the Maryland Constitution's provisions on voting rights are "even more protective of rights of political participation than the provisions of the federal Constitution" and therefore that the "right to vote is not subject to expiration for voter inactivity or for any other non-constitutional qualification." *Id.* at 221–22, 228–29.

The Kansas Supreme Court used the primacy approach in a case over the constitutionality of a law allowing for mail-in voting in certain situations, declaring that under the Kansas Constitution, "voters are constitutionally guaranteed the right to a secret ballot." Sawyer v. Chapman, 729 P.2d 1220, 1223 (Kan. 1986) (citing KAN. CONST. art. IV, § 1).

fall below the federal floor.[180] A state court could still decide that the rights under its own constitution are identical to the rights under the U.S. Constitution.[181] It will do so, however, through an independent analysis, not because it gives any deference to federal court interpretation. Moreover, the fact that state constitutions textually grant the right to vote, while the U.S. Constitution does not, should counsel against states adopting the federal standard as their own.[182] As many of the voting-rights cases discussed above demonstrate, courts that use the primacy approach in the election context typically recognize that state constitutions provide a broader right to vote than the U.S. Constitution.

The main benefit of the primacy approach for the constitutional right to vote is that it gives full force to the broader protection of voting rights contained within state constitutions. Federal case law interpreting the Equal Protection Clause is still important because it furnishes a baseline of constitutional protection for the right to vote, couched in terms of equality. It therefore provides a framework for a lower limit on the kinds of election regulations states may impose. But again, state constitutions are more explicit than the U.S. Constitution when it comes to right to vote. State constitutions interpreted through a primacy methodology thus confer a more robust complement to federal Equal Protection Clause analysis. As explained below, there are strong reasons for a widespread adoption of the primacy approach for all state constitutional cases involving the fundamental, constitutional right to vote.

IV. THE PROPER MODE OF STATE CONSTITUTIONAL ANALYSIS FOR THE RIGHT TO VOTE

There are two reasons to reject the lockstep approach and to embrace one of the state-focused methods of constitutional interpretation that allows courts to recognize and give independent

180. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *see also* Anderson & Oseid, *supra* note 97, at 876 ("If a state court's decision rests on state grounds that are independent and adequate to support the decision, then the Supreme Court cannot review that decision even if the case also involves federal issues.").

181. Utter & Pitler, *supra* note 101, at 647 ("Although the primacy approach may insulate state decisions from Supreme Court review, state primacy does not necessarily result in state court decisions expanding upon federal minimums.").

182. This suggests that the Wisconsin appellate analysis in the voter ID litigation was incorrect. *See supra* note 171.

force to state constitutional provisions granting voting rights. First, the right to vote is so foundational to our democratic system that it deserves the most robust protection possible.[183] Second, the U.S. Constitution explicitly says that we should look at state rules for voter eligibility.[184]

Ultimately, the primacy approach is the most appropriate interpretative method for protecting the constitutional right to vote. It authorizes a state court to give initial effect to its state constitution's more explicit conferral of voting rights, while still recognizing the federal floor if needed. Primacy acknowledges that state constitutions are different from the U.S. Constitution when it comes to the right to vote, thereby ensuring that the most important right in our democracy enjoys full constitutional protection. Primacy also adheres to the U.S. Constitution's understanding of the right to vote by doing exactly what the U.S. Constitution says—giving primary focus to state rules on voting rights but also abiding by the implied federal right under the Equal Protection Clause where necessary.

A. The Right to Vote Deserves the Most Robust Protection Possible

There is a simple reason to analyze state constitutions' explicit safeguards of voting rights faithfully and independently from federal jurisprudence: the right to vote is the most fundamental and important right that we have. It therefore deserves the strongest protection possible.

A state constitution exists and is legitimate only because the state's residents have decided to adopt it through democratic means. As one of the Wisconsin trial courts considering the state's voter ID law explained:

> The people's fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature's so-called "plenary authority"), not the other way around. Until the people's vote approved the Constitution, the legislature had no authority to regulate anything, let alone elections. Thus, voting rights hold primacy over implicit legislative authority to regulate elections. In other words, defendants' argument that the fundamental right to vote must yield to legislative fiat turns our constitutional scheme of democratic government squarely on its head.
>
> This is why, over the years, although recognizing that the legislature and governor are accorded implicit authority to enact laws regulating elections, our Supreme Court

183. Consider *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (recognizing that the right to vote is "a right at the heart of our democracy"), and *Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 450 (1974) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.")).

184. U.S. CONST. art. I, § 2, cl. 1.

> has repeatedly admonished that such laws cannot destroy or substantially impair a qualified elector's right to vote.[185]

The U.S. Supreme Court has declared that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[186] As Professor James Gardner has explained, "The meaning of the right to vote is among the most contentious, highly charged questions in all of contemporary law. To a degree unmatched in other areas, judicial and legislative actions affecting the right to vote may have immediate and decisive impacts on the nation's public life."[187] Because of its foundational importance on so many areas, we must protect the right to vote vigorously from political manipulation and curtailment.

But federal court protection has not lived up to this lofty goal. Instead, under the *Burdick* balancing test, the Supreme Court has vacillated between using strict scrutiny and a lower level of scrutiny depending on whether the law in question imposes a severe burden on voting rights.[188] If federal courts were serious about preserving the right to vote, then they would always employ strict scrutiny review to laws that burden political participation. Courts' failure to do so leads to a narrowing of voting-rights protection. We need not, however, rely on federal courts to safeguard the right to vote robustly. State constitutions provide a textual hook for state courts to fill this void. State courts must employ the primacy approach if they truly seek to protect the most fundamental and foundational right in our democracy.

B. Lockstepping the Right to Vote Is Inconsistent with Our Constitutional Structure

There are at least three reasons to reject a lockstep approach to interpreting the right to vote under state constitutions. First, the text of the U.S. Constitution says that states will determine voter

185. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586, pt. II (Wis. Cir. Ct. Mar. 12), *cert. granted*, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012).

186. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

187. James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 893 (1997).

188. *See* Douglas, *supra* note 5, at 162 (describing the Court's different approaches to election law disputes).

qualifications.[189] Federal courts should therefore look to state rules, not the other way around. Second, the history of the constitutional structure for voting rights portends a greater role for state definitions of the right to vote. Third, lockstepping goes against the ideal of judicial federalism, which suggests that state constitutions should play a significant role in protecting individual liberties. This Section discusses each concept and explains why they counsel against lockstepping state constitutional right-to-vote provisions with U.S. Supreme Court voting-rights jurisprudence.

1. Constitutional Text

Lockstepping explicit state constitutional grants of the right to vote with the narrower, implied federal right is contrary to the U.S. Constitution. Doing so subjugates the role states are supposed to play in determining the qualification of voters. The U.S. Constitution does not define who has the right to vote; it delegates that responsibility to the states. Article I, Section 2 provides that, for elections to the House of Representatives, "electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature."[190] The Seventeenth Amendment provides the same test for U.S. Senate elections.[191] Thus, the U.S. Constitution explicitly leaves the question of who is eligible to vote in U.S. congressional elections to the states.

Most election law derives from the states; the U.S. Constitution delegates to the states in the first instance the right to dictate the times, places, and manner of holding elections and provides that states determine rules for voter qualifications.[192] State constitutions give a specific grant of voting rights to the state's residents. They say that citizens of the United States who are residents of the state "shall be qualified to vote" or are "qualified elector[s]."[193] By contrast, the

189. U.S. CONST. art. I, § 2, cl. 1.

190. *Id.*

191. *Id.* amend. XVII.

192. *See, e.g.*, James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 886 (2006) ("[B]y far the most important source of law structuring the American political arena is state law."). Congress can still enact voting rules, such as a nationwide law concerning voter ID, under the Elections Clause. *See* U.S. CONST. art. I, § 4, cl. 1 ("[B]ut the Congress may at any time by Law make or alter such Regulations . . . ."); RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 199 (2012) (advocating for a government-issued nationwide voter ID).

193. *See supra* Part II.B (discussing state constitutional grants of the right to vote).

U.S. Constitution does not directly grant the right to vote to anyone; it says through negative language that states may not deny voting rights to certain groups of people.[194] Moreover, federal precedent on the right to vote merely requires equality.[195]

Lockstepping is therefore an inappropriate method of inquiry for the right to vote. If we are faithful to the U.S. Constitution's delegation of voter eligibility rules to the states, then there is nothing with which to lockstep. It is incongruent to lockstep a state's more specific voting rules with a completely different provision of the U.S. Constitution that actually says nothing specifically about the right to vote.[196] Lockstepping a state's equal protection clause with the Fourteenth Amendment's Equal Protection Clause may be conceptually consistent because the language of the two provisions is similar and both kinds of clauses exist to achieve the same thing—equality.[197] But when there is a state constitutional provision with no federal counterpart, state courts should not use lockstepping.[198]

State constitutional provisions on the right to vote are meaningfully and textually different from the U.S. Constitution's protections. Justice Scalia acknowledged this point in his recent decision in *Arizona v. Inter Tribal Council*, recognizing that the U.S. Constitution's Elections Clause gives Congress the authority to

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194. *See supra* Part II.A (discussing the lack of a specific enumeration of the right to vote in the U.S. Constitution and the underpinnings of the implied federal right to vote within various constitutional clauses).

195. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 104–05 (2000):

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

196. For a similar argument with respect to state constitution education clauses, see Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 351–52, 360 (2011); *see also id.* at 305 ("It is surprising that conceptions of individual rights and legislative powers in state and federal courts largely converge, even where the unit of analysis is a state constitutional enumeration with no federal analogue.").

197. *See, e.g.*, Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 74–75 (Ga. 2011) (lockstepping the Georgia Constitution's equal protection provision with the U.S. Constitution's Equal Protection Clause).

198. *Cf.* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 707–08 (2011) ("Why the meaning of a federal guarantee proves the meaning of an independent state guarantee is rarely explained and often seems inexplicable."); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 347 (1993) (arguing that courts that lockstep state constitutional provisions with federal rights ignore or render the state provisions a "mere row of shadows" (citing State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring))).

override state legislative choices on the "times," "places," and "manner" of holding elections but not on the qualification of voters.[199] States retain the authority to prescribe voting qualifications. As Justice Scalia explained, the Founders sought to split the authority to regulate elections between Congress and the states because they feared concentrated power:[200] "Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government.' "[201] It follows that state courts should give independent force to their constitutional language that determines voter eligibility.

A lockstepping approach, however, thwarts a state court's ability to provide the heightened level of protection that state constitutions' direct provision of the right to vote demands. Lockstepping diminishes the significance of state constitutional grants of the right to vote.[202] Put succinctly, although there is no federal right to vote in the U.S. Constitution, there is an explicit right to vote under state constitutions. This textual difference, combined with the U.S. Constitution's express delegation of voter eligibility rules to the states, compels the conclusion that lockstepping state constitutional protections for voting rights is incompatible with our constitutional structure.[203]

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199. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2258 (2013) (citing THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

200. *Id.*

201. *Id.* (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

202. *See* Sutton, *supra* note 198, at 707 ("Some state courts diminish their constitutions by interpreting them in lockstep with the Federal Constitution. . . .").

203. In a related context, state courts have been ineffective at curtailing partisan gerrymandering in part because they have failed to recognize the differences between the federal and state constitutions with respect to the rules for apportionment. *See* Gardner, *supra* note 187, at 927–28:

> [B]ecause most state courts did not begin to construe their own constitutions until after federal courts had already begun to construe related provisions of the U.S. Constitution, state courts often simply imported the terminology and conceptual templates of federal constitutional law into the state constitutional jurisprudence when an independent inquiry into the meaning of state constitutional provisions might have been more illuminating, thereby diminishing the utility and persuasiveness of their analyses.

See also Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 210–11 (2003) (noting that "it may be difficult to convince state courts not to follow" U.S. Supreme Court precedent regarding partisan gerrymandering).

2. History

The history of placing the right to vote within state authority also counsels against the lockstep approach. Well before the adoption of the U.S. Constitution, state constitutions already granted the right to vote to the state's citizens. The U.S. Constitution maintained this structure.[204] Founding-era state constitutions contained provisions explicitly granting the right to vote, which might provide one reason why the U.S. Constitution did not also include this protection: the state constitutions could already do this work. Delegates to the Virginia Constitutional Convention of 1776—including James Madison—debated several suffrage clauses before settling on Virginia's formulation: " 'That elections of members to serve as representative of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage.' "[205] Thus, James Madison was aware that Virginia's Constitution already explicitly preserved the right to vote. The same is true of Richard Bassett, a delegate to the federal constitutional convention in Philadelphia who led Delaware's constitutional convention of 1776 and was a delegate to Delaware's second constitutional convention.[206] Basset was in charge of a committee that adopted Delaware's Declaration of Rights, which "provided for free elections and granted the franchise to all white, male Christians, including Roman Catholics."[207] Vermont's 1777 constitution also included the right of universal suffrage.[208]

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204. *See* KEYSSAR, *supra* note 3, at 4–7, 23–24 (describing the approach to suffrage laws in colonial times and the Framers' decision not to mention voting in the U.S. Constitution beyond art. I, § 2).

205. JOHN J. DINAN, THE VIRGINIA STATE CONSTITUTION 5 (G. Alan Tarr ed., Oxford Univ. Press 2011) (2006) (citing Robert Hilldrup, The Virginia Convention of 1776: A Study in Revolutionary Politics 191–93 (May 1, 1935) (unpublished Ph.D. dissertation, University of Virginia) (on file with University of Virginia Library)); *see also* VA. CONST. art. I, § 6. Hilldrup explains that there was "considerable struggle" during the debate over the article containing this language. Hilldrup, *supra*, at 191. He also points out that the text includes potentially restrictive clauses that might curtail the right to vote, such as the requirement that voters have "sufficient evidence of permanent common interest with and attachment to the community." *Id.* at 191–92. This language suggests that the constitutional provision is more "conservative" than a seventeenth-century law the drafters of the Virginia constitution supposedly considered. *Id.* at 193.

206. RANDY J. HOLLAND, THE DELAWARE STATE CONSTITUTION 6–7 (G. Alan Tarr ed., Oxford Univ. Press 2011) (2012).

207. *Id.*

208. WILLIAM C. HILL, THE VERMONT STATE CONSTITUTION 9 (G. Alan Tarr ed., Oxford Univ. Press 2011) (1992).

The Founding Fathers likely felt no need to insert a right-to-vote provision in the U.S. Constitution due to the preceding direct state grants of that right.[209] Moreover, it would have been difficult politically for the ratification of the U.S. Constitution to include a national right to vote given the serious debate among the Founders and in the states about who should enjoy the franchise.[210] The Founders specifically did not want to allow Congress to determine voter eligibility, because "[a] Congress empowered to regulate the qualifications of its own electorate . . . could 'by degrees subvert the Constitution.' "[211] Instead, the drafters provided in Article I, Section 2 that voter eligibility for federal elections was dependent on state eligibility rules. This provision was a "compromise, an outgrowth both of an ideologically divided constitutional convention and the practical politics of constitutional ratification," but it was possible specifically because state constitutions already conferred the right to vote.[212]

Accordingly, we need not locate the right to vote in the Fourteenth Amendment's Equal Protection Clause, especially given that it exists already within the state constitutions.[213] This is not to suggest that we should abandon federal voting-rights jurisprudence, as the Equal Protection Clause provides a useful floor for the right to vote. But it does mean that federal law is not the only source of the constitutional right to vote.

3. Judicial Federalism

Lockstepping is also inconsistent with judicial federalism, which posits that courts should recognize state constitutions as providing their own source of individual rights protection.[214] As

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209. For a fuller historical picture of founding era understanding of the Elections Clause and voter qualification rules, see Kirsten Nussbaumer, Republican Election Reform and the American Montesquieu 12–13 (June 28, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898406) (discussing the tradition of "fixing suffrage" through constitutional text).

210. *See* KEYSSAR, *supra* note 3, at 5–7 (describing the wide variety among the states' laws for voter qualifications based on residency, sex, race, religion, and property interests).

211. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2258 (2013) (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 250 (Max Farrand ed., rev. 1966)).

212. *See* KEYSSAR, *supra* note 3, at 21.

213. *See* AMAR, *supra* note 38, at 186–87 (explaining that, at the time of its adoption, the Fourteenth Amendment's Equal Protection Clause was not understood to encompass voting rights).

214. *See* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1097 (1997) (describing the increased reliance on state constitutions as "new judicial federalism").

Justice Brennan wrote in his seminal *Harvard Law Review* article, "the decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law."[215] Instead, "state courts no less than federal are and ought to be the guardians of our liberties."[216] Justice Brennan focused his article on advocating against lockstepping for clauses in state constitutions that are textually identical to a U.S. constitutional counterpart, such as provisions in the Bill of Rights.[217] The right to vote is even further removed from a legitimate lockstep analysis because there is no direct federal analogue.

In addition, lockstepping "contradicts the historical relationship between the state and federal constitutions."[218] Whenever the U.S. Supreme Court issues a decision under the U.S. Constitution involving individual rights, it does so within the context of promoting a uniform rule for all fifty states.[219] There is always an aspect of federalism inherent in a decision to narrow the scope of a federal right: state constitutions may be more expansive.[220] This is why "[U.S.] Supreme Court interpretations of the federal constitution as applied against the states should not be viewed as presumptively valid precedent for state constitutional analysis."[221] More specifically, when a federal court's interpretation of a right as important as voting is narrower than a state constitution's explicit demand, a state court is wrong to mirror the state's protection to match the federal rule.

As Justice Brennan explained, state courts should give their constitutions independent force when they disagree with U.S. Supreme Court decisions on an important issue of individual liberties.[222] Moreover, state courts that robustly protect rights can

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215. Brennan, *supra* note 156, at 502.

216. *Id.* at 491.

217. *See, e.g.*, *id.* at 498–502 (discussing state versions of protections embodied in the Bill of Rights).

218. Utter & Pitler, *supra* note 101, at 646.

219. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 396 (1984) (explaining that, in its constitutional analysis, the Supreme Court considers the fact that "federal constitutional interpretations apply a uniform national mandate to a diverse group of state governments").

220. *Id.*

221. *Id.* at 397.

222. Brennan, *supra* note 156, at 502; *cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (positing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of

help to check more restrictive federal jurisprudence and, ultimately, national power.[223] State courts should therefore use a state-focused interpretative method, such as primacy, that allows them to recognize state constitutions as more protective of voting rights than the U.S. Constitution. This is the best method to elevate the importance and significance of the right to vote in an era of restrictive U.S. Supreme Court rulings.

Having state courts provide more robust protection than federal courts on the right to vote might flip on its head the "myth of parity," which posits that "persons advancing federal constitutional claims against local officials will fare better, as a rule, in a federal, rather than a state trial court" and that "federal district courts are institutionally preferable to state appellate courts as forums in which to raise federal constitutional claims."[224] Professor Burt Neuborne, in expounding upon the benefits of adjudicating individual rights in federal court, suggested that federal judges are more open to constitutional claims because they are better equipped to conduct complex analysis, psychologically predisposed to protecting individual liberties, and insulated from majoritarian pressures.[225] Rejecting a lockstep approach inherently renounces federal courts' protection of the right to vote as deficient and questions the myth of parity for voting-rights issues.

But current federal court jurisprudence on voting rights necessitates a shift on how we compare federal and state court interpretation. Federal courts undertheorize the liberty interest in voting, particularly through the amorphous *Burdick* severe burden test.[226] State courts, using their state constitutions, can make up for this deficiency by analyzing faithfully their constitutional provisions granting the right to vote.[227] That is, federal courts do not even need to give robust treatment to the implicit right to vote under the Fourteenth Amendment, even if they should, because the right to vote

these limits should be understood as delineating only the boundaries of the federal courts' role in enforcing the norm").

223. *See* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1033 (2003) ("State judicial rejection of excessively narrow Supreme Court precedents concerning the scope of individual rights helps check national power in at least four ways.").

224. Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115–16 (1977).

225. *Id.* at 1120–21.

226. *See supra* Part II.A (describing the difficulty plaintiffs face under the *Burdick* severe burden test to establish that a state voting law violates the federal Equal Protection Clause).

227. *Cf.* Hasen, *supra* note 59, at 97 (suggesting a statutory canon of construction in favor of "democracy" to fill the void of "underenforced constitutional norms of equality in voting").

is also a state right—as Article I, Section 2 and the state constitutions themselves demonstrate. Moreover, the direct, specific language granting voting rights in state constitutions provides a textual hook for a state court to provide broader protection to the right to vote than a federal court might under the implicit language of the U.S. Constitution. The myth of parity has not panned out for the right to vote, requiring state courts to fill the void left under federal doctrine.

In sum, there are textual, historical, and jurisprudential reasons for rejecting the lockstep methodology to the right to vote. Lockstepping, however, is the prevalent approach, perhaps because it is common in other areas of law, especially when the federal and state constitutional texts are the same or very similar.[228] Moreover, lockstepping promotes uniformity between federal and state analyses on an issue that both the U.S. Constitution and state constitutions explicitly address. But state constitutions go well beyond the U.S. Constitution in granting voting rights. Judicial interpretation should follow suit.

C. Primacy Provides the Best Interpretative Method for the Right to Vote

Textually and jurisprudentially, primacy presents the best approach for voting rights. The U.S. Constitution already directs a state primacy approach to the right to vote by pointing to state rules for voter eligibility.[229] State constitutions fill this gap by explicitly defining who enjoys the right to vote.

Primacy-based analyses should guide future litigation over voter-eligibility issues, such as voter ID requirements. State courts should first determine whether a particular election regulation goes beyond the bounds of what the state constitution permits. If necessary, the court can then resort to an analysis under the federal floor to ensure that judicial interpretation of the state constitution's protections are not less than the federal rules for voting rights, which include the U.S. Supreme Court's Equal Protection Clause jurisprudence. This is why the Wisconsin courts were correct and the Pennsylvania court wrong in their state constitutional analyses in the 2012 voter ID litigation.[230] Put simply, state courts must give their

228. *See* Williams, *supra* note 101, at 1502 (noting that state courts tend to follow federal constitutional doctrine in the majority of cases).

229. U.S. CONST. art. I, § 2.

230. There could, of course, be a more nefarious explanation for the choice of interpretative methodologies—lockstep or not—in these voter ID cases: the judges may have been trying to

state constitutions independent force in determining the constitutionality of a voter ID law.

The primacy approach, importantly, does not abandon all federal jurisprudence on voting rights. The federal floor still provides a significant level of protection that ensures state voting rules do not dip below a certain threshold. Equal protection is an important concept that undergirds the development of election law.[231] In addition, federal courts often can be more independent protectors of the right to vote in the face of manipulation by partisan legislatures.[232] The U.S. Constitution also has meaningful negative protections, such as prohibitions on race-, sex-, or age-based voting restrictions. Furthermore, the U.S. Constitution is important in directing our inquiry for eligibility questions to the states via Article I, Section 2. We should not (and cannot, under the Supremacy Clause) abandon an approach that considers the right to vote under the U.S. Constitution and federal precedent where necessary. But state courts should resort to the lesser federal protection only after analyzing fully whether their more robust state constitutions fail to safeguard individuals' voting rights. Thus, state constitutions augment the federal floor in addition to filling in the gaps from Article I, Section 2. Courts should consider state constitutions first before falling back on the U.S. Constitution regarding the right to vote.

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reach a particular result based on ideology. Both Wisconsin trial court judges were Democrats, and they invalidated the state's voter ID law under a nonlockstep approach. *See* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865, 1875 (2013) (noting that the Wisconsin Judges were Democrats). The Pennsylvania trial court judge who upheld the law through lockstepping was a Republican. *See* Francis Wilkinson, *Pennsylvania Voter ID Judge Rescues Republicans*, BLOOMBERG (Oct. 4, 2012), http://www.bloomberg.com/news/2012-10-04/pennyslvania-voter-id-judge-rescues-republicans.html (identifying the Pennsylvania trial judge as a Republican). But the potential results-driven nature of judicial decision making does not obscure the need for a reasoned doctrinal justification for choosing one interpretive methodology over another. Indeed, recognizing the existence of a principled approach at least might cabin state courts that otherwise would affirm a law that restricts voting rights for fear of overturning the legislature, as it would require the court to justify its departure from the constitutional text.

231. *See, e.g.*, Jocelyn Friedrichs Benson, *Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud*, 44 HARV. C.R.-C.L. L. REV. 1, 12–13 (2009) ("In recognizing the state's interest in combating fraud in elections, early federal court opinions instruct courts to balance protection of the fundamental right to vote under the Equal Protection Clause . . . against the government's duty to protect the integrity of the electoral process."); Gilda Daniels, *Voter Deception*, 43 IND. L. REV. 343, 371–72 (2010) (stating that the Equal Protection Clause assists the government "in its pursuit of free access to the franchise").

232. *See* Hasen, *supra* note 230, at 1870 ("The judicial reaction [to Republican legislative overreach to contract voting rights] suggests that courts may now be more willing to act as backstops to prevent egregious cutbacks in voting rights and perhaps to do even more to assure greater equality and fairness in voting.").

This analysis, in turn, means that plaintiffs should advocate against an approach that looks solely to federal law when challenging a state's voter ID requirement. Of course, there could still be a valid federal equal protection as-applied challenge if there is enough evidence that the law disproportionately affects a particular group of voters—*Crawford* said as much.[233] But no court has sustained an equal protection as-applied challenge.[234] Therefore, it makes sense for litigants to focus on state constitutions.

Pennsylvania's constitution is emblematic. Article VII, Section 1 of the Pennsylvania Constitution provides:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.[235]

That is, Pennsylvania's constitution directly grants the right to vote to every U.S. citizen who is a resident of the state and is over 21 years old. The only exception the state constitution provides is for duly enacted laws about registration.

A voter ID law imposes an additional qualification on top of citizenship, residence, and age. Without an ID, a citizen simply may not vote, even if he or she meets the constitutionally enumerated qualification requirements. Thus, the state has created a category of ineligible voters—those who do not possess an ID—beyond what the constitution allows.[236] Such a law has nothing to do with registration but is rather about the voting process itself.[237] The Pennsylvania

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233. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 203 (2008); *see also* Douglas, *supra* note 63, at 669 (discussing the relevance of *Crawford*'s "as-applied only" rule).

234. *See, e.g.*, Am. Civil Liberties Union of N.M. v. Santillanes, 546 F.3d 1313, 1322–23 (10th Cir. 2008) (rejecting as-applied challenge).

235. PA. CONST. art. VII, § 1.

236. *See infra* notes 256–59 and accompanying text (discussing state-imposed criteria for voter eligibility beyond what the constitution permits).

237. The Tennessee Supreme Court equated its voter ID law with a registration requirement, declaring that the law "pertain[s] to an existing voting qualification." City of Memphis v. Hargett, No. M2012-02141-SC-R11-CV, 2013 WL 5655807, at *16 (Tenn. Oct. 17, 2013). But this bald declaration begs the question of why the voter ID is not an additional

plaintiffs, therefore, should not have conceded that the Pennsylvania voter ID law would be constitutional if the state enacted "reasonable voter education efforts, reasonably available means for procuring identification, and reasonable time allowed for implementation."[238] That concession may have been proper under current federal Equal Protection Clause jurisprudence, but the admission leaves the door open for the court to uphold the law *under the state constitution* once the state achieves these implementation efforts. The plaintiffs, however, did not invoke the federal Equal Protection Clause in their suit. Moreover, this mode of analysis is textually inconsistent with the Pennsylvania Constitution. Of course, the plaintiffs probably made this statement because they recognized (or feared) that the court would likely look to federal precedent—and in particular *Crawford*—in its analysis of the state constitution and were trying to distinguish that decision on its facts. But by doing so, the plaintiffs assented to the validity of lockstepping the right to vote.

Separate from and in addition to the federal constitutional test, the analysis under the state constitution should actually be quite simple. The state constitution grants the right to vote subject to a few conditions. A voter ID law is an *additional* condition. Unless the state constitution also allows the legislature to impose further qualification

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qualification if it separates those who may vote from those who may not. In the abstract, a voter ID law is similar to a registration law if everyone can comply without restriction. As the court acknowledged, however, the voter ID law imposes special hurdles on certain people (such as the indigent) who do not already have an ID. The court did not explain, in light of these unequal hurdles, why the law was more like a registration requirement instead of an additional qualification to vote.

238. Applewhite v. Commonwealth, 54 A.3d 1, 5 (Pa. 2012). One of the plaintiffs' amici, the AFL-CIO, made this point directly in its brief, noting that "state constitutional provisions demand a separate analysis" from the U.S. Constitution and that "it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution." Brief of Amicus Curiae Pennsylvania AFL-CIO in Support of Petitioner's Petition for Review and Application for Special Relief in the Nature of a Preliminary Injunction at 15, Applewhite v. Commonwealth, 2012 WL 3332376 (Pa. Commw. Ct. Aug. 15) (No. 330) (citations omitted), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/BriefofAmicusCuriaePennsylvaniaAFL-CIOinSupportofPetitioners.pdf, *vacated*, 54 A.3d 1 (Pa. 2012). The AFL-CIO brief also explained that "the Pennsylvania Supreme Court is free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution." *Id.* (citation and alterations omitted). The court did not directly address this point in its analysis, instead simply following the U.S. Supreme Court's decision in *Crawford*. *Applewhite*, 2012 WL 3332376, at *16–19. This might be because the plaintiffs' brief was not as explicit in focusing on the independent nature of the state constitutional protection. *See* Petitioner's Pre-Trial Brief and Pre-Trial Statement at 18–26, *Applewhite*, 2012 WL 3332376 (No. 330), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/PetitionersPre-TrialBriefandPre-TrialStatement.pdf (emphasizing the alleged undue burden on the fundamental right to vote).

requirements, and unless the state justifies the law pursuant to this power,[239] then a voter ID law goes beyond the state constitution's prescription *even if it would be permissible under the federal Equal Protection Clause*. If a state constitution does in fact broadly empower the legislature to regulate voting, then two additional considerations arise. First, there is a separate legal question regarding whether that clause overrides the voter eligibility provision. Second, there is a subsequent factual question as to whether the voter ID law actually accomplishes this goal. But these are different inquiries from what the Pennsylvania court considered, as it simply declared without explanation that the voter ID law "does not attempt to alter or amend Pennsylvania Constitution's substantive voter qualifications, but rather is merely an election regulation to verify a voter's identity."[240] Underlying that interpretation was the federal jurisprudence in *Crawford*—not a faithful reading of the explicit text of the Pennsylvania Constitution.[241]

The state courts that have rejected lockstepping and embraced the primacy approach in voter ID cases, such as those in Wisconsin and Missouri, are correct. As the Missouri Supreme Court declared, "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."[242] This is not to say that voter ID laws are per se unconstitutional.[243] The Georgia Supreme Court upheld Georgia's voter ID law after a separate interpretation of its own constitution.[244] The question in that instance, however, is not over the appropriateness of the Georgia court's interpretative methodology; it is instead about whether the court was correct in its substantive analysis of the Georgia Constitution.

Although rejecting the lockstep approach could lead some states to try to amend their constitutions to provide the legislature with greater authority to regulate elections or to adopt voter ID

239. *See, e.g.*, KAN. CONST. art. V, § 4 ("The legislature shall provide by law for proper proofs of the right of suffrage.").

240. *Applewhite*, 2012 WL 3332376, at *16.

241. *Id.* at *16–19 (emphasizing the Supreme Court's reasoning in *Crawford*).

242. Weinschenck v. State, 203 S.W.3d 201, 212 (Mo. 2006).

243. *See, e.g.*, City of Memphis v. Hargett, No. M2012-02141-SC-R11-CV, 2013 WL 5655807, at *1 (Tenn. Oct. 17, 2013) (upholding Tennessee's voter ID law under the Tennessee Constitution).

244. *See* Democratic Party of Ga., Inc. v. Perdue, 707 S.E.2d 67, 74–75 (Ga. 2011).

requirements, this is an example of democracy at work.[245] A state's citizens could decide whether they want to give the legislature that power. An analysis of a voter ID law under a state constitution that delegates to the legislature robust authority to regulate the voting process in one clause does not mangle the state constitution's explicit grant of the right to vote in another, so long as a court can read these clauses in harmony.[246] As it stands, however, most state constitutions give the legislature authority to regulate the registration process or absentee balloting, not to impose additional voter qualification rules.[247]

A court invoking the proper analysis in light of a constitutional delegation of authority to the legislature still must conduct an evidentiary inquiry into how and why the state government implemented the voting law. For example, the Missouri court explained that, even under the Missouri Constitution, "some regulation of the voting process is necessary to protect the right to vote itself."[248] Even so, under the constitution, the Missouri legislature may regulate only *certain aspects* of the state's voting process, such as registration.[249] Therefore, even though "many matters may tangentially affect voting,"[250] the legislature may not simply concoct new voter qualifications as it wishes. Accordingly, a state court giving its constitution independent scope still must determine whether the specifics of the voter ID law impose an actual burden on the right to vote such that it becomes an additional qualification to vote. If there are suitable alternatives for those who do not have an ID, then the state is not imposing an additional hurdle or qualification on voting rights because it is not creating a class of voters who would be able to vote but for their possession of identification.[251] The legislature also must have the authority to enact such a law. This is a different

245. For example, Minnesota citizens rejected a proposed constitutional amendment that would have enacted a new voter ID requirement. *See* Ragsdale, *supra* note 18 (reporting that only 46% of voters supported the proposed constitutional amendment to adopt a photo ID requirement).

246. *See infra* Part V (addressing the presumptive invalidity of election laws that add voter qualifications).

247. *See supra* Part II.B (detailing state constitutional provisions on voter qualifications).

248. Weinschenck v. State, 203 S.W.3d 201, 212 (Mo. 2006).

249. MO. CONST. art. VIII, § 5 ("Registration of voters may be provided for by law.").

250. *Weinschenck*, 203 S.W.3d at 212.

251. *See* South Carolina v. United States, 898 F. Supp. 2d 30, 34 (D.D.C. 2012) (noting that, under South Carolina law, a voter who does not possess a photo ID can still vote so long as the voter states in an affidavit why he or she does not have the ID).

inquiry than the Indiana or Pennsylvania courts conducted, because it does not rest solely on federal precedent.[252]

V. THE PRESUMPTIVE INVALIDITY OF ELECTION LAWS THAT ADD VOTER QUALIFICATIONS

A primacy approach to state constitutional interpretation of the right to vote rejects *Burdick*'s severe burden formation as too deferential to state regulation of elections, as that test fails to recognize the explicit right of suffrage within state constitutions. But in its place, state courts need a workable test that elevates the importance of the fundamental right to vote while still allowing jurisdictions to run their elections. The solution, once again, is right in front of us: the structure of state constitutions. Courts simply need to apply faithfully what state constitutions say.[253]

A. State Constitutional Structure

As discussed above, all but one state constitution explicitly grants to its citizens the right to vote.[254] Most of these constitutional provisions are couched in mandatory terms: all citizens "*are* qualified electors" or "*shall* be entitled to vote" so long as they are U.S. citizens, residents of the state for a certain time, and over eighteen years of age.[255]

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252. League of Women Voters of Ind., Inc. v. Rokita, 929 N.E.2d 758, 767 (Ind. 2010) (relying on *Crawford* in upholding Indiana's voter ID law); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376, at *15–29 (Pa. Commw. Ct. Aug. 15) (applying *Crawford* to uphold Pennsylvania's voter ID law), *vacated*, 54 A.3d 1 (Pa. 2012).

253. State courts, of course, could create other tests that also protect sufficiently the state constitutional right to vote. The analysis presented here is one workable solution, but it is not the exclusive way in which state courts must proceed. Indeed, courts could adopt a test that is even more protective of voting rights.

254. *See supra* Part II.B (explaining that every state constitution besides Arizona's explicitly grants the right to vote to the state's citizens).

255. *See, e.g.*, PA. CONST. art. VII, § 1:

> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections . . . . 1. He or she shall have been a citizen of the United States at least one month. 2. He or she shall have resided in the State ninety (90) days immediately preceding the election. 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election . . . .

Only three states' constitutions do not cast their right-to-vote provisions in mandatory language such that citizens "shall" have the right to vote or "are" qualified electors, instead using the permissive word "may." See Alaska Const. art. 5, § 1 ("Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local

State constitutions, as previously noted, also delegate authority to state legislatures to regulate elections, but this comes only *after* the state constitutions confer voting rights. That is, the right to regulate elections is derivative of the people's right to vote. As one of the Wisconsin trial courts considering the voter ID law explained, the people of the state ratified the constitution, so the citizen's right to vote arises first, before legislative authority to alter that right.[256] In addition, the constitutional power state legislatures enjoy is based on permissive language and is often limited to regulating certain aspects of the election process. Pennsylvania citizens, for example, "*shall* be entitled to vote at all elections subject . . . to such laws requiring and regulating the registration of electors as the General Assembly *may* enact."[257] Other state constitutions allow legislatures to pass laws involving absentee balloting or felon disenfranchisement.[258] Some state constitutions also permit the legislature to enact laws to "preserve the integrity" of elections or "guard against abuses of the elective power."[259]

State constitutions thus grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process. The constitution, not the legislature, confers the right to vote, so the legislature's power cannot completely override this constitutional grant. A primary conferral of the right to vote, which then may be subject to legislative authority, is the only way to understand properly both the textual and contextual grant of voting rights. That is, the legislature's power cannot outweigh the mandatory nature of the voting protection. Courts construing these provisions in harmony, then, must give full effect to the mandatory, explicit nature of voting rights while still providing the legislature with room to regulate elections consistent with constitutional authorization.

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election."); Ca. Const. art. II, § 2 ("A United States citizen 18 years of age and resident in this State may vote."); Ind. Const. art. II, § 2 ("A citizen of the United States who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election."). Given that the U.S. Constitution points to state rules for voter eligibility, however, we should understand these states as also requiring the provision of the right to vote to its citizens.

256. Order Granting Motion for Temporary Injunction, Milwaukee Branch of the NAACP v. Walker, No. 11 CV 5492, 2012 WL 739553 (Wis. Cir. Mar. 6, 2012) (granting temporary injunctive relief to preclude enforcement of new Wisconsin voter ID law).

257. PA. CONST. art. VII, § 1 (emphasis added).

258. *See, e.g.*, FLA. CONST. art. V, § 4 (registration and absentee balloting); KAN. CONST. art. V, § 2 (felon disenfranchisement).

259. *See, e.g.*, COLO. CONST. art. IV, § 11; N.M. CONST. art. V, § 1.

B. A Two-Part Test for the State Constitutional Right to Vote

Given the foregoing analysis, a court considering a state constitutional challenge to an election regulation should ask two separate questions: (1) whether the law at issue infringes upon the explicit constitutional grant of voting rights by adding an additional qualification, and then (2) whether the exercise of the legislature's power can outweigh that mandatory right. The plaintiff should have the burden of showing that the regulation in question imposes an additional voter qualification, while the state should have the ultimate burden of justifying such a law.

A plaintiff satisfies his or her initial burden under this proposed test by showing that the law creates categories—those who may vote and those who may not—based on additional criteria not listed in the state constitution. For example, a voter ID law is generally an additional qualification because those voters who satisfy all other eligibility rules still may not vote without possessing an ID, assuming that everyone does not already have an ID or there are no other ways the state accommodates non-ID holders. A voter ID requirement is therefore not merely a means of proving the constitutionally enumerated eligibility rules, as those who meet the valid qualifications may still suffer disenfranchisement if they do not also have the ID. By contrast, forcing a citizen to sign his or her name at the polls, for instance, is not a qualification, even though an individual may not vote without doing so, as it does not define *who* is eligible to vote—especially because everyone has the ability to meet this requirement (assuming there is an accommodation for disabled voters who cannot sign their name). A signature law instead delineates the *process by which* a voter casts his or her ballot and asks nothing more. Regular election-administration laws that do not create a group of citizens ineligible to vote for failure to satisfy the state's requirements do not impose an additional voter qualification. Put another way, if *every* voter possessed a valid ID, then the ID law would not be an additional qualification because it would not impose a status requirement on voters that some people cannot easily meet. Everyone is still eligible to vote regardless of the voter ID law because everyone has one, and the law would be regulating the process of voting instead of delineating an additional qualification. But that is not the reality of today's voter ID laws. To be sure, a voter ID law in a state in which everyone owned an ID still might impose an added burden on voters—of bringing and presenting the ID—but this is different from distinguishing which voters may cast a ballot based on possession of an ID. If, however, having an ID is not a universal trait,

or the state does not otherwise accommodate those without one, then the requirement turns into an additional voter qualification.[260]

Once a plaintiff demonstrates that a law imposes an additional qualification on the right to vote, it is then the *state's* burden to show why the law is a permissible exercise of its legislative authority. To do so, the legislature must present specific findings on why the law in question does not infringe the state constitution's explicit provision of voting rights to its citizens. Without specific findings, a legislature might curtail the constitutional right to vote through general legislative declarations—contrary to the text and structure of state constitutions.

This proposal flips the normal burden in constitutional voting-rights litigation. Under the federal *Burdick* test, the plaintiff has the obligation to show that the law in question burdens the right to vote to a severe level.[261] If the plaintiff cannot do so, then a lockstepping state court following *Burdick* will apply an intermediate balancing test that largely defers to the state's justifications for the law.[262] In essence, "laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association."[263] Under *Burdick*, then, the plaintiff assumes the ultimate burden of proving the law's invalidity by demonstrating the barriers the law imposes on voting rights, and the court typically credits whatever justification the state posits for its election regulation.[264] A court following *Burdick* will reverse the presumption of validity and hold the state to a higher threshold only if the court finds that the law imposes a severe burden.[265]

Flipping the normal federal framework and imposing a presumption of invalidity to laws that add voter qualifications is

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260. There are, of course, line-drawing questions. The key inquiry for a court is whether a state is creating a category of ineligible voters based on failure to meet a particular state-imposed criterion beyond what the constitution permits. If so, then the plaintiff can meet its initial burden under this test.

261. Burdick v. Takushi, 504 U.S. 428, 434 (1992).

262. *Id.* (noting that, if a law imposes only "reasonable, nondiscriminatory restrictions" on voting rights, then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions" (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983))).

263. Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 336 (2007).

264. *Burdick*, 504 U.S. at 434; *see* Elmendorf, *supra* note 263, at 327 (discussing the deferential nature of the *Burdick* standard).

265. *See* Elmendorf, *supra* note 263, at, 336–37 ("Sometimes, however, an inspection of the challenged law's form and context . . . reveals something alarming. If so, the presumption of constitutionality may be reversed, and the Court will take a close look at the law's tailoring and the justifications asserted for it.").

justified because state constitutions already support this analytical move. They explicitly confer the right to vote as an initial matter, subject only later to a grant of power that the state legislature may invoke. This is evident through the mandatory nature of the voting-rights provision, the permissive language authorizing legislative regulation, and the simple fact that a legislature's power cannot override the explicit conferral of the fundamental right to vote. Courts should therefore consider a law that adds additional voter qualifications to be *presumptively invalid* under the state constitution because the law is contrary to the constitution's explicit grant of the right to vote. The state should then have the burden of overcoming that presumption with direct evidence showing that the law is consistent with the state constitution's specific conferral of legislative power to regulate elections.

Many state constitutions limit the legislature's authority to regulate elections to certain areas, such as the registration or absentee balloting processes.[266] A state may enact an election law only based on this limited power. As discussed above, a requirement that voters show an ID to vote, when possessing an ID is not a universal trait, is an additional qualification for voting because those who do not have the ID are effectively denied the franchise. This rule violates a state constitution's mandatory grant of voting rights. Once the plaintiff meets the initial burden of showing that the law imposes an additional qualification on the state constitutional right to vote, the state should have the ultimate burden of justifying the legislative power to enact the law. An ID law does not regulate the registration or absentee balloting process. Therefore, a court construing a state constitution that limits the legislature's power to regulate only these aspects of the election system should invalidate a voter ID requirement that disenfranchises some voters.

Other state constitutions, however, give slightly broader power to the legislature to root out fraud or protect the integrity of the election process.[267] In these states, proponents would argue that a voter ID law effectuates those goals. But instead of requiring the plaintiff to demonstrate the magnitude of the burdens a voter ID law

266. *See, e.g.*, HAW. CONST. art. II, § 4 ("The legislature shall provide for the registration of voters and for absentee voting . . . .").

267. *See, e.g.*, ARIZ. CONST. art. VII, § 1 ("There shall be enacted registration and other laws to secure the purity of elections and guard against abuses of the elective franchise.); DEL. CONST. art. V, § 1 ("[T]he General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.").

imposes, the state should have the obligation to prove that the voter ID law in fact protects the integrity of the election and is therefore consistent with the legislature's authority to override the explicit grant of voting rights. A state may not satisfy this burden through simple legislative findings that a voter ID law *might* help to root out fraud, especially if there is no actual evidence of fraud occurring in the state's elections. This generalized rationale should be insufficient to outweigh the state constitution's express voting-rights provision. Instead, courts should require states to prove through direct evidence that the voter ID requirement actually will solve a fraud or integrity problem occurring in the state's elections.[268] This is the only way the state can justify its decision to override the state constitution's explicit grant of the right to vote.

Finally, a few states give the legislature plenary power over elections.[269] But although more contextual than textual, the analysis is still the same: the specific conferral of the right to vote comes first, subject only secondarily to the legislature's authority to regulate the election process. This is because, as the Wisconsin trial court ruling on the state's voter ID law explained, "The people's fundamental right of suffrage preceded and gave birth to our [state c]onstitution (the sole source of the legislature's so-called 'plenary authority'), not the other way around. Until the people's vote approved the [state c]onstitution, the legislature had no authority to regulate anything, let alone elections."[270] That is, a state constitution cannot grant authority to a state legislature to override the very aspect of our democracy—the right to vote—that gives the constitution legitimacy. Both the initial allocation of voting rights in state constitutions and the fundamental

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268. *Cf.* David Schultz, *Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 530 (2008) ("[T]he test [for analyzing a voting restriction] should require the government to detail what constitutes a 'severe' burden on a fundamental right. After all, that is the normal requirement whenever the government seeks to infringe upon these types of rights.").

269. *See, e.g.*, LA. CONST. art. XI, § 1 ("The legislature shall adopt an election code which shall provide for permanent registration of voters and for the conduct of all elections."); NEV. CONST. art. II, § 6:

> Provision shall be made by law for the registration of the names of the Electors within the counties of which they may be residents and for the ascertainment by proper proofs of the persons who shall be entitled to the right of suffrage, as hereby established, to preserve the purity of elections, and to regulate the manner of holding and making returns of the same; and the Legislature shall have power to prescribe by law any other or further rules or oaths, as may be deemed necessary, as a test of electoral qualification.

270. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, 2012 WL 763586, at *4 (Wis. Cir. Ct. Mar. 12), *cert. granted*, No. 2012AP584, 2012 WL 1020229 (Wis. Ct. App. Mar. 28), *cert. denied*, 811 N.W. 2d 821 (Wis. 2012).

importance of the right to vote to our democracy requires this result. A contrary reading—that the legislature can override the explicit, mandatory nature of the right to vote—would make the constitutional grant of voting rights a nullity because it would be subject to unlimited legislative curtailment. Even if the legislature has broad authority, then, it still must use specific evidence to justify any law that adds a voting qualification beyond what the state constitution allows. The legislature should present articulable reasons to support a law that curtails the right to vote in some way.

The two-part, burden-shifting analysis that this Article espouses is akin to strict scrutiny, requiring the state to justify an election regulation by demonstrating how it is tied specifically to the legislature's power.[271] The U.S. Supreme Court has recognized that "under our Constitution . . . the States are given the initial task of determining the qualifications of voters who will elect members of Congress."[272] A close analysis of state constitutions reveals that those documents explicitly grant the right to vote in unequivocal terms, subject only to a few enumerated status qualifications and to the legislature's authority, which is limited to certain areas in most states. Thus, state constitutions themselves suggest that legislatures must justify the imposition of additional voter qualifications that infringe the right to vote. An analysis that is similar to federal strict scrutiny review comes directly from the state constitutional text and structure, as well as the fundamental nature of the right to vote.[273]

This formulation does not require widespread judicial oversight of elections, however, as states should be able to overcome the presumption of invalidity in most instances for run-of-the-mill election-administration laws. States need to regulate how an election should operate. Many election-related laws, moreover, do not impose additional voter qualifications but instead are about other mechanics of the election process, such as ballot access requirements for

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271. Using heightened scrutiny and rejecting deference to state legislatures for impediments to voting rights was the original formulation of the Warren Court's right-to-vote decisions. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627–28 (1969) ("Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.").

272. Storer v. Brown, 415 U.S. 724, 729–30 (1974) (citing U.S. CONST art. I, § 2, cl. 1).

273. *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1295 (2002) ("If . . . we believe that voting is important for more than expressive reasons, then it is unclear why we do not recognize that a 'right to effective representation' entails, at the very least, a presumption of a right to vote that should require a 'compelling state interest' to defeat.").

candidates or campaign finance regulations.[274] But when a plaintiff can demonstrate that a particular law adds an additional voting qualification beyond what the state constitution permits, courts should consider the law presumptively invalid under the constitutional text. The state should then have the burden of showing with specific evidence why it was justified in passing that law. This mode of analysis is most faithful to a primacy approach to constitutional protection of the right to vote and adheres most closely to state constitutional text and structure.

VI. CONCLUSION

There have been myriad calls for Congress or the federal courts to fix voting-rights jurisprudence to give broader protection to the individual right to vote.[275] But the solution is in plain sight if state courts simply read state constitutions faithfully to their text and independently from federal jurisprudence. In locating the right to vote, we too often look solely at the implied right under the U.S. Constitution's negative language and the Equal Protection Clause. Construing a voting regulation under the U.S. Constitution, however, presents only half of the inquiry. Almost all state constitutions grant citizens the right to vote through explicit, direct language. Yet many state courts interpret their own state's constitution to be in lockstep with federal constitutional law.

This "absolute harmony" lockstepping approach is backwards. The U.S. Constitution directs the inquiry about voting qualifications to the states, not the other way around.[276] Moreover, it makes little sense to lockstep a state constitution's specific grant of voting rights with the very different implied right under the general language of the federal Equal Protection Clause. Courts construing restrictions on voting rights should consider the broader scope of state constitutions. A voter ID law, for example, imposes an added qualification on who

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274. *See* Douglas, *supra* note 5, at 178 (distinguishing between laws that directly impact voters with laws that only tangentially affect voters by regulating other aspects of the election process).

275. *See, e.g.*, Raskin, *supra* note 58, at 572; *see also* Brad Plumer, *'We Have to Fix That,' but Will We?*, WASH. POST (Nov. 8, 2012), http://www.washingtonpost.com/politics/decision2012/we-have-to-fix-that-but-will-we/2012/11/08/c83b4976-29ca-11e2-bab2-eda299503684_story.html:

> Election Day saw news story after news story about interminable lines at polling stations. In some areas, people waited for two hours, three hours or more. To many observers, it seemed ludicrous that a country as advanced and as wealthy as the United States can't figure out how to hold a decent election.

276. U.S. CONST. art. I, § 2.

may vote, which goes beyond the explicit mandate of all fifty state constitutions.

The U.S. Supreme Court in recent years has contracted the scope of the right to vote under the federal Equal Protection Clause.[277] A renewed, independent focus on state constitutions and their explicit grant of the right to vote is textually faithful to both the U.S. and state constitutions and will restore the importance of the most foundational right in our democracy.

277. *See* Douglas, *supra* note 5, at 151–57 (discussing Supreme Court decisions that have created confusion for lower courts and in some cases limited the scope of the right to vote).

VII. APPENDIX: STATE CONSTITUTIONAL PROVISIONS ON THE RIGHT TO VOTE

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Alabama[280]	"shall have the right to vote"		
Alaska[281]	"Every citizen . . . may vote"		
Arizona[282]		"All elections shall be free and equal"	"No Person shall be entitled to vote . . . unless"; "shall not be denied or abridged"
Arkansas[283]	"any person may vote"	"Elections shall be free and equal"	
California[284]	"may vote"		"may not be conditioned by a property qualification"
Colorado[285]	"shall be qualified to vote"	"free and open"	
Connecticut[286]	"shall be . . . an elector"		"No person shall be denied . . . enjoyment of his or her civil or political rights"

278. An "explicit" grant means that the state constitution includes language declaring that a citizen "shall be qualified to vote," "shall be entitled to vote," "is a qualified elector," or other similar language. *See supra* notes 73–81 and accompanying text.

279. An "implicit" grant of the right to vote means that the state constitution prohibits the denial of voting rights based on certain characteristics, such as race or sex. *See supra* notes 91–94 and accompanying text.

280. ALA. CONST. art. VIII, § 177.

281. ALASKA CONST. art. V, § 1.

282. ARIZ. CONST. art. II, § 21; *id.* art. VII, § 2.

283. ARK. CONST. art. III, §§ 1–2.

284. CAL. CONST. art. II, § 2; *id.* art. I, § 22.

285. COLO. CONST. art. VII, § 1; *id.* art. II, § 5.

286. CONN. CONST. art. VI, § 1; *id.* art. I, § 20.

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Delaware[287]	"shall be entitled to vote"	"All elections shall be free and equal"	
Florida[288]	"shall be an elector"		
Georgia[289]	"shall be entitled to vote"		
Hawaii[290]	"shall be qualified to vote"		"No citizen shall be disfranchised, or deprived"
Idaho[291]	"is a qualified elector"		"No power . . . shall at any time interfere with . . . the right of suffrage"
Illinois[292]	"shall have the right to vote"	"All elections shall be free and equal"	
Indiana[293]	"may vote"	"All elections shall be free and equal"	
Iowa[294]	"shall be entitled to vote"		
Kansas[295]	"shall be deemed a qualified elector"		

287. DEL. CONST. art. V, § 2; *id.* art. I, § 3.
288. FLA. CONST. art. VI, § 2.
289. GA. CONST. art. II, § 1, ¶ II.
290. HAW. CONST. art. II, § 1; *id.* art. I, § 8.
291. IDAHO CONST. art. VI, § 2; *id.* art. I, §§ 19, 20.
292. ILL. CONST. art. III, §§ 1, 3.
293. IND. CONST. art. II, §§ 1, 2.
294. IOWA CONST. art. II, § 1.
295. KAN. CONST. art. V, § 1.

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Kentucky[296]	"shall be a voter"	"All elections shall be free and equal"	
Louisiana[297]	"shall have the right to register and vote"		
Maine[298]	"shall be an elector"		
Maryland[299]	"and every citizen . . . ought to have the right of suffrage"; "shall be entitled to vote"	"elections ought to be free and frequent"	
Massachusetts[300]	"have an equal right to elect officers"	"All elections ought to be free"	
Michigan[301]	"shall be an elector and qualified to vote"		
Minnesota[302]	"shall be entitled to vote"		"No member of this state shall be disfranchised"
Mississippi[303]	"is declared to be a qualified elector"		
Missouri[304]	"are entitled to vote"	"free and open"	

296. KY. CONST. §§ 6, 145.
297. LA. CONST. art. I, § 10(A).
298. ME. CONST. art. II, § 1.
299. MD. CONST. DECLARATION OF RIGHTS, art. I, § 7; MD. CONST. art. I, § 1.
300. MASS. CONST. pt. I, art. IX.
301. MICH. CONST. art. II, § 1.
302. MINN. CONST. art. VII, § 1; *id.* art. I, § 2.
303. MISS. CONST. art. XII, § 241.
304. MO. CONST. art. VIII, § 2; *id.* art. I § 25.

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Montana[305]	"is a qualified elector"	"free and open"	"No person shall be denied the equal protection of the laws"
Nebraska[306]	"shall . . . be an elector"	"shall be free"	
Nevada[307]	"shall be entitled to vote"; also calls voting a "privilege"		"There shall be no denial of the elective franchise at any election"
New Hampshire[308]	"shall have an equal right to vote"	"All elections are to be free"	"The right to vote shall not be denied to any person because of the nonpayment of any tax."
New Jersey[309]	"shall be entitled to vote"		
New Mexico[310]	"shall be qualified to vote"	"All elections shall be free and open"	"and no power . . . shall at anytime interfere to prevent the free exercise of the right of suffrage"
New York[311]	"shall be entitled to vote"		
North Carolina[312]	"shall be entitled to vote"	"All elections shall be free"	
North Dakota[313]	"shall be a qualified elector"		

305. MONT. CONST. art. IV, § 2; *id.* art. II, §§ 4, 13.
306. NEB. CONST. art. I, § 22; art. VI, § 1.
307. NEV. CONST. art. II, § 1.
308. N.H. CONST. pt. I, art. XI.
309. N.J. CONST. art. II, § 1, ¶ 3.
310. N.M. CONST. art. VII, § 1; *id.* art. II, § 8.
311. N.Y. CONST. art. II, § 1.
312. N.C. CONST. art. VI, § 1; *id.* art. I, § 10.
313. N.D. CONST. art. II, § 1.

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Ohio[314]	"has the qualifications of an elector"		
Oklahoma[315]	"are qualified electors"	"the free exercise of the right of suffrage"	"The State shall never enact any law restricting or abridging the right of suffrage"
Oregon[316]	"is entitled to vote"	"All elections shall be free and equal"	
Pennsylvania[317]	"shall be entitled to vote"	"Elections shall be free and equal"	
Rhode Island[318]	"shall have the right to vote"		
South Carolina[319]	"shall have an equal right to elect officers"; "shall be an elector"; "is entitled to vote"	"free and open"	
South Dakota[320]	"shall be entitled to vote"	"free and equal" (two different clauses)	
Tennessee[321]	"shall be entitled to vote . . . and there shall be no other qualification attached to the right of suffrage"	"free and equal"	"right of suffrage . . . shall never be denied to any person"
Texas[322]	"shall be deemed a qualified voter"		

314. OHIO CONST. art. V, § 1.
315. OKLA. CONST. art. III, § 1; *id.* art. II, § 4; *id.* art. I, § 6.
316. OR. CONST. art. II, §§ 1, 2.
317. PA. CONST. art. VII, § 1; *id.* art. I, § 5.
318. R.I. CONST. art. II, § 1.
319. S.C. CONST. art. I, § 5; *id.* art. II, §§ 4, 5.
320. S.D. CONST. art. VI, § 19; *id.* art. VII, § 1, 2.
321. TENN. CONST. art. IV, § 1; *id.* art. I, § 5.
322. TEX. CONST. art. VI, § 2.

State	Explicit Grant of the Right to Vote[278]	Elections Shall Be "Free," "Free and Open," or "Free and Equal"	Implicit Grant of the Right to Vote Through Negative Language[279]
Utah[323]	"shall be entitled to vote in the election"	"All elections shall be free"	"The rights . . . to vote . . . shall not be denied or abridged"
Vermont[324]	"all voters . . . have a right to elect officers"; "shall be entitled to all the privileges of a voter"	"ought to be free and without corruption"	
Virginia[325]	"all men . . . have the right of suffrage"	"all elections ought to be free"	
Washington[326]	"shall be entitled to vote"	"free and equal"	
West Virginia[327]	"shall be entitled to vote"		"Nor shall any person be deprived by law, of any right, or privilege"
Wisconsin[328]	"is a qualified elector"		
Wyoming[329]	"shall be entitled to vote"	"open, free, and equal"	"The rights . . . to vote . . . shall not be denied or abridged"

323. UTAH CONST. art. IV, §§ 1, 2; *id.* art. I, § 17.
324. VT. CONST. ch. I, art. VIII; *id.* ch. II, § 42.
325. VA. CONST. art. I, § 6.
326. WASH. CONST. art. VI, § 1; *id.* art. I, § 19.
327. W. VA. CONST. art. IV, § 1; *id.* art. III, § 11.
328. WIS. CONST. art. III, § 1.
329. WYO. CONST. art. VI, §§ 1, 2; *id.* art. I, § 27.