

Equal Protection Through State Constitutional Amendment

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By requiring proof of intent to discriminate, federal equal protection doctrine has limited the possibility of achieving substantive racial equality through litigation in federal courts. Unfortunately, state courts have not provided a substantially better avenue for this project. Many state courts have unimaginatively interpreted their constitutions' equal protection clauses in lockstep with this narrow, intent-focused paradigm, or else have independently narrowed their scope such that, although state constitutional claims can be brought, they are unlikely to reach a different result than federal claims. In the more than forty years since Justice Brennan called for independent interpretation of state constitutions, scholars have analyzed how state judges have precluded the promise of state constitutions. This Note takes those analyses to their logical conclusion: if judges refuse to interpret their states' constitutions independently to provide actual equal protection, the constitutions must be rewritten to require a different interpretation.

This solution will not be a panacea, but with the doors to the conservative United States Supreme Court closed to civil rights plaintiffs, a state-centric approach is needed. Justice Kavanaugh recently reaffirmed that the Supreme Court is not the only guardian of individual rights in America—losing plaintiffs may seek relief under their state constitutions, or may seek to amend those constitutions. Litigators can still try to make progressive arguments utilizing current state constitutional language, but those arguments have not yet compelled state courts to fulfill their role as protectors of individual rights. In light of this setback, racial justice advocates should amend state constitutions so that they guarantee a remedy when state actors, or even private actors, disproportionately harm racial minorities.

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¹ J.D., Harvard Law School, 2021; B.A., Vassar College, 2015. I would like to thank Nikolas Bowie and Judge Jeffrey Sutton, whose class on State Constitutional Law inspired this work; Professor Alan Jenkins for his thoughtful feedback in honing my first draft; and Martha Minow for her helpful comments and insight. I am also grateful to the editors of the *Harvard Civil Rights-Civil Liberties Law Review*, particularly Aleena Ijaz, Thomas Freeman, and Ebony Slaughter-Johnson, for their guidance in expanding the Note and shaping it into its current form.

I. INTRODUCTION

The Fourteenth Amendment² was the basis for the constitutional revolution that ended *de jure* racial segregation,³ but narrow interpretations by the United States Supreme Court have diminished its promise. From the early days after its enactment, the Court⁴ has closed off avenues for achieving racial justice in federal courts.⁵ In a series of cases, the Court established a requirement of discriminatory purpose or intent for government action to violate the Equal Protection Clause of the Fourteenth Amendment, refusing to hold that a disparate impact, or the failure to remedy one, violates the guarantee of equal protection.⁶ Today, the conservative majority of the Court has solidified this doctrine of “race-neutral universalism,” eschewing a jurisprudence that would lead to substantive equality and “guarantee commensurate outcomes for . . . subordinate[d] minority groups” in favor of a colorblind jurisprudence that focuses on formalistic equal treatment of individuals.⁷ State constitutions, particularly through amendment, can provide an alternate avenue for realizing racial justice.⁸

² The Amendment reads, in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

³ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

⁴ For ease of distinguishing the United States Supreme Court from state and other courts, where “Court” is capitalized in this Note, it refers to the United States Supreme Court.

⁵ See, e.g., *The Slaughter-House Cases*, 83 U.S. 36 (1872) (rendering the Privileges and Immunities Clause a nullity).

⁶ See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely [sic] because it has a racially disproportionate impact.”); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”) (citation omitted). Disparate impact liability has been judicially manageable, where recognized. Although the Court has declined to extend the disparate impact theory to the Equal Protection Clause, it has recognized that statutes, most notably Title VII, prohibit practices having a disparate impact based on race. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”). European courts also widely recognize disparate impact claims. See generally Julie C. Suk, *Disparate Impact Abroad*, in *A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50* 283 (Samuel R. Bagenstos & Ellen D. Katz eds., 2015) (describing disparate impact claims in European courts).

⁷ See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059, 1063–64 (2011).

⁸ Much of the harm from the Court’s colorblind doctrine is evidenced in affirmative action cases. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314–15 (1978) (using a

The Supreme Court's narrow, intent-focused interpretation of the Fourteenth Amendment fails to recognize that "minorities can also be injured when the government is 'only' indifferent to their suffering or 'merely' blind to how prior official discrimination contributed to it and how current official acts will perpetuate it."⁹ Countless state policies disadvantage individuals because of their race, even absent a judicially cognizable discriminatory intent.¹⁰ Examples of these policies can be seen along the school-to-prison

reverse discrimination principle to hold that government quotas designed to assist minorities may constitute unlawful discrimination against white applicants). Unfortunately, because state constitutions cannot violate the federal Constitution per the Supremacy Clause, U.S. CONST. art. VI, cl. 2, state constitutional law may not be the arena in which to fight for affirmative action. Even if a state constitution explicitly allowed for affirmative action, any affirmative action policy enacted pursuant to the state constitution could still be challenged successfully under the Fourteenth Amendment. See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2013)) ("*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interest.' . . . Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications."). So long as the Fourteenth Amendment is interpreted as protecting racial majorities even against race-conscious policies designed to remedy past and present discrimination against racial minorities, state constitutions cannot supersede this federal "floor" and allow for such policies. See also *infra* note 132 and accompanying text. States are not, however prohibited from providing protection on top of the federal floor, so long as that protection does not interfere with any federal rights. See David J. Fine et al., *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 285 (1973) ("Although a state court cannot expand a state provision to the point where it conflicts with a countervailing federal right, short of such a collision the states have the power to enlarge individual liberties as much as they deem appropriate."). The question is whether the recognition of the rights of minorities, as against a policy having a disparate impact, would be viewed as infringing on the rights of others, namely the white majority. *Ricci v. DeStefano*, 557 U.S. 557 (2009), is illustrative of this misguided emphasis on colorblindness. The Court held that a city violated Title VII when it discarded the results of a test to determine the best qualified candidates for promotion because white test-takers scored disproportionately on the test. *Id.* at 563, 579 ("[T]he City rejected the test results because 'too many whites and not enough minorities would be promoted were the lists to be certified.' Without some other justification, this express, race-based decisionmaking violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."). Not even the desire to avoid a disparate impact would make the action permissible, "unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute." *Id.* at 563. *Ricci* involved a statute that recognized both disparate treatment and disparate impact liability; while not completely analogous to challenging a state constitutional provision authorizing a cause of action for disparate impact discrimination, it is illustrative of an assumption that attempts to remedy alleged disparate impacts may infringe on the federal right of white individuals to equal protection. Not all applications of such a constitutional provision would raise this issue, but the fact remains that such an amendment could be challenged as violating the Fourteenth Amendment, and would need a strong defense in federal court.

⁹ LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1516–19 (2d ed. 1988).

¹⁰ One observer lamented that "[t]he Supreme Court has construed the Equal Protection Clause to permit almost any government action that avoids explicit discrimination, unless it can be shown to be based on outright hostility to a racial or ethnic group. As a consequence, the Clause provides no protection against . . . unconscious bias." David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 307–08 (1997). Reva Siegel posits a theory of "preservation through transformation," in which status hierarchies are reinforced through facially neutral language, articulating a socially benign reason for a statute that "incidentally" perpetuates status inequalities, insulating the underlying policies from review. Reva B. Siegel, "*The Rule of Love*": *Wife Beating as Prerog-*

pipeline.¹¹

Some policies give state actors too much discretion without attempting to counteract their implicit biases.¹² For example, the failure to account for implicit bias may explain “intraschool segregation” in which Black and Latino students are disproportionately disciplined and left behind while teachers select their white peers to participate in advanced classes.¹³ The American Civil Liberties Union of New Jersey (“ACLU-NJ”), found such racial segregation across academic tracks had “created a school within a school” in one district: more than seventy percent of the students in the lower-level classes were Black and more than seventy percent of those in the advanced classes were white, even though the school as a whole was less than fifty percent white.¹⁴ But when ACLU-NJ filed a complaint against the

ative and Privacy, 105 YALE L.J. 2117, 2119, 2189 (1996). Even civil rights rhetoric, such as “colorblindness,” can supply the “legitimate,” “nondiscriminatory” reasons for the policy. *Id.* at 2185. Thus, the equal protection doctrine “now serve[s] to rationalize, rather than scrutinize, the new, facially neutral forms of status-enforcing state action [it has] helped bring into being.” *Id.* at 2195. For an overview of the “array of clashing and contesting ideas that lie behind the seemingly unitary concept of discriminatory intent” and the state of evidentiary play, see generally Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1291 (2018).

¹¹ The school-to-prison pipeline is “a disturbing national trend wherein children are funneled out of public schools and into the juvenile and criminal justice systems.” *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited May 11, 2021), archived at <https://perma.cc/9UPN-QXVF>.

¹² Implicit bias is defined as “the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.” *Understanding Implicit Bias*, KIRWAN INST. ON RACE & ETHNICITY (May 29, 2012), <https://www.kirwaninstitute.osu.edu/research/understanding-implicit-bias/>, archived at <https://perma.cc/DJ5A-C3UM>. For more on the mechanics of implicit bias, see Yvonne Elosiebo, *Implicit Bias and Equal Protection: A Paradigm Shift*, 42 N.Y.U. REV. L. & SOC. CHANGE 451, 475–86 (2018).

¹³ See generally Daniel J. Losen, *Silent Segregation in Our Nation’s Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 517–18 (1999). Although implicit bias is arguably a form of intentional discrimination that meets *Personnel Adm’r of Mass. v. Feeney*’s “because of” standard, 442 U.S. 256, 279 (1979), it is not clear that the Court would recognize it as such. In the jury selection context, some courts have suggested that unconscious racial bias might count as “purposeful discrimination.” See, e.g., *State v. Saintcalle*, 309 P.3d 326, 338 n.8 (Wash. 2013) (en banc), *abrogated on other grounds by City of Seattle v. Erickson*, 398 P.3d 1124, 1126 (Wash. 2017). Yet this reasoning has not been adopted more broadly. Moreover, while students could argue there was intent in an individual decision, this would be difficult to prove in cases where the intent is unconscious. Even if unconscious intent could be proven, the remedy would address the individual student, not the overall policy. It would be easier to prove a disparate impact by providing statistical evidence, and more impactful to reform the institution as a whole, but the policy decision to allow teachers discretion is one the Court would likely find to be devoid of discriminatory intent, and thus not unconstitutional.

¹⁴ AM. C.L. UNION OF N.J., *Complaint against the South Orange Maplewood School District under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973* (Oct. 9, 2014), 7–8, https://www.aclu.org/sites/default/files/assets/ocr_complaint_vs_somsd.pdf, archived at <https://perma.cc/6ER3-HVQG>. The complaint suggested that implicit bias could account for the racial disparities, given the race-neutral policies in place, citing research that “‘students’ verbal nuances and vernacular dialects” can “arouse implicit biases in teachers’ causing them to judge ‘the speakers’ intelligence, personality, social status, and ambition.” *Id.* at 9 n.28 (quoting CHERYL STAATS, KIRWAN INST. ON RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 2013 30–31 (2013), http://www.kirwaninstitute.osu.edu/reports/2013/03_2013_SOTS-Implicit_Bias.pdf, archived at <https://perma.cc/M2ZL-8ZKM>).

school district, it was a complaint with the federal Department of Education's Office of Civil Rights arguing a statutory violation, not a lawsuit brought under the Fourteenth Amendment.¹⁵ Perhaps ACLU-NJ recognized that a constitutional claim of implicit bias, although it arguably alleges intentional albeit unconscious discrimination, would be more likely to fail than an administrative complaint arguing disparate impact, as prohibited by the Department's regulations implementing Title VI and Section 504. Administrative remedies can be effective, but relying on federal agencies is a poor substitute for a private cause of action.¹⁶

Other policies consciously or unconsciously incorporate European cultural standards. For example, a school dress code policy that prohibits long hair for male students may seem race-neutral, but it imposes a disparate impact on students of color, such as DeAndre Arnold, who was suspended by his school for wearing dreadlocks, an expression of his Trinidadian heritage.¹⁷ Under *Washington v. Davis*, this policy would likely be found constitutional unless Mr. Arnold could prove that the hair length policy was chosen with an intent to discriminate against Black students.¹⁸ The high evidentiary burden of *Washington* and its progeny makes it "extremely difficult to prevail on an equal protection claim without a facial classification or

¹⁵ AM. C.L. UNION OF N.J., *supra* note 14, at 1.

¹⁶ Agency officials, particularly in deregulatory administrations, may choose not to bring enforcement actions against parties violating statutes that the agency has authority to enforce. It would be ill-advised, for example, to rely on Betsy DeVos to bring an enforcement action against schools that discriminate, given that she was rightly criticized for walking back Obama-era protections. See Laura Jimenez & Antionette Flores, *3 Ways DeVos Has Put Students At Risk by Deregulating Education*, CTR. FOR AM. PROGRESS (May 30, 2019), <https://www.americanprogress.org/issues/education-k-12/reports/2019/05/30/470509/3-ways-devos-put-students-risk-deregulating-education/>, archived at <https://perma.cc/B5L9-7LEQ>. Even if agencies are willing and able to act, they may lack the information and resources to target every violation. As the Court acknowledged in *Heckler v. Chaney*, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing." 470 U.S. 821, 831 (1985). Agencies are generally given discretion to decide whether agency resources are best spent on any individual violation, especially given that they may not have enough resources to undertake any given enforcement action at all. See *id.*

¹⁷ Chelsey Cox, *Texas Teen Banned by High School from Attending Graduation After Refusing to Cut Dreadlocks*, USA TODAY (Jan. 24, 2020), <https://www.usatoday.com/story/news/nation/2020/01/24/black-texas-teen-barred-high-school-after-graduation-not-cutting-dreadlocks/4562210002/>, archived at <https://perma.cc/9SF6-WPA6>.

¹⁸ See 426 U.S. 229, 239 (1976). If it were the case that the policy was discriminatorily enforced in that white male students were allowed to grow their hair, then Mr. Arnold would have a claim. Cf. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

smoking-gun evidence of racial animus.”¹⁹ Mr. Arnold has no constitutional recourse.²⁰

Still other policies unintentionally perpetuate past discrimination. Seemingly race-neutral policies can have a disparate impact on people of color because they were disproportionately affected by past discrimination or segregation. For example, many states now use algorithmic risk assessments in every step of the criminal legal system, from assigning bonds amounts to deciding sentences.²¹ Under one assessment algorithm used in Florida, Black defendants were almost twice as likely to be labeled a higher risk but not actually re-offend, while white defendants were more likely to be labeled lower risk but go on to re-offend.²² Some of the socioeconomic inputs for the algorithm correlate with race, often as a result of past and present discrimination. For example, joblessness may be a result of discriminatory hiring,²³ home address may be the result of redlining,²⁴ and so on. But because race is not one of the factors explicitly used by the algorithm, it is unlikely that an Equal Protection challenge would succeed.²⁵ Moreover, it is

¹⁹ Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 532 (2009) (citing, inter alia, David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729, 731 (1996) (describing the “near impenetrable brick wall” that minorities run into when bringing an equal protection claim); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 418, 426–32 (1999) (acknowledging the Court’s unwillingness to infer discriminatory intent, notwithstanding strong circumstantial evidence)).

²⁰ Federal statutory challenges would also be likely to fail, particularly because there is no private right of action to enforce regulations established under Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001). Mr. Arnold, like students challenging intraschool segregation, would need to hope that government agencies were willing to step in.

²¹ See Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>, archived at <https://perma.cc/BFJ9-DBX4>. Risk assessments are “computer program[s] [that spit] out a score predicting the likelihood of [the individual] committing a future crime.” *Id.*

²² *Id.*

²³ In 2018 when the national unemployment rate was 3.7%, and the white unemployment rate was 3.2%, the Black rate was 6.3%. Janelle Jones, *Black Unemployment is At Least Twice as High as White Unemployment at the National Level and in 12 States and D.C.*, ECON. POL’Y INST. (Oct. 30, 2018), https://www.epi.org/publication/2018q3_unemployment_state_race_ethnicity/, archived at <https://perma.cc/7DKJ-PZYW>. This joblessness may be the result of discriminatory hiring. See Lincoln Quillian et al., *Hiring Discrimination Against Black Americans Hasn’t Declined in 25 Years*, HARV. BUS. REV. (Oct. 11, 2017), <https://hbr.org/2017/10/hiring-discrimination-against-black-americans-hasnt-declined-in-25-years>, archived at <https://perma.cc/ZP4D-LR3Q>.

²⁴ See BRUCE MITCHELL, NAT’L CMTY. REINVESTMENT COAL., HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 4 (2018). “[T]he vast majority of neighborhoods marked ‘hazardous’ in red ink on maps drawn by the federal Home Owners’ Loan Corp. from 1935 to 1939 are today much more likely than other areas to comprise lower-income, minority residents.” Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>, archived at <https://perma.cc/87KN-N3VU>. This is a clear example of past discrimination leading to a present disparate impact.

²⁵ Angwin, *supra* note 21.

not clear that an algorithm can have “discriminatory intent” if its programmers did not.²⁶

Finally, some policies are hard to describe as “policies” at all, but are the result of systemic racism. Policing, prosecution, and sentencing procedures have the practical effect of incarcerating and killing more individuals of color.²⁷ Challenges are difficult because the Court has refused to accept statistical evidence of this disparate impact as a Fourteenth Amendment violation absent additional evidence that either the decisionmakers in the individual instance acted with discriminatory purpose or that a policymaker enacted or maintained a policy because of the anticipated racially discriminatory effect.²⁸ The intent-based equal protection doctrine prevents challenges to pervasive practices that disadvantage people of color.

These policies, and countless others, are allowed to continue unabated by the Court, with no remedy under the federal Constitution.²⁹ But state actors are governed by more than one constitution and claims can be brought alleging violations of state equal protection clauses.³⁰ Justice Brennan, in a

²⁶ Cf. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding the disproportionate impact of a hiring test does not trigger strict scrutiny absent some evidence of discriminatory intent). And because the programmers of the risk assessment algorithm used race-neutral factors, the Court would likely find that they too lacked intent.

²⁷ See ASHLEY NELLIS, SENT’G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 10–11 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>, archived at <https://perma.cc/JR6P-YHGT>. Black people are incarcerated in state prisons across the country at more than five times the rate of white people. *Id.* at 3. Nellis suggests three drivers of this disparity: policies and practices, implicit bias, and structural disadvantage. *Id.* at 9.

²⁸ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292–98 (1987) (refusing to accept as proof of racial discrimination statistical evidence that capital sentences are sought and imposed to a greater degree for Black defendants and where the victim was white).

²⁹ One may ask why constitutional claims should be prioritized. Some have argued that “the United States now enjoys, and has long enjoyed, a statutory constitution [in which] legislation and its regulation are . . . the primary source of constitutional structures, rules, and rights.” William N. Eskridge, Jr., *America’s Statutory Constitution*, 41 U.C. DAVIS L. REV. 1, 5 (2007). After all, Title VII of the Civil Rights Act of 1964 has been interpreted to prohibit employment actions having a disparate impact based on race. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 424–25 (1971). But constitutional provisions have a broader reach and more symbolic significance than statutes, and can govern the permissibility of statutes themselves. While legislation might sweep beyond state constitutions in granting rights in some arenas, constitutional provisions have a greater ability to limit state governments and achieve racial justice, and are also harder for subsequent legislatures to repeal. Statutes are fickle whereas constitutions are more enduring.

³⁰ Some scholars have articulated novel interpretations of the federal Constitution that would recognize claims of implicit bias. See, e.g., Elosiebo, *supra* note 12, at 490 (proposing a standard of disparate impact plus discriminatory negligence under the Fourteenth Amendment). If such an approach were adopted by the Court, then equal protection would not require state constitutional amendment, but this seems unlikely given the current makeup of the Court. Instead, this Note proposes that such interpretations should be written into state constitutions. And in any case, as Judge Jeffrey Sutton so aptly put it, “[h]ow would you react if [a basketball] player took just one of the two free throws offered him?” Jeffrey Sutton, *Brennan Lecture Speech: Why Teach and Why Study State Constitutional Law?*, 34 OKLA. CITY U. L. REV. 165, 165 (2009). A dubious state or local law can be challenged under both the federal and state constitutions—why limit ourselves to the federal Constitution?

seminal article lamenting the Court's trend of closing the courthouse door to civil rights litigants, called for "state courts to step into the breach" and fulfill their "manifest purpose [] to expand constitutional protections."³¹

Some of the earliest state constitutions, predating the federal Constitution, contained equality provisions, often as the first section of the first article.³² Many states have ratified equal protection clauses since the enactment of the Fourteenth Amendment, with some adding provisions prohibiting discrimination against persons in the exercise of their civil rights, inspired by the civil rights movement of the mid-twentieth century.³³ Other states that never explicitly added equal protection clauses have interpreted such a guarantee into other equality or due process clauses.³⁴

Equal protection claims can be brought under state constitutions, but judicial interpretations have narrowed, and sometimes all but extinguished, the promise of their equal protection clauses. Part II of this Note looks at the promise of state constitutions and the reasons they can and should be interpreted differently from the federal Constitution. Part III examines the various ways judges and other actors have limited the scope of state equality guarantees. Some states needlessly follow federal interpretation, whereas others independently restrict seemingly broad language. Part IV imagines a path forward. Some strategies can utilize existing constitutional language, but the best solution is to amend state constitutions with specific language guaranteeing actual equal protection in a way that judges cannot limit.

³¹ William J. Brennan Jr., *State Constitutions and the Protection of Individual Liberties*, 90 HARV. L. REV. 489, 502–03 (1977). Justice Brennan described these cases as entrusting state courts to increase their scrutiny where federal scrutiny is diminished or federal jurisdiction foreclosed. *Id.* More recently, the Chief Justice of Indiana revived this call for the vitality and independence of state constitutions to be used to protect civil liberties. See Loretta H. Rush & Marie Forney Miller, *A Constellation of Constitutions: Discovering and Embracing State Constitutions as Guardians of Civil Liberties*, 82 ALA. L. REV. 1353 (2019).

³² See, e.g., PA. CONST. of 1776, art. 1, § 1 ("All men are born equally free and independent, and have certain natural, inherent and inalienable rights.").

³³ See, e.g., CONN. CONST. of 1965, art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."). Sex and disability were added as protected categories in 1974 and 1984, respectively. This clause is notable in that it also guarantees freedom from segregation and is thus written in a way that protects more than the federal Constitution.

³⁴ See, e.g., *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985) ("Nowhere in [Article 1, paragraph 1 of the New Jersey Constitution, which is a grant of fundamental rights,] do the phrases 'equal protection' or 'due process' appear. Nonetheless, article 1, paragraph 1, like the fourteenth amendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike. To this extent, article 1 safeguards values like those encompassed by the principles of due process and equal protection."); *City of Hueytown v. Jiffy Chek Co.*, 342 So.2d 761, 762 (Ala. 1977) ("Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws.").

II. THE PROMISE OF STATE CONSTITUTIONS

The purpose of state constitutions, their functions, their text, and their historical usage, along with judicial precedent, all establish that, in many instances, state constitutions should be written and interpreted differently than the federal Constitution, at least when it comes to the protection of individual rights. “The very design of our federal system contemplated ‘a double source of protection for the rights of citizens.’”³⁵ The federal Constitution was not designed to function alone, nor was the federal government designed to serve and protect every need and right of the individual. “The federal Constitution ‘did not *create* the American constitutional system; rather it *completed* that system.’”³⁶ Before the Fourteenth Amendment and the incorporation of the Bill of Rights against the states, state violations of individual rights, with some exceptions, were restricted only by state constitutions. “Because the original national government truly was one of limited and enumerated powers and because the States had general and assumed powers, most individual rights litigation for roughly the first 150 years of American history was premised on the state constitutions and arose in the state courts.”³⁷ A project report in this very journal made this structural point nearly fifty years ago: “Having far broader power to deprive the individual of basic liberties, the states ought to have been regulated by a much more extensive bill of rights, by a charter that incorporated the federal guarantees, and perhaps more.”³⁸

If state constitutions were designed to protect individual rights, and to govern the use of the vast police power of the states, it is sensible for their form and content to differ from a federal Constitution structuring and limiting a large government of enumerated powers.³⁹ Moreover, state constitu-

³⁵ Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 51 (1988) (quoting Brennan, *supra* note 31, at 503).

³⁶ *Id.* (quoting Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN’S L. REV. 381, 395–96 (1987)); see also Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 32 (1988) (“Without the state constitutions, the national Constitution . . . was an incomplete text.”).

³⁷ JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 12–13 (2018). Sutton notes that early treatises devoted to individual rights “mainly concerned state constitutional law” and most of the individual rights decisions in those treatises came from state courts. *Id.* at 13 (citing THOMAS COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (3d ed. 1898)). Even after incorporation of the federal Bill of Rights against the states, and the migration of individual rights litigation into federal courts, state constitutions remain an important foundation for the articulation of rights, and cases in state courts win protections not guaranteed by the federal Constitution. See, e.g., *infra* notes 50–56 and accompanying text.

³⁸ Fine, *supra* note 8, at 278.

³⁹ It is perhaps disingenuous to blatantly rely on the history of state constitutions and the intentions of their framers, given that the first state constitutions allowed slavery. Even if state constitutions, which begin with declarations of rights, were intended to protect individual rights, they cannot be said to have been intended to protect the right to be free from racial discrimination. Alabama’s constitution, in a provision that is now unconstitutional, still explicitly provides for segregated schools. ALA. CONST. art. XIV, § 256. But common law constitu-

tions have historically imposed positive social and economic obligations on state governments, such as the right to a public education.⁴⁰ Textual differences bespeak their different functions and “contradict the assumption that state constitutional law was intended to parallel federal constitutional law.”⁴¹ They generally contain longer bills of rights, using language that is “richer, more detailed and more specific,” as well as positive, rather than negative or prohibitory language.⁴² States have explicitly granted rights found nowhere

tions are living constitutions. See David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. (Sept. 27, 2010), <https://www.law.uchicago.edu/news/living-constitution>, archived at <https://perma.cc/C72C-FD6>. State constitutions were intended to protect individual rights, even if the individual rights then envisioned were not the same as those now enshrined in our common law, let alone those adopted through constitutional amendment. See *id.* Given the rights-focused structure of state constitutions, see *infra* notes 40–46 and accompanying text, it is not inappropriate to emphasize the different function envisioned for state constitutions while at the same time utilizing them to protect rights beyond the imagination of their framers.

⁴⁰ See EMILY PARKER, EDUC. COMM’N OF THE STATES, 50-STATE REVIEW: CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 5–22 (2016), <http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>, archived at <https://perma.cc/4JE3-PWFQ> (collecting provisions). See generally EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS (2013); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 897–98, 901 (1989) (“Federal courts will continue to play a critical role as the enforcers of choice in the areas of traditional negative rights against the State. But it is state courts, with their decided institutional advantages, that provide us with the opportunity to develop a parallel positive jurisprudence of human decency and caring.”). While the Sixth Amendment contains a litany of positive rights in the criminal trial context, U.S. CONST. amend. VI, the rest of the federal Constitution is more focused on structure and limits than on positive rights.

⁴¹ Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 208 (1998).

⁴² James G. Exum, Jr., *Rediscovering State Constitutions*, 70 N.C. L. REV. 1741, 1746 (1992). Exum points out that Article I of North Carolina’s constitution is a 38-part declaration of rights, including rights that find no counterpart in the Bill of Rights. Like other state constitutions, North Carolina grants a right “to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. CONST. art I, § 15; see also N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”). In 2018, a ballot measure was adopted guaranteeing the right to hunt, fish, and harvest wildlife, using expansive language and enumerating the only exceptions:

The right of the people to hunt, fish, and harvest wildlife is a valued part of the State’s heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. CONST. art. I, § 38 (amended 2018). This specific enumeration might seem foreign to those familiar only with the federal Constitution, but it is not uncommon in state constitutions. New York amended its constitution in 1894 to include the “Forever Wild” clause, which, while too long to reprint in full here, guarantees that forest preserves “shall be forever kept as wild forest lands,” with specific exceptions delineated down to the width of ski trails permitted in different areas. N.Y. CONST. art. XIV, § 1 (amended 1894). This article also provides that “[f]orest and wild life conservation are hereby declared to be policies of the state,” *id.* § 3.1,

in the federal constitution, such as New York's right of employees "to organize and to bargain collectively through representatives of their choosing."⁴³ Even where state rights correspond to federal rights, states have expanded on the rights, and particularized them. For example, "many states not only forbid cruel and unusual punishment, but also require that punishments be proportionate to offenses and that rehabilitation figure into the sentence for such an offense."⁴⁴ States have even codified the penumbras of the federal constitution, guaranteeing and particularizing the right to privacy.⁴⁵ One commentator suggests:

The sparse language of the [federal] Bill of Rights suggests that federal delegates, representing a diverse and widely dispersed population and wielding the power to dispute every word in the document, found it difficult to agree on details or a greater number of specific rights. By contrast, delegates to individual state constitutional conventions . . . may have found the going somewhat easier.⁴⁶

State constitutions can be written to grant positive rights and impose obligations relevant to local populations, and should be interpreted to give effect to these greater, more specific rights.⁴⁷

along with "conserv[ing] and protect[ing] its natural resources and scenic beauty and encourage[ing] the development and improvement of its agricultural lands for the production of food and other agricultural products," *id.* § 4.

⁴³ N.Y. CONST. art. I, § 17 (amended 1938).

⁴⁴ Christopher W. Hammons, *State Constitutional Reform: Is It Necessary*, 64 ALB. L. REV. 1327, 1331 (2001) (citing ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); IND. CONST. art. I, § 16 ("All penalties shall be proportioned to the nature of the offense.")). Hammons also notes that thirty-five states, in addition to prohibiting the establishment of religion, specifically prohibit expenditures for any sectarian purpose. *Id.* (citing Ronald K. L. Collins, *Bills and Declarations of Rights Digest*, in THE AMERICAN BENCH 2500 (3d ed. 1985)).

⁴⁵ See *Privacy Protections in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 6, 2020), <https://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx>, archived at <https://perma.cc/T3B2-ATEV> (collecting provisions).

⁴⁶ Exum, *supra* note 42, at 1746.

⁴⁷ Not all scholars agree that state constitutions should be interpreted independently from the federal Constitution. James Gardner asserts that, because states do not have unique character and values, independent state constitutionalism cannot be based on these considerations, calling the disproportionate importance given to these considerations by state courts an implausible "romantic subnationalism." JAMES GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 55–56 (2005). To Gardner, internal diversity in states and porous boundaries between them render the idea of independent state constitutional interpretation socially and empirically unsustainable. *Id.* at 69, 79; see also Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 58–68 (2006) (asserting that differences between states in character or values are relatively rare and so cannot provide the basis for independent state constitutionalism). Justice Hans Linde responded to Gardner: "It is easy to confuse reliance on separate communal values and on separate state sources." Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 930 (1993). Justice Linde agreed that differences in state constitutional interpretations are often not attributable to the different values or beliefs of the

State constitutions have historically been used to grant greater rights than the federal Constitution, and courts have affirmed this function in several cases. Massachusetts abolished slavery within the commonwealth in the late 1700s under a provision declaring that “[a]ll men are born free and equal.”⁴⁸ More recently, Massachusetts led the way in recognizing marriage equality, explaining that, “[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”⁴⁹

Justice Brennan, in calling for state courts to extend their constitutional provisions beyond the federal model, compiled a slew of cases, largely in the criminal procedure realm, in which states explicitly rejected the federal interpretation of similarly- or identically-worded provisions.⁵⁰ The California Supreme Court, in interpreting its constitutional privilege against self-incrimination to require the exclusion of statements taken before *Miranda* warnings were given, explicitly “reaffirm[ed] the independent nature of the California Constitution and [its] responsibility to separately define and protect the rights of California citizens despite conflicting decisions of the United States Supreme Court interpreting the federal Constitution.”⁵¹ The New Jersey Supreme Court has applied this independent interpretive right even to identically worded provisions. Invoking its “right to construe [a] State constitutional provision in accordance with what [it] conceive[s] to be its plain meaning,” the court interpreted its search-and-seizure clause to require that a person consenting to a non-custodial search have knowledge of

state’s inhabitants, but they can have other explanations, just as the common law of torts may vary from state to state even absent some special reason in the state’s traditions or communitarian character. *Id.* (citing Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 194–95 (1984)).

⁴⁸ See *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193, 208–10 (Mass. 1836) (recognizing the unconstitutionality of slavery in Massachusetts as an established rule). See generally John D. Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the “Quock Walker Case,”* 5 AM. J. LEGAL HIST. 118 (1961).

⁴⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003). The Supreme Court cited *Goodridge* when it recognized marriage equality in *Obergefell v. Hodges*, 576 U.S. 644, 662, 666 (2015).

⁵⁰ Brennan, *supra* note 31, at 498–501.

⁵¹ *People v. Disbrow*, 545 P.2d 272, 280–81 (Cal. 1976), *superseded by constitutional amendment*, CAL. CONST. art. I, § 28, subd. (f)(2), *as recognized in* *People v. Lessie*, 223 P.3d 3, 9 (Cal. 2010). This decision was contrary to the Supreme Court’s decision in *Harris v. New York*, 401 U.S. 222, 226 (1971), but the California Supreme Court followed the lead of the Supreme Court of Hawaii in *State v. Santiago*, 492 P.2d 657, 664–65 (Haw. 1971), to interpret its constitution independently to require a different result than in *Harris*. The *Disbrow* opinion also cited an earlier California decision for the proposition that “the California Constitution is, and always has been, a document of independent force.” 545 P.2d at 281 (quoting *People v. Brisendine*, 531 P.2d 1099, 1113–14 (Cal. 1975)). That decision explained independent state constitutionalism as a reaffirmation of a basic principle of federalism “that the nation as a whole is composed of distinct geographical and political entities bound together by a fundamental federal law but nonetheless independently responsible for safeguarding the rights of their citizens.” *Brisendine*, 531 P.2d at 1114.

the right to refuse consent.⁵² The Hawaii Supreme Court reached the same conclusion in interpreting its search-and-seizure clause, explaining that while its decision “results in a divergence of meaning between words which are the same in both the federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates such divergence where the result is greater protection of individual rights under state law than under federal law.”⁵³ The Court explained:

[T]he opinion of the United States Supreme Court on the meaning of the phrase ‘unreasonable searches and seizures’ is merely another source of authority, admittedly to be afforded respectful consideration, but which we are free to accept or reject in establishing the outer limits of protection afforded by [the state clause].⁵⁴

Search-and-seizure doctrine remains an area in which state courts confidently “utilize a different method of interpretation.”⁵⁵ Indiana’s Chief Justice, Loretta Rush, presents this as an example of “independence and departure” even where the language of the state and federal provisions are the same.⁵⁶

Some states have even written independent interpretation into their constitutions—California’s provides: “[r]ights guaranteed by this constitution are not dependent on those guaranteed by the United States Constitution.”⁵⁷ To encourage independent interpretation even where there is similar language, some states today, notably Oregon, Maine, and New Hampshire, purport to examine state constitutional issues first as a rule, only looking to federal law if the state constitution does not recognize and protect the asserted right.⁵⁸ This “primacy” approach⁵⁹ “assumes that state constitutions serve as the primary sources for the protection of individual rights, with the

⁵² *State v. Johnson*, 346 A.2d 66, 68 & n.2 (N.J. 1975). Notably, the New Jersey Supreme Court raised the state constitutional question *sua sponte*, giving the attorneys an opportunity to win a case on state constitutional grounds that they would have otherwise almost certainly lost. *Id.* at 68.

⁵³ *State v. Kaluna*, 520 P.2d 51, 58 n.6 (Haw. 1974).

⁵⁴ *Id.*

⁵⁵ *Jacobs v. State*, 76 N.E.3d 846, 851 (Ind. 2017). The *Jacobs* court noted that, unlike the federal focus on reasonable expectations of privacy, the Indiana analogue is interpreted to “turn[] on an evaluation of the reasonableness of the police conduct under the totality of the circumstances.” *Id.* at 851–52.

⁵⁶ Rush & Miller, *supra* note 31, at 1377.

⁵⁷ CAL. CONST. art I, § 24 (amended 1974). This explication was perhaps not necessary—the principle predated the amendment, which was passed by the legislature and approved by the voters in a referendum. Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 103 & n.51 (1993). That said, the California Supreme Court has limited its own ability to interpret its constitution independently. *See infra* note 75 and accompanying text.

⁵⁸ *See* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 647 (1987) (citing *State v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983); *State v. Cadman*, 476 A.2d 1148, 1150 (Me. 1984); *State v. Ball*, 471 A.2d 347, 350–52 (N.H. 1983)). *But see* Long, *supra* note 47, at 72–86 (collecting cases in which these states “declin[e] to apply that autonomous spirit consistently”). *State v.*

federal Bill of Rights providing a safety net of minimum protections.”⁶⁰ While the Supreme Court might not go that far, it has recognized that “[u]nder [*Michigan v. Long*], state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”⁶¹ The Court allowed that states “are free to serve as experimental laboratories, in the sense that Justice Brandeis used that term in his dissenting opinion in *New State Ice Co. v. Liebmann* (urging that the Court not impose federal constitutional restraints on the efforts of a State to ‘serve as a laboratory.’).”⁶² Justice Kavanaugh recently reiterated this point, explaining that losing plaintiffs may seek relief under their state constitutions as interpreted by state courts, or else seek to amend them, and that this illustrates “a fundamental feature of our constitutional structure: [the Supreme] Court is not the *only* guardian of individual rights in America.”⁶³

Kennedy has particularly sweeping rhetoric extolling the need for independent state constitutionalism:

The point is . . . that a state’s constitutional guarantees . . . were meant to be and remain genuine guarantees against misuse of the state’s governmental powers, truly independent of the rising and falling tides of federal case law both in method and in specifics. State courts cannot abdicate their responsibility for these independent guarantees, at least not unless the people of the state themselves choose to abandon them and entrust their rights entirely to federal law.

666 P.2d at 1323.

⁵⁹ Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 380, 383 (1980) (“State bills of rights are first in two senses: first in time and first in logic In my view, a state court should always consider its state constitution before the Federal Constitution . . . even when counsel does not raise it, which is most of the time.”). The Law Journal Editorial Board of the *New Jersey Law Journal* recently urged the New Jersey Supreme Court to adopt the primacy approach and consider state constitutional claims before federal constitutional claims. See Law Journal Editorial Board, *NJ Supreme Court Should Rely on NJ Constitution*, LAW.COM, N.J. L.J. (Nov. 25, 2020), <https://www.law.com/njlawjournal/2020/11/25/nj-supreme-court-should-rely-on-nj-constitution/?slreturn=20210411124109>, archived at <https://perma.cc/NJL8-QXYS>.

⁶⁰ Van Cleave, *supra* note 41, at 214–15. It should again be noted that federal law is still relevant: states cannot violate the federal Constitution through the interpretation of their own constitutions. But they can provide greater protection of individual rights, so long as that protection does not interfere with rights protected by the federal Constitution.

⁶¹ *Arizona v. Evans*, 514 U.S. 1, 7–8 (1995) (citing *Michigan v. Long*, 463 U.S. 1032 (1983)); see also *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982) (“[A] state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”).

⁶² *Evans*, 514 U.S. at 8 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Although the Court describes state judges as experimenting with the law, it may not be wise to explicitly urge state judges to “experiment.” They might bristle at the notion that they are free to play scientist with their constituents.

⁶³ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring). Justice Kavanaugh went on to cite Judge Sutton and Justice Brennan for the notion that states “generally possess authority to safeguard individual rights above and beyond the rights secured by the U.S. Constitution.” *Id.* (citing SUTTON, *supra* note 37; Brennan, *supra* note 31).

State constitutions are interpreted by state judges, free from the constraints of making decisions for an entire nation. The Court “is ever mindful that its rulings apply throughout the land, and accordingly they must be sensitive to the disparities in local needs and local conditions from state to state and respectful of the need for and the virtues of diversity.”⁶⁴ For this reason, the Court, “in reading the federal constitution, must lay out a minimal rule for a diverse nation, with due concern for principles of federalism[, while] State courts . . . have a different focus, which is to fashion workable rules for a narrower, more specific range of people and situations.”⁶⁵ The Court itself has recognized this constraint, explaining that federal courts are more reluctant to impose “inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions” to difficult problems.⁶⁶ State judges, while not without their own constraints,⁶⁷ have *carte blanche* to tailor their constitutions’ provisions to the needs of their states.⁶⁸

⁶⁴ Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1809–10 n.23 (1992) (citing the Brandeis dissent in *New State Ice Co.*, 285 U.S. at 311, as a “classic” elaboration of this point).

⁶⁵ Kaye, *supra* note 35, at 55. Judge Jeffrey Sutton calls this constraint on the Court the “federalism discount.” SUTTON, *supra* note 37, at 17 (“In some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that federal constitutional law will be underenforced, that a ‘federalism discount’ will be applied to the right.”).

⁶⁶ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973).

⁶⁷ Again, one such constraint is the Supremacy Clause, U.S. CONST. art. VI, cl. 2. *See supra* note 8 and accompanying text.

⁶⁸ The different position of states compared to the federal government suggests that different tailoring would be required. One of the requirements interpreted into the Fourteenth Amendment, the state action requirement, is itself motivated by federalism concerns, and thus has no place in state equal protection clauses. *See Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 936–37 (1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. . . . A major consequence is to require courts to respect the limits of their own power as directed against state governments and private interests.”); *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 488, 491–92 (2d ed. 2002) (asserting that the state action doctrine “enhances federalism by preserving a zone of state sovereignty”). If a state court interprets its equal protection clause to require state action merely because the federal analog does, it ignores the rationale behind the requirement, but that has not stopped state courts. *See U.S. Jaycees v. Richardt*, 666 P.2d 1008, 1012–14 (Alaska 1983). State constitutions simply must be interpreted independently. In fact, it is not surprising that several state constitutions specifically prohibit private discrimination. *See, e.g.*, MONT. CONST. art II, § 4 (“No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.”). California has interpreted its equal protection clause, which merely states that “[a] person may not be . . . denied equal protection of the laws,” CAL. CONST. art I, § 7, as recognizing equal protection violations absent state action. *See Gay L. Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 598–99 (Cal. 1979). New Jersey has interpreted its constitution, which lacks an equal protection clause, to recognize the same. *See Peper v. Princeton Univ. Bd. of Trustees*, 389 A.2d 465, 477 (N.J. 1978).

III. THE CURRENT FAILURE OF STATE CONSTITUTIONS

Given the text and history of state constitutions and the freedom granted by the Supreme Court in *Michigan v. Long* to interpret state constitutions to provide greater protection for rights, state judges should be taking the invitation to experiment with fashioning independent rules for state constitutional claims. To the disappointment, but perhaps not the surprise, of advocates, many states judges⁶⁹ have proven unable or unwilling to meet the call and provide greater protection, particularly for minorities denied equal protection of the laws. Even where states judges have displayed the imagination and courage to depart from federal standards, subsequent developments have closed the door on any expansive civil rights doctrine.

A. *Unimaginative Parallelism*

Many states, and their judges, interpret their state constitutions by following federal interpretations of parallel clauses, whether or not they contain parallel language.⁷⁰ This technique of dependent interpretation has been labeled “parallelism,” “lock-step,” and more charitably, “absolute harmony.”⁷¹ Rather than interpret the unique histories and texts of their constitutions, and the local context in which they function, these judges throw up their hands and quote the equivalent federal test, copying and pasting federal doctrine into a state law decision. For example, the Supreme Court of Nebraska recently and explicitly reaffirmed, “The Nebraska Constitution and the U.S. Constitution have identical requirements for equal protection challenges.”⁷² This phenomenon is not recent or confined to Nebraska.⁷³ Even some state courts that purport to interpret state constitu-

⁶⁹ The following examples were chosen as particularly illustrative of the different interpretive and political hurdles to independent state constitutionalism in the realm of equal protection challenges.

⁷⁰ See Van Cleave, *supra* note 41, at 207.

⁷¹ *Id.* (citing Marshal J. Tinkle, *State Constitutional Law in Maine: At the Crossroads*, 13 VT. L. REV. 61, 74 (1988); David M. Skover, *Address: State Constitutional Law Interpretation: Out of “Lock-Step” and Beyond “Reactive” Decisionmaking*, 51 MONT. L. REV. 243, 245 (1990); Utter & Pitler, *supra* note 58, at 645).

⁷² *State v. Hibler*, 923 N.W.2d 398, 413 (Neb. 2019). The court did not explain why the requirements are identical, merely citing another case, *Lingenfelter v. Lower Elkhorn NRD*, 881 N.W.2d 892, 914 (2016), that stated the same. Following the chain of citations, no case explained why the Nebraska provision need be interpreted parallel to the federal one. Nor did any case independently interpret the provision to reach a parallel test. The trail simply runs cold.

⁷³ See, e.g., *Valley Nat. Bank of Phx. v. Glover*, 159 P.2d 292, 299 (Ariz. 1945) (“The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect.”); *Naudzius v. Lahr*, 234 N.W. 581, 583 (Mich. 1931) (“The equality of rights protected by our Constitution is the same as that preserved by the Fourteenth Amendment to the Federal Constitution.”), *overruled in part on other grounds by Manistee Bank & Trust Co. v. McGowan*, 232 N.W.2d 636 (Mich. 1975); *State v. McManus*, 447 N.W.2d 654, 660 (Wis. 1989) (“This court has held that the due process and equal protection clauses of the Wisconsin Constitution are the substantial equivalents of their respective clauses

tional provisions independently default to parallelism absent evidence to justify independent interpretation. Although the California constitution includes a provision explicitly reaffirming that state constitutional rights are not dependent on federal constitutional rights,⁷⁴ the California Supreme Court has required that, when interpreting a provision of the state constitution, “there must be cogent reasons for a departure from a construction placed on a similar constitutional provision by the United States Supreme Court.”⁷⁵

Parallelism may be the result of strong path dependence,⁷⁶ with advocates and judges managing their workloads and resources, and failing to take the time to develop independent historical analyses.⁷⁷ Justice Souter la-

in the federal constitution.”) See generally Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1219 & n.160 (1985) (collecting cases). Wisconsin is an interesting case. The Supreme Court of Wisconsin has gone so far as to ignore its equality provision in cases in which federal and state constitutional claims are raised. See *State ex rel. Sonneborn v. Sylvester*, 132 N.W.2d 249, 252 (Wis. 1965) (“Since there is no substantial difference between the two constitutions, we will henceforth refer only to the 14th Amendment of the U.S. Constitution.”). But the Wisconsin provision is not linguistically parallel; it is framed more like the federal Declaration of Independence: “All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness.” WIS. CONST. art. I, § 1. Nevertheless, the Supreme Court of Wisconsin found this language to be “somewhat vague and general,” and ultimately concluded that “[t]he phrase must mean equality before the law, if it means anything.” *Black v. State*, 89 N.W. 522, 527 (Wis. 1902). The court ultimately decided to interpret the clause in line with the Fourteenth Amendment, explaining, “[t]he idea is expressed more happily in the fourteenth amendment, where it is said that no state shall deny any person within its jurisdiction the ‘equal protection of the law.’” *Id.*

⁷⁴ CAL. CONST. art I, § 24 (amended 1974).

⁷⁵ *E. Bay Asian Local Dev. Corp. v. State*, 13 P.3d 1122, 1139 (Cal. 2000). This relational or comparative approach, in which evidence is needed to break the relationship between parallel provision, is accompanied in some states by a list of criteria. See, e.g., *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986) (“The following non-exclusive criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.”); see also Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1021–26 (1997).

⁷⁶ Path dependence occurs when “[t]he selection of a prior path, for whatever reason, determines current behavior.” Clayton P. Gillette, *Lock-in Effects in Law and Norms*, 78 B.U. L. REV. 813, 813 (1998).

⁷⁷ See generally Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN ST. L. REV. 783, 797 (2011) (“If the cost of engaging the machinery of doctrine-development in respect to a particular individual right is higher than the conceivable returns on that investment of time and energy, we should not be surprised when state constitutional decisions are essentially path dependent.”) Friedman explains that, “[t]he more a state court relies upon federal individual rights frameworks when addressing the meaning of the correlative provisions of the state constitution, the more the cost of trying to independently articulate or reconfigure state constitutional doctrine will increase.” *Id.* at 816. Another part of the cost may be that American-trained attorneys, from judges and their clerks to advocates, simply have more knowledge of federal constitutional law. *Id.* at 815–16 (citing SUTTON, *supra* note 37, at 166 (“[M]ost law schools do not teach state constitutional law, and none . . . offers it as a core part of its curriculum.”)). Finally, the dependence on federal precedent may be related to the general dependence on precedent. Friedman cites Judge Richard A. Posner for the suggestion that appellate courts are motivated to follow prece-

mented during his time as a New Hampshire judge that if a court places “too much reliance on federal precedent, [the court] will render the State rules a mere row of shadows.”⁷⁸ Alternatively, parallelism could be the unfortunate result of patriotism valued at the expense of federalism⁷⁹ or state judges might believe that some issues are best resolved at the national level, with a uniform national rule.⁸⁰

But judges committed to parallelism fail to understand that state constitutional provisions can and should be interpreted independently of the federal Constitution based on textual, structural, historical, and contextual differences. Even absent any differences at all, state constitutional provisions must be interpreted in the context of state constitutions, which serve a different function than the federal constitution.⁸¹ State constitutional provisions are not dependent upon or subsidiary to corresponding federal constitutional provisions—in fact, the drafters of the federal Bill of Rights drew upon rights first protected by state constitutions.⁸² In many instances, nothing ties state judges to federal standards other than their unwillingness to depart from them. While it may seem inconvenient to require legal actors to learn

dent to limit their workloads, “[a]dherence to precedent does this both directly, by reducing the amount of fresh analysis that the judges have to perform, and indirectly, by reducing the number of appeals, since the more certain the law, the lower the litigation rate.” *Id.* at 816 n.200 (quoting RICHARD A. POSNER, *HOW JUDGES THINK* 145 (2008)). Why do states judges feel obligated to manage their workloads by utilizing precedent, federal or otherwise? Friedman suggests that, unlike Supreme Court justices, who wrote no more than eight full opinions each during the 2007 term with the help of their three or four law clerks, some state supreme court justices wrote more than three times that number of opinions, with half the clerks. *See id.* at 819–20. State court judges may simply lack the time and resources to develop independent doctrinal methodologies unless forced to, particularly when prior state court decisions have already utilized the federal framework.

⁷⁸ *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

⁷⁹ Long, *supra* note 47, at 71 (“State judges’ patriotic devotion to American national law, coupled with the common juristic unease with structural reform, suggest that state constitutionalism may appear as an insidious threat to the ‘normal,’ i.e. federal, way of doing things. If the ‘American’ (legal) way of life is the best in the world, a state judge might wonder how that way can be improved by application of independent state constitutionalism?”).

⁸⁰ *See id.* at 98. Alternatively, state judges may fear that finding state guarantees should be interpreted to reach a different, broader result than federal guarantees would raise legitimacy questions. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 *RUTGERS L.J.* 841, 853 (1991).

⁸¹ *See supra* Part II; *see also* Fine, *supra* note 8, at 286 (“Even if a state judge could say that his state’s bill of rights was enacted with precisely the same values in mind as the [F]ourteenth [A]mendment, the ideals of federalism would prevent him from blindly accepting the Supreme Court’s pronouncements on the [F]ourteenth [A]mendment as definitive interpretations of the state charter. But the language, history, and intent of every state’s bill of rights are different from that of the [F]ourteenth [A]mendment. Thus, the obligation to make an independent determination would seem to apply a fortiori.”). It is true that some provisions may explicitly be intended to mirror federal provisions, *see infra* note 108, but absent a command of parallelism, state judges are only wedded to federal interpretation by choice, and this choice flies in the face of federalism and the “double security . . . to the rights of the people” that our system of divided government was intended to ensure. *See* THE FEDERALIST NO. 51, at 339 (Alexander Hamilton or James Madison) (Modern Library ed., 1937).

⁸² *See generally* William J. Brennan, Jr., *The Bill of Rights and the States*, in THE GREAT RIGHTS 64, 67–86 (Edmond Cahn ed., 1963).

the nuances of two different standards, or to hold state actors, or even private actors, to those differing standards, that is the nature of a system of dual sovereignty, and it is familiar to anyone subject to complementary state and federal statutes and regulations.⁸³

There is an additional downside to parallelism: it incentivizes state judges asked to interpret their state constitutions to issue extremely narrow interpretations while waiting for the Supreme Court to be presented with the issue, “rather than venture into uncharted territory” and risk later Supreme Court decisions disrupting the complete parallelism of interpretation.⁸⁴ Absent guidance from federal courts, state judges committed to parallelism ultimately abdicate responsibility for interpreting their own constitutions and resolving constitutional questions. Nevertheless, risk-averse state judges will continue to use parallelism unless confronted with language that is not at all parallel.

B. *Independent Narrowing*

Even when state judges depart from federal standards, they often unnecessarily reach independently narrow interpretations of broad equality guarantees. Often nothing in the language or history of the state provisions requires such a limiting read; state judges are just unwilling or unable to read expansive terms expansively.

Section 11 of Article I of the New York Constitution begins with the standard invocation of equal protection.⁸⁵ But the next sentence goes further, providing, “No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.”⁸⁶ Unlike the Fourteenth Amendment, this appears on the face of the text to prohibit discrimination by private, as well as state actors. But the clause has been limited by New York courts:

[T]he Civil Rights Clause contained in the second sentence prohibits private as well as State discrimination as to ‘civil rights.’

⁸³ For example, some employers not subject to the federal anti-discrimination statute, Title VII, may be subject to the Massachusetts counterpart. *Compare* 42 U.S.C. § 2000e(b) (“The term ‘employer’ means a person engaged in an industry affecting commerce who has fifteen or more employees . . .”), with MASS. GEN. LAWS ch. 151B, § 1(5) (2014) (“The term ‘employer’ does not include . . . any employer with fewer than six persons in his employ . . .”).

⁸⁴ See Van Cleave, *supra* note 41, at 205 (“When state courts take the position that they should not embark on federal constitutional interpretation until the United States Supreme Court has been presented with the issue, they deprive the state constitution of its independent force. In addition, such a stance also deprives the United States Supreme Court of the brain power and creativity of state judges, which can provide the Supreme Court with alternative modes of analysis for resolving the particular issue.”); see also *infra* Section IV.B.

⁸⁵ See N.Y. CONST. art. I, § 11 (amended 2001) (“No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”).

⁸⁶ *Id.*

The term ‘civil rights’ was understood by the delegates at the 1938 Constitutional Convention to mean ‘those rights which appertain to a person by virtue of his citizenship in a state or community.’ [It] is not self-executing, however, and prohibits discrimination only as to civil rights which are ‘elsewhere declared’ by Constitution, statute, or common law.⁸⁷

The Court of Appeals of New York held that racial discrimination in the renting of apartments did not violate the New York Constitution because the “civil rights” mentioned are “[o]bviously . . . those elsewhere declared,” the provision “require[s] legislative implementation to be effective,” and “the opportunity to acquire interests in real property” is not a civil right in any statute.⁸⁸ As to the first sentence, the court found that, based on “the plain meaning of plain words,” and on statements at the Convention, it “is no more broad in coverage than its Federal prototype.”⁸⁹ The court held that it merely embodies provisions of the Federal constitution already binding upon the state.⁹⁰ While the New York court did not necessarily start with a presumption that the state constitution should be interpreted parallel to the federal analogue, its independent interpretation ultimately resulted in the same narrow doctrine.⁹¹ In response to this narrowing, some New Yorkers are now seeking to amend their constitution to do more than merely reiterate the federal protection of their rights.⁹²

New Jersey presents an interesting case because it has interpreted a guarantee of equal protection into its constitution.⁹³ New Jersey has proudly eschewed the federal approach, not even utilizing tiers of review.⁹⁴ Instead,

⁸⁷ *People v. Kern*, 554 N.E.2d 1235, 1241 (N.Y. 1990) (citing *Dorsey v. Stuyvesant Town Corp.*, 87 N.E.2d 541, 548 (N.Y. 1949)).

⁸⁸ *Dorsey*, 87 N.E.2d at 548–49. New York has since enacted the New York State Human Rights law, which explicitly enumerates housing as a civil right. N.Y. EXEC. LAW § 291 (McKinney 1993).

⁸⁹ *Dorsey*, 87 N.E.2d at 548 (citing 2 REV. RECORD OF N.Y. STATE CONSTITUTIONAL CONVENTION 1065 (1938)).

⁹⁰ *See id.*

⁹¹ Defaulting to federal doctrine after purporting to do independent analysis has been described as “unexamined reliance on federal precedent.” *See* Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1236–37, 1253–54, 1270 (2005). Wharton points to *United States Jaycees v. Richardet*, 666 P.2d 1008, 1010 (Alaska 1983), in which the Alaska Supreme Court imported the state action requirement into Alaska’s equal rights amendment, and *Bell v. Low-Income Women of Tex.*, 95 S.W.3d 253, 266 (Tex. 2002), in which the Texas Supreme Court relied on federal precedent, including *Feeney*, for “helpful guidance” and proceeded to import a discriminatory purpose requirement into the Texas equal rights amendment, even while noting that the Texas amendment was “designed expressly to provide protection which supplements the federal guarantees of equal treatment.” *Id.* at 257–59.

⁹² *See infra* Section IV.B.

⁹³ *See Greenberg v. Kimmelman*, 494 A.2d 294, 303 (N.J. 1985).

⁹⁴ *See id.* at 302–03 (“In the future, as in the past, we shall continue to look to both the federal courts and other state courts for assistance in constitutional analysis. The ultimate responsibility for interpreting the New Jersey Constitution, however, is ours. By developing an interpretation . . . that is not irrevocably bound by federal analysis, we meet that responsibility

its test “consider[s] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”⁹⁵ Nevertheless, New Jersey courts have noted “that although [their] mode of analysis differs in form from the federal tiered approach, the tests weigh the same factors and often produce the same result.”⁹⁶ The rejection of the tiers of scrutiny allows New Jersey courts to more easily recognize equal protection violations against categories of persons that federal courts do not recognize as a suspect or semi-suspect class,⁹⁷ but race-based violations are substantively treated no better than they would be under strict scrutiny in federal courts.

New York judges independently interpreted broad constitutional language to be narrower in scope and New Jersey judges interpreted their uncodified equal protection guarantee more narrowly than necessary, even while insisting on an independent mode of analysis. Absent specific language that cannot be interpreted narrowly, it is not clear that there is any way to convince state judges, even when they eschew parallelism, to reach sweeping doctrinal results that would actually guarantee equal protection.⁹⁸

C. *Subsequent Narrowing*

Various states, through decisions or amendments, have explicitly walked back prior broad readings of equality provisions that had held racial disparities violated the states’ constitutions.

In *Sheff v. O’Neill*, the Supreme Court of Connecticut held that two provisions of the state constitution together required “the legislature to take affirmative responsibility to remedy segregation in [the] public schools, regardless of whether that segregation has occurred de jure or de facto.”⁹⁹ No discriminatory intent was required. The court undertook a “conjoint reading” of the free public schools provision in Article 8, § 1, and the equal

and avoid the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution.”)

⁹⁵ *Id.* at 302.

⁹⁶ *Sojourner A. v. New Jersey Dep’t of Hum. Servs.*, 828 A.2d 306, 333 (N.J. 2003).

⁹⁷ *See, e.g., Garden State Equal. v. Dow*, 82 A.3d 336, 367–68 (N.J. Super. Ct. Law Div. 2013) (recognizing that the denial of same sex couples of the right to marry, after *United States v. Windsor*, 570 U.S. 744 (2013), was an equal protection violation of the New Jersey Constitution).

⁹⁸ Of course, some state courts have carved their own path on criminal procedure, *see supra* notes 50–56 and accompanying text, but, even so, many of those decisions have been somewhat incremental. These states have accepted or rejected exceptions to frameworks developed at the federal level but have not blazed a new trail in the same way that rejecting the discriminatory intent requirement would.

⁹⁹ 678 A.2d 1267, 1283 (Conn. 1996) (citing CONN. CONST. art. 8, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”); art. 1, § 20 (“No person shall be denied the equal protection of the law nor be subjected to *segregation* or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, color, ancestry, national origin, sex or physical or mental disability.”) (emphasis added)).

protection and anti-segregation and -discrimination provision in Article 1, § 20, considering the “affirmative constitutional right” of the former to be informed by the “highly unusual” explicit prohibition on segregation in the latter.¹⁰⁰ The court found that the segregation prohibition meant that § 20 was not substantially the equivalent of the federal equal protection clause, noting that “insofar as [it] differs textually from its federal counterpart, its judicial construction must reflect such a textual distinction.”¹⁰¹ Although § 20 prohibits segregation that occurs “because of” race, segregation is neutral as to intent, so:

Whatever this language may portend in other contexts, . . . in the context of public education, in which the state has an affirmative obligation to monitor and to equalize educational opportunity, the state’s awareness of existing and increasing severe racial and ethnic isolation imposes upon the state the responsibility to remedy ‘segregation . . . because of race [or] . . . ancestry. . . .’¹⁰²

While the Supreme Court would require invidious, intentional discrimination under the federal Equal Protection Clause, the court here noted that “[r]acial and ethnic segregation has a *pervasive and invidious impact* on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors.”¹⁰³

But this holding was construed narrowly by subsequent Connecticut courts. Although Connecticut dispensed with the intent requirement in *Sheff*, and *Sheff* is still good law, it has been limited to the school segregation context. “Decisions subsequent to *Sheff* reveal that the Supreme Court [of Connecticut] did not open the door to disparate impact challenges.”¹⁰⁴ The court found “[t]he holding in *Sheff* . . . was not premised on the equal protection clause . . . but instead was decided on the clause in article first, § 20, that declares that Connecticut citizens shall not be subjected to segregation” combined with “the affirmative constitutional obligation to provide a substantially equal educational opportunity under article eight, § 1.”¹⁰⁵ Perhaps the “segregation or discrimination” language could be used to challenge a practice causing a disparate impact in an area in which the state has an affirmative constitutional obligation, but Connecticut has foreclosed any pure equal protection challenges brought on theories not adopted by federal courts.

¹⁰⁰ *Id.* at 1281. The court noted that only the constitutions of Hawaii and New Jersey also explicitly prohibit segregation. *See id.* at 1281 n.29.

¹⁰¹ *Id.* at 1282.

¹⁰² *Id.* at 1282–83. The court also noted the history of § 20 and the intention of convention delegates to provide “total protection against discrimination.” *Id.* at 1283.

¹⁰³ *Id.* at 1285 (emphasis added).

¹⁰⁴ *Wendt v. Wendt*, 757 A.2d 1225, 1244 (Conn. App. Ct. 2000), *cert. denied*, 255 Conn. 918 (2000).

¹⁰⁵ *Abdullah v. Comm’r of Corr.*, 1 A.3d 1102, 1110 n.7 (Conn. App. Ct. 2010).

California also interpreted its constitution to prohibit *de facto* segregation in public schools, relying on its equal protection clause alone. This interpretation was also overruled—and not by the courts, but by the people of California. In *Crawford v. Board of Education*, California rejected the *de jure-de facto* distinction, holding that “all public school districts bear an obligation under the state Constitution to undertake reasonably feasible steps to alleviate schools segregation, regardless of the cause of such segregation.”¹⁰⁶ The victory was short lived. Just three years later, the California legislature placed on the ballot Proposition One, known as the Robbins Amendment, which declared that school boards have no obligation or responsibility with regard to school assignment and transportation that exceeds their responsibilities under the federal Equal Protection Clause.¹⁰⁷ The amendment passed with more than two-thirds of the votes, ending all mandatory school reassignment and busing.¹⁰⁸ The United States Supreme

¹⁰⁶ 551 P.2d 28, 42 (Cal. 1976). It should be noted that the court did not rely on any differences between the Fourteenth Amendment and the California equal protection clause, merely conducting the analysis under the state Constitution and relying on state precedent. *Id.* The court solved the “state action” problem by holding that “local school boards are so ‘significantly involved’ in the control, maintenance and ongoing supervision of their school systems as to render any existing school segregation ‘state action’ under [the] state constitutional equal protection clause.” *Id.* at 36.

¹⁰⁷ Kendra M. Gage, *Creating the Black California Dream: Virna Canson and the Black Freedom Struggle in the Golden State’s Capital, 1940–1988* (2015) (Ph.D. dissertation, University of Nevada, Las Vegas); see also CAL. CONST. art. I, § 7(a) (amended 1979) (“A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this State may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.”). This “forced linkage” amendment approach has been criticized as “constitut[ing] a blanket adoption, *in futuro*, of all interpretations of the United States Supreme Court, thereby abdicating a part of a state’s sovereignty and judicial autonomy.” Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 217 (2003); see also Van Cleave, *supra* note 57, at 101–03.

¹⁰⁸ Gage, *supra* note 107. This was not the only time a progressive state constitutional decision has been reversed by amendment—scholars have collected numerous examples, often in the realm of criminal procedure. See generally James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 11 (1983); Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153 (1987). For example, after the Massachusetts Supreme Judicial Court invalidated a death penalty statute under the state constitution’s “cruel or unusual punishments” clause in *District Attorney for the Suffolk District v. Watson*, 381 Mass. 648, 650 (1980), an amendment to that clause was ratified, stipulating, “[n]o provision of the Constitution, however, shall be construed as prohibiting the imposition of the punishment of death.” MASS. CONST., Arts. of Amend., art. CXVI (adopted 1982).

Court upheld the amendment against an Equal Protection challenge, holding that the Fourteenth Amendment does not prevent a state, once it elects to do “more” than the Fourteenth Amendment requires, from choosing to “recede” back to the minimum.¹⁰⁹ Even still, nothing is stopping a state from electing to do more than the Fourteenth Amendment, and California teaches us that state constitutions are more easily amended than the federal Constitution.

IV. A PATH FORWARD

The experiences of Connecticut and California are illustrative of potential avenues for achieving a vision of justice in which all people are guaranteed actual equal protection of the laws, including freedom from laws with disproportionate racial impacts. One approach would be to rely on useful clauses in state constitutions, potentially in conjunction with other affirmative obligations on state governments, and attempt to advocate for more expansive interpretations of the existing language. A potentially more radical approach would seek to amend state constitutions with language that would be harder to narrowly construe. Both approaches take advantage of what scholars have termed the “new federalism”: state courts relying on their own law, especially state constitutional law, in order to decide questions involving individual rights.”¹¹⁰

Any solution relying on state constitutions will face some obstacles and limitations. Not all states allow private actions for damages for violations of state constitutional rights, so only injunctive relief may be available.¹¹¹ Even

¹⁰⁹ Crawford v. Bd. of Educ., 458 U.S. 527, 535 (1982).

¹¹⁰ Shirley S. Abrahamson & Diane S. Gutmann, *The New Federalism: State Constitutions*, 71 JUDICATURE 88, 88–90 (1987). This has also been called “eclectic federalism.” Ellen Peters, *Remarks Made at the Second Circuit Judicial Conference (Sept. 5, 1986)*, in 115 F.R.D. 349, 405–06 (1987).

¹¹¹ See generally Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court’s Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877 (2001); JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 7 (4th ed. 2006). Most state constitutions include a general textual right to a remedy, see, e.g., PA. CONST. art. I, § 11 (“All courts shall be open; and every man for an injury done to him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without, sale, denial, or delay.”), but not all states have interpreted such clauses to allow for damages for violations of state constitutional rights in all circumstances, see Binett v. Sabo, 710 A.2d 688, 696–97 (Conn. 1998) (collecting cases). Other states have enabling acts, either allowing suits for all state constitutional claims or for violations of specifically enumerated rights. See, e.g., Arkansas Civil Rights Act of 1993, ARK. CODE ANN. § 16-123-105(a) (1993) (broad enabling act); CONN. GEN. STAT. ANN. § 31-51(q) (West 1983) (enabling act only for religious discrimination against employees). Still other states invoke *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or state common law to allow a cause of action for damages. See generally Brown v. State, 674 N.E.2d 1129, 1138 (N.Y. 1996) (relying upon an analogy to the *Bivens* action, RESTATEMENT (SECOND) OF TORTS § 874A (AM. L. INST. 1979), and common law antecedents to the constitutional provision to authorize a civil action for damages for violations of the New York constitution). But see Katzberg v. Regents of Univ. of Cal., 29 Cal. 4th 300, 322 (2002) (holding the framers of the state constitution did

in states that allow actions for damages, where no state statute permits courts to award attorneys' fees to prevailing plaintiffs on state constitutional claims, litigation brought by plaintiffs' lawyers is chilled.¹¹² Any solution would thus require additional legislation, constitutional amendment, or a common law change that would provide a private cause of action for violations of the state constitution, or at least of the equal protection guarantee, and would permit or mandate attorneys' fees for prevailing plaintiffs.

A. *Viable Solutions Using Current Language*

An immediate solution is for advocates to utilize existing state constitutional provisions.¹¹³ In some states, this may require convincing judges to get out of lockstep with the federal judiciary and analyze their constitutions independently. This will entail expending significant resources researching history: in some states, judges, despite their freedom to depart from federal analysis, will only do so when there are textual differences, legislative history differences, state cases predating federal changes, state structural differences, a subject of "unique local interest," a countervailing state or local issue, or differing public attitudes.¹¹⁴ Even after all this research by advocates and litigants, elected state judges may be resistant to new doctrinal approaches absent some groundswell of social change, fearing political

not intend to permit damages as a remedy for deprivation of due process). Another obstacle to damages is that some states grant qualified or absolute immunity to state officials in actions arising from the state constitution. *See, e.g.,* Lloyd v. Borough of Stone Harbor, 432 A.2d 572, 583 (N.J. Super. Ct. Ch. Div. 1981).

¹¹² *See* Wharton, *supra* note 91, at 1277. In states without an enabling statute, plaintiffs can convince courts to award fees based on their equitable powers, often arguing for a "private attorney general" exception for litigation protecting important societal interests, but some states have resisted this argument. *See, e.g.,* N.M. Right to Choose/NARAL v. Johnson, 986 P.2d 450, 451–53 (N.M. 1999). The availability of fees is especially important because "social justice litigation tends to be resource-intensive, requiring lawyers, paralegals, experts, monitors, discovery costs, and travel expenses." JON GREENBAUM, LAWS. COMM. FOR C.R. UNDER L., TOWARD A MORE JUST JUSTICE SYSTEM: HOW OPEN ARE THE COURTS TO SOCIAL JUSTICE LITIGATION 7 (2016), <https://lawyerscommittee.org/wp-content/uploads/2016/08/Toward-A-More-Just-Justice-System.pdf>, archived at <https://perma.cc/X8JS-LAHS>.

¹¹³ One other type of provision bears mentioning. Many state constitutions contain anti-class legislation provisions. *See, e.g.,* OR. CONST. art. I, § 20 ("No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."). In *Zockert v. Fanning*, the Supreme Court of Oregon held that class legislation, even if not intended as such, is actionable discrimination. 800 P.2d 773, 779 (Or. 1990). Similar constitutional provisions can be used to strike down laws with a discriminatory effect, but advocates should be wary of the potential for adverse rulings under these clauses. Anti-class legislation clauses "largely served to protect the majority against legislative creation of special privileges or exemptions that destroy equality." Tarr, *supra* note 80, at 860 (emphasis added). To the extent that, consistent with the Fourteenth Amendment, states can pass race-conscious legislation, such as statutes mandating affirmative action, anti-class legislation provisions could be used to strike down such legislation.

¹¹⁴ *See* State v. Hunt, 450 A.2d 952, 964–67 (N.J. 1982) (Handler, J., concurring); *see also supra* note 75 and accompanying text.

backlash if they actively vindicate the rights of the minorities.¹¹⁵ Alternatively, advocates can argue that equality provisions require more when read in conjunction with other provisions imposing affirmative obligations on the state. Connecticut courts requiring the additional affirmative obligation limited the holding in *Sheff* to the school context,¹¹⁶ but this approach can be used affirmatively to fight for racial equality. Many state constitutions contain substantive provisions dealing explicitly with poverty, education, housing, shelter, health, and nutrition.¹¹⁷ While this would limit litigation to enumerated realms, there are many instances of disparate impact in poverty, education, and the like.

But there are limits to any approach using current language. As was seen after *Sheff*, interpretations can be narrowed when the language supports both broad and narrow readings. Additionally, achieving social change through litigation can lead to backlash and retrenchment. Professor Michael Klarman has compared the response to *Goodridge* to the massive resistance to *Brown v. Board of Education*, arguing that because “judicially mandated social reform” is viewed as “outside interference” or “judicial activism” that “def[ies] the will of the people,” it “may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions.”¹¹⁸

¹¹⁵ Over three-quarters of states use some form of judicial election at some level of court, and all but one of those states hold some elections—contested partisan, contested nonpartisan, or unopposed retention—for judges to their court of last resort. BRENNAN CTR., JUDICIAL SELECTION: SIGNIFICANT FIGURES (2015), <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>, archived at <https://perma.cc/HS2V-FPG5>. That said, where terms are long, even up to ten or twelve years, see *State Supreme Courts*, BALLOTPEdia, https://ballotpedia.org/State_supreme_courts (last visited May 11, 2021), archived at <https://perma.cc/BKX7-LQ2M>, judges may not fear being voted out of office for their unpopular opinions.

¹¹⁶ See *supra* Section III.C.

¹¹⁷ See generally Neuborne, *supra* note 39, at 893–95 (collecting provisions).

¹¹⁸ Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 473–75 (2005). Klarman fears perverse results, “[b]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance.” *Id.* at 482. Klarman has since somewhat recanted this view, in light of subsequent history. See Michael Klarman, *How Same-Sex Marriage Came to Be*, HARV. MAG. (Mar.–Apr. 2013), <https://harvardmagazine.com/2013/03/how-same-sex-marriage-came-to-be>, archived at <https://perma.cc/4NM9-C8YE>. And Klarman has since suggested that even democratic social reform can trigger backlash. See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTER: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 1669 (2013) (“Political backlash results from government action that strongly contravenes public opinion. Whether that action derives from legislatures or courts seems relatively unimportant. Yet courts are more likely than legislatures to take action that is sufficiently deviant from public opinion to generate powerful backlash.”). Justice Ginsburg also warned that premature and overbroad rulings, including, in her view, *Roe v. Wade*, can cause backlash. David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same-Sex Marriage Issue*, HUFFINGTON POST (Apr. 11, 2012), https://www.huffingtonpost.com/2012/02/12/ruth-bader-ginsburg-gay-marriage_n_1269399, archived at <https://perma.cc/UJ57-5MA9>. Not all commentators, however, are persuaded by this backlash thesis. See, e.g., JAMES PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 115–16 (2001) (arguing that white intransigence would have resulted from desegregation at-

B. *The Promise of Constitutional Amendments*

To avoid subsequent narrowing or retrenchment¹¹⁹ and ensure actual equality, advocates should seek to amend state constitutions to broadly and unequivocally guarantee actual equal protection and freedom from discrimination. State constitutions are more easily amendable than the federal constitution, although some political willpower will be needed to enact these changes.¹²⁰ State constitutions are particularly well suited for amending with specific language, and for continued experimentation to find the most effective language. Specific language will insulate state court decisions from federal review and protect against disingenuous interpretations, allowing for a better equal protection doctrine in state courts.

State constitutions are more easily amenable.¹²¹ Eighteen states allow voters to amend their constitutions through initiatives.¹²² Alternatively, all

tempts, with or without *Brown*); Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 976–78 (2005) (arguing that more violence may have resulted had the Court not emerged as a “stalwart friend and supporter of civil rights.”). For a complication of the backlash thesis, see generally Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1494 (2006) (arguing that gains from civil rights litigation outweigh the backlash).

¹¹⁹ A benefit of constitutional amendments is their relative stability compared to legislation and litigation. See JOHN DINAN, STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES 274–77 (2018).

¹²⁰ See *infra* notes 124–28 and accompanying text.

¹²¹ This ease of amendment is reflective of popular sovereignty. Thomas Jefferson notably believed that constitutions are not “too sacred to be touched” and instead should be revised “every 19 or 20 years” because “[e]ach generation is as independent of the one preceding . . . [and] has then, like them, a right to chuse [sic] for itself the form of government it believes most promotive of it’s [sic] own happiness” given its circumstances. Letter from Thomas Jefferson to Samuel Kercheval (Jul. 12, 1816), in NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002>, archived at <https://perma.cc/W92L-P4FD>.

¹²² *Initiative and Referendum States*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited May 11, 2021), archived at <https://perma.cc/4TFM-CCRN>. The number of signatures required to get an amendment on the ballot varies. See DINAN, *supra* note 119, at 17. Nine states require eight to ten percent of the votes cast for governor in the most recent election, while Mississippi requires twelve percent and Arizona and Oklahoma require fifteen percent. See *id.* Other states have other standards, such as ten percent of registered voters required in Nebraska or eight percent of voters for the president in Florida. See *id.* at 17 nn.29–30. Some states also require signature-gatherers to satisfy geographic-distribution requirements, gathering signatures from a range of counties or legislative districts. See *id.* at 17. In Massachusetts and Mississippi, the state legislature can craft an amended or alternate measure, and Massachusetts also allows the legislature to block the amendment altogether. See *id.* In most states, the amendments need only obtain the support of a majority of votes cast on the measure, but some states impose higher ratification requirements, and Nevada even requires amendments to be ratified in two successive general elections. See *id.* at 18. Finally, some states limit the subjects of amendments initiated through this process. Mississippi does not allow for the modification of any portion of its Bill of Rights. *Id.* at 18 n.45 (citing MISS. CONST. art. 15, § 273(5) (amended 1992)). And Massachusetts does not allow for initiatives to reverse judicial decisions. *Id.* (citing MASS. CONST. art. XLVIII, pt. II, § 2 (adopted 1918)). There is one last limitation: in some states, voters may “amend” the constitution by initiative, but may not “revise” it. Compare CAL. CONST. art. 18, § 3 (“The electors may amend the Constitution by initiative.”) with CAL.

state constitutions allow amendments to be initiated by state legislatures, but unlike the federal Constitution, many states do not require a supermajority of legislators to pass amendments, although many require the legislature to approve the amendment in two sessions, and most require only a simple majority vote by the electorate for ratification.¹²³ As of 2017, there have been over 7,500 amendments to current state constitutions, averaging 1.3 amendments per year per constitution.¹²⁴

Of course, succeeding in ratifying an amendment is not guaranteed. Constitutional amendments require popular consensus—whether initiated by state legislatures or voter initiatives.¹²⁵ Rather than convincing a handful of justices to change their interpretive analysis, advocates will need to convince at least half of all voters of the merits of the new mode of interpretation.¹²⁶ It

CONST. art. 18, § 1 (“The Legislature . . . may propose an amendment or revision of the Constitution.”). See also *Raven v. Deukmejian*, 801 P.2d 1077, 1085–86 (Cal. 1991) (explaining the difference between an amendment and a revision amounting to substantial changes to the constitutional scheme). In *Raven*, the Supreme Court of California struck down part of an initiative that would have amended the California constitution to provide that it “not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States” because this would have the practical effect of vesting “a critical portion of state judicial power in the United States Supreme Court, certainly a fundamental change in [the] preexisting governmental plan.” *Id.* at 1086, 1089. An amendment granting greater equal protection rights or requiring courts to construe the state constitution independently would not so substantially change the governmental structure as to constitute a revision.

¹²³ See G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 *RUTGERS L.J.* 1075, 1076–77 (2005). Note that most state constitutions limit amendments to a single purpose. *Id.* at 1092. Delaware is the only state that doesn’t require amendments proposed by the legislature to be ratified by a vote of the electorate. *Id.* at 1077. State constitutions can also be revised at constitutional conventions, but wholesale revision could do more harm than good, so some states allow for limited constitutional conventions in which only certain subjects can be considered. *Id.* at 1085. For a breakdown of the requirements by state, see DINAN, *supra* note 119, at 13–15. Ten states require only a bare legislative majority in one session, while eleven require a majority in two sessions. *Id.* at 14. Conversely, sixteen states require two-thirds legislative approval in one session, another four require two-thirds approval in two sessions, and nine states require three-fifths legislative approval in one session. *Id.* Eight states require ratification by more than a simple majority of votes on the amendment. *Id.* at 13.

¹²⁴ DINAN, *supra* note 119, at 23.

¹²⁵ From 1904 to 2019, only forty-two percent of citizen-initiated measures, including both proposed statutes and constitutional amendments, have been approved by the voters. See *Initiative Frequency and Success Throughout the Decades*, *BALLOTPEdia*, https://ballotpedia.org/Initiative_frequency_and_success_throughout_the_decades (last visited May 11, 2021), archived at <https://perma.cc/4GFM-GEYT>. Between 1996 and 2003, voters ratified 655 of 847 constitutional amendments proposed by state legislatures. See Tarr & Williams, *supra* note 123, at 1092. And neither of these statistics accounts for proposals that failed to even get on the ballot.

¹²⁶ Of course, judges’ reluctance to shift their interpretation of a state constitutional provision may be “on the ground that these changes would be viewed as more legitimate if they came about through constitutional amendments.” See DINAN, *supra* note 119, at 278. “On this view, constitutions are legitimate and are viewed by citizens as legitimate insofar as changes in constitutional principles come about through changes in constitutional texts that citizens have an opportunity to approve or disapprove.” *Id.* at 279. Some judges seem to have endorsed such a view. See, e.g., *State v. Hamm*, 423 N.W.2d 379, 383 (Minn. 1988) (“There are questions that the drafters of our constitutions, federal and state, felt were best left for the people to

may not be possible in every state, or any state, to build a coalition that can get an equal protection amendment ratified, let alone one with specific language incapable of narrow construction. Even California, a very liberal state, rejected a 2020 proposition that would have repealed a constitutional provision prohibiting affirmative action—supporters of the proposition raised over twenty million dollars to campaign for the measure, but were defeated by an opposition campaign that only raised just under one and a half million dollars.¹²⁷ If twenty million dollars cannot get an affirmative action measure ratified in California, there may not be hope right now for equal protection amendments. And defeat could set back progress by years in the many states in which the constitution limits resubmission of proposals to voters for some period of time.¹²⁸

decide by constitutional amendment. . . . Therefore, what the members of this court (or the members of the legislature) think about the merits of a six-person jury is immaterial. The right to reduce the size of a jury has been vested only in the people of this state. If a written constitution can be amended by statute or by judicial fiat, it retains no sanctity whatsoever.”). Notably, the Minnesota constitution did not expressly require twelve-person juries; this requirement was read into the constitution by the court. *Id.* at 380–81 (citing *State v. Everett*, 14 Minn. 439, 444 (1869)). In any case, the people of Minnesota responded by amending their constitution to allow for six-person juries in nonfelony cases. MINN. CONST. art. I, § 6 (amended 1988).

¹²⁷ *California Proposition 16, Repeal Proposition 209 Affirmative Action Amendment (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_\(2020\)](https://ballotpedia.org/California_Proposition_16,_Repeal_Proposition_209_Affirmative_Action_Amendment_(2020)) (last visited May 11, 2021), archived at <https://perma.cc/25L6-USHW>. This defeat is all-the-more demoralizing given the success of the anti-labor statute that defined app-based transportation drivers as independent contractors. See *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, [https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_\(2020\)](https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020)) (last visited May 11, 2021), archived at <https://perma.cc/XWW4-6XF2>.

¹²⁸ See, e.g., N.J. CONST. art. IX, § 7; PA. CONST. art. XI, § 1. At the same time, even a defeated amendment can spark debate, with social movements ultimately shaping the development of constitutional doctrine, “[f]or example, ERA proponents correctly anticipated that officials responsible for interpreting the Constitution might respond to the shifts in popular opinion that a campaign to amend the Constitution produced, even if, by formal measures, the People endorsed the status quo.” See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1326 (2006). Campaigns for constitutional amendments can be part of a “dual strategy,” with the attempted lawmaking influencing litigation, and constitutional change “produced by the steady iteration of a claim across institutional settings.” *Id.* at 1367–68. The National Organization for Women’s lawyer, Mary Eastwood, recognized that this dual strategy would hold the movement together, *id.* at 1367, and the movement ultimately won cases that would shape the modern law of sex discrimination under the Fourteenth Amendment into a “de facto ERA.” *Id.* at 1324. Martha Minow commented on Siegel’s work, noting that “the interpretation of [] amendments at the state level . . . provides . . . many avenues for reconstituting society and self-government.” Martha Minow, *Constituting Our Constitution, Constituting Ourselves: Comments on Reva Siegel’s Constitutional Culture, Social Movement Conflict and Constitutional Change*, 94 CALIF. L. REV. 1455, 1461 (2006). For more on how social movements have affected the development and interpretation of the U.S. Constitution, see generally Mark Tushnet, *Social Movements and the Constitution*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 232 (Mark Tushnet et al. eds., 2015). At the state level, however, constitutional development through interpretation is seen by some as less necessary because of the ease of amendment. See John Dinan, *State Constitutionalism*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION, *supra* note 128, at 864, 878.

Political willpower may be difficult to muster, but equal protection amendments seem to be a natural extension of state constitutions. As previously discussed, state constitutions generally contain extensive bills of rights, using language that is “richer, more detailed and more specific”¹²⁹ than the federal Bill of Rights, as well as positive language as opposed to negative or prohibitory language, with some even explicitly guaranteeing more than the corresponding federal right.¹³⁰ State bills of rights tend to be placed at the beginning of state constitutions, with Article I outlining the individual rights of state residents.¹³¹ Given the prominence and specificity of individual rights guarantees, expanded equal protection guarantees would be right at home in state constitutions.

State constitutions are ripe for experimentation. Many scholars have called the federal Bill of Rights a constitutional “floor,” because even if state constitutions are interpreted to protect fewer rights, states cannot themselves violate rights protected by the federal Constitution.¹³² Even if a state amends its constitution in a way that judges interpret to provide fewer rights than before, there will be little harm, because the federal Equal Protection Clause will still apply and set the minimal safeguards for infringed rights. And poorly written state amendments are far easier to replace than federal amendments. The privileges and immunities clause of the federal Fourteenth Amendment was essentially nullified in 1873,¹³³ but it is still the (ineffective) law of the land. Experimentation with the federal Constitution is not wise, but states should take up Justice Brandeis’ call to serve as “laboratories of democracy.”¹³⁴ States can utilize different language and determine what works best in practice, with the most effective language then available for adoption by other states. For example, the New York Senate passed a proposed “Inclusive Equal Rights Amendment,” which would (1) expand the categories of people protected, (2) define the term “civil rights” to make the state’s current anti-discrimination clause in Article I, § 11 self-executing, and (3) explicitly prohibit disparate impact discrimination.¹³⁵ But this may not be the best approach. Perhaps the Court is right to be skeptical of strict scrutiny for disparate impact claims, and an “active rational basis test”

¹²⁹ See Exum, *supra* note 42, at 1746.

¹³⁰ See *supra* notes 40–46 and accompanying text.

¹³¹ See Hammons, *supra* note 44, at 1331.

¹³² See Kaye, *supra* note 35, at 51; Van Cleave, *supra* note 41, at 202.

¹³³ See *The Slaughter-House Cases*, 83 U.S. 36 (1872).

¹³⁴ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹³⁵ See S.B. 517C, 2019 Leg. Sess. (N.Y. 2019); see also *Inclusive Rights Amendment*, COMM. TO REFORM THE STATE CONST., https://www.committee2reform.org/equal_rights_amendment, archived at <https://perma.cc/9M2Y-SR4T>. The proposed amendment died in the New York Assembly. See *Senate Bill S517C*, N.Y. STATE SENATE, <https://www.nysenate.gov/legislation/bills/2019/s517>, archived at <https://perma.cc/MH4X-D5RA>.

would be better.¹³⁶ The only way to determine the best approach is to experiment.¹³⁷

Of course, there is reason to be wary—utilizing amendments to achieve a progressive vision of racial justice may open an unwanted can of worms and invite constitutional proposals that would harm minorities. California has played host to the aforementioned Robbins Amendment, along with Proposition 8, which formalized marriage as a heterosexual institution.¹³⁸ But conservatives have long been using constitutional amendments to attempt to return their states to less enlightened days—thirty-one states approved amendments limiting recognition of same-sex marriage between 1998 and 2012¹³⁹—so the can of worms is already open. Progressives should not sacrifice an avenue for racial justice out of fear of conservative backlash—unilateral disarmament will not lead to progress.

Constitutional amendments can lead to better jurisprudence for racial justice than can be achieved under current state constitutions. Narrow language is harder for judges to interpret disingenuously and language differing from federal provisions will all but require independent interpretation.¹⁴⁰ Additionally, many states look to the history of state constitutional provisions in interpreting them.¹⁴¹ Those proposing amendments today can make clear

¹³⁶ Minnesota courts apply a “stricter standard of rational basis review” when there is statistical evidence of a disparate impact. *See* *Granville v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 668 N.W.2d 227, 233 (Minn. Ct. App. 2003); *see also* *State v. Frazier*, 649 N.W.2d 828, 831 (Minn. 2002) (calling the test an “active rational basis test”). The Minnesota Supreme Court had previously suggested in a footnote that “statistics showing the effect of the statute in operation combined with relevant factors that appear in the statute’s history could be held to create an inference of invidious discrimination which would trigger the need for satisfaction of a compelling state interest.” *State v. Russell*, 477 N.W.2d 886, 888 n.2 (Minn. 1991). But the legacy of *Russell* has not been to require strict scrutiny, only this stricter rational basis review in which the court is “unwilling to hypothesize a rational basis to justify a classification,” instead requiring “a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals.” *Id.* at 889. Closing the door on the possibility of strict scrutiny was itself a form of narrowing by the court.

¹³⁷ Judge Jeffrey Sutton explains that it is not “self-ordained” that, for example, three levels of scrutiny is the best way to assess equal-protection claims, so “it may be more appropriate to have fifty-one imperfect solutions rather than one imperfect solution—particularly when imperfection may be something we invariably will have to live with in a given area.” Sutton, *supra* note 30, at 175–76. *See generally* SUTTON, *supra* note 37.

¹³⁸ *See supra* note 107 and accompanying text; CAL. CONST. art. I, § 7.5.

¹³⁹ *See* DINAN, *supra* note 119, at 139–43.

¹⁴⁰ *See* *Sheff v. O’Neill*, 678 A.2d 1267, 1282 (Conn. 1996) (“[E]ffect must be given to . . . each word in our constitution[.]” In other cases, we have held that, insofar as article first, § 20 differs textually from its federal counterpart, its judicial construction must reflect such a textual distinction.”) (quoting *Cahill v. Leopold*, 103 A.2d 818, 828 (Conn. 1954)) (other citations omitted).

¹⁴¹ *See, e.g.,* *Kahn v. Griffin*, 701 N.W.2d 815, 829 (Minn. 2005) (“Thus, we suggest that, as a general rule, there are certain factors that litigants should consider when addressing an issue that may implicate a separate independent analysis under the Minnesota Constitution. The following nonexclusive list of factors should prove useful: (1) the text of the state Constitution, (2) the history of the state constitutional provision, (3) relevant state case law, (4) the text of any counterpart in the U.S. Constitution, (5) related federal precedent and relevant case law from other states that have addressed identical or substantially similar constitutional language, (6) policy considerations, including unique, distinct, or peculiar issues of state and local

the intended purpose of the amendments through contemporaneous statements, essentially creating the legislative history that courts will rely on. When the text and history of equality provisions require judges to guarantee actual equal protection, those rulings will be insulated from federal review.¹⁴²

concern, and (7) the applicability of the foregoing factors within the context of the modern scheme of state jurisprudence.” (emphasis added).

¹⁴² *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (holding that a “plain statement” from a state court that its decision rests on “independent and adequate” state law grounds precludes review by the United States Supreme Court). Some may worry that states will give up their persuasiveness in federal courts if they are no longer interpreting parallel provisions. Professor Rachel A. Van Cleave writes:

The critical tension in state constitutionalism is between the need to persuade critics that the state court is justified when it diverges from federal precedent, and the goal of having a voice in constitutional discourse and debate. In seeking to persuade critics, state courts tend to rely extensively on differences between the federal and the state constitutions. However, it is precisely this “discourse of distinctness” which other critics claim results in isolationism of the state and irrelevance of constitutionalism generally.

Van Cleave, *supra* note 41, at 200 (citing Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215, 228–29 (1992); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 777 (1992); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1152 (1993)). But Van Cleave explains that this is a somewhat false dichotomy: state constitutions do not become irrelevant when they diverge from federal precedent or even when they interpret wholly different provisions. For example, in *People v. Wheeler*, the California Supreme Court rejected the United States Supreme Court’s *Swain v. Alabama* ruling on peremptory strikes in the selection of petit juries, establishing a burden-shifting procedure for challenging peremptory strikes as racial discrimination under California’s constitutional protection of a fair trial by a representative cross-section of the community. 583 P.2d 748, 763–65 (Cal. 1978). The right to trial by a representative cross-section was inferred from the constitutional guarantee of “trial by jury.” *Id.* at 757–58 (citing CAL. CONST. art. I, § 16). The United States Supreme Court adopted a closely parallel procedure six years later in *Batson v. Kentucky*, relying on the Fourteenth Amendment Equal Protection Clause. 476 U.S. 79, 96 (1986). The *Batson* Court rejected the idea of a right to “a jury drawn from a cross section of the community” under the Sixth Amendment, *id.* at 84 n.4, but the Court still elected to reexamine its *Swain* holding from two decades earlier, in part because a number of state courts, including the *Wheeler* court, and two federal Courts of Appeals, had construed peremptory challenges used to strike Black jurors as violations of the Sixth Amendment. *Id.* at 82 n.1. In fact, three justices, concurring in a decision to deny certiorari in a similar case three years earlier, noted *Wheeler* and explicitly decided to wait to address the issue in order “to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by [the] Court.” McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J., concurring). Ultimately, the interpretation of a completely different right by state courts influenced the Supreme Court’s decision to overturn *Swain*. The Court benefits from the constitutional analyses of state courts, even when they interpret different language. Van Cleave, *supra* note 41, at 213 (“Where a state court engages in thoughtful and in-depth analysis, its opinion can have an influence on the development of federal law, or on the law of other states, even if the decision rests solely on the state’s constitution rather than on the federal charter.”). State constitutional amendments can lead to actual equal protection, without jeopardizing states’ abilities to push federal courts in the direction of racial justice. The same can be said for states’ ability to influence sister courts, or “horizontal federalism, a federalism in which states look to each other for guidance.” Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985). For example, when the Supreme Court of Vermont advocated a “sibling state approach in state constitutional argument,” it

What could actual equal protection entail? There are competing and conflicting visions of equity and equality, and choices will need to be made as to which to constitutionalize.¹⁴³ The ideal formulation for a state constitutional amendment is beyond the scope of this Note, and there may be no one ideal solution, but some imperfect solutions could build on the work of scholars who have critiqued the federal doctrine. The Supreme Court's intent requirement leaves no remedy for policies that have a disparate impact, even if that disparate impact is known.¹⁴⁴ In light of unconscious bias, evidence of a disparate impact should itself give rise to an inference of discriminatory intent.¹⁴⁵ In fact, any focus on intent is at odds with the reality of systemic racism.¹⁴⁶ Perhaps disparate impact based on race should trigger strict scrutiny¹⁴⁷ or perhaps, once disparate impact is demonstrated, the burden should be shifted to the government to justify the policy via proof that it lacked feasible, less discriminatory means for achieving its objectives.¹⁴⁸ Others

proposed examining "what other states with identical *or similar* constitutional clauses have done." Vermont v. Jewett, 500 A.2d 233, 237 (Vt. 1985).

¹⁴³ For an explication of two visions, see Aziz Z. Huq, *Bostock v. BLM*, BOSTON REV. (July 15, 2020), <http://bostonreview.net/philosophy-religion-law-justice/aziz-z-huq-bostock-v-blm>, archived at <https://perma.cc/YYJ5-8G3H> (comparing and contrasting transactional and infrastructural equality). Huq describes this new contest between visions of equality with reference to the older fight between anti-classification and anti-subordination. *Id.* Anti-classification, and the call for a "colorblind" Constitution, was once a "demand for radical infrastructural equality," but today it is used to defend racial hierarchies that "operate through superficially race-neutral forms." *Id.* This has been termed "ideological drift." See Jack Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 872–73 (1993). If the implications of a vision of equality can drift over time, that may warrant hesitation in constitutionalizing any one vision. But legislative negotiation and compromise have been insufficient in defining our vision of equality under the law, so some constitutionalizing seems necessary.

¹⁴⁴ See *supra* Part I.

¹⁴⁵ See Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978) ("[A] showing of significant disproportionate advantage to a racial minority group, without more, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged. . . . [I]t raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken quite apart from prejudice."); see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355–56 (1987) (proposing "a test that would look to the 'cultural meaning' of an allegedly racially discriminatory act as the best available analogue for and evidence of the collective unconscious that we cannot observe directly").

¹⁴⁶ See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1085 (2011) ("It makes no sense that outcomes along group lines are largely imagined as irrelevant if we cannot locate a specific government actor engaging in the specific intentional act of discrimination that produces the disadvantage. Studies of the effects of unconscious bias have existed long enough for us to seek ways to operationalize their meaning within the law.").

¹⁴⁷ See Paul Brest, *Palmer v. Thompson*, *An Approach to the Problem of Unconstitutional Motivation*, SUP. CT. REV. 95, 130–31 (1971).

¹⁴⁸ See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN L. REV. 1111, 1144–45 (1997).

have proposed even more novel tests.¹⁴⁹ At a minimum, a better equal protection doctrine would eschew *Feeney*,¹⁵⁰ and find that taking an action with knowledge that it would have discriminatory consequences is a discriminatory intent.¹⁵¹

Which of these tests would best protect students from the implicit bias of their teachers? Which would provide Deandre Arnold with a claim against his school's discriminatory rules and allow him to keep his dreadlocks? Which would find that sentencing algorithms have an unconstitutional disparate impact? That the criminal legal system, from policing to sentencing, unconstitutionally kills people of color? This Note does not have the answer. State equal protection clauses need not even limit themselves to prohibiting discrimination by state actors. So long as the proposed clauses do not violate federal law, advocates are only as limited as their imaginations and their ability to get the language ratified.¹⁵² Working backwards from harms for which there is currently no remedy, advocates can fashion constitutional language that would guarantee a remedy. Getting that language adopted will not be easy, and litigators should not stop trying to get state judges to independently interpret their constitutions more broadly, but constitutional amendments are a viable avenue for guaranteeing actual equal protection under the law.

V. CONCLUSION

Advocates for racial justice must remember that there is more than one constitution that protects individual rights in this country. Where the federal Equal Protection Clause fails to guarantee remedies for laws that harm racial minorities, advocates can look to state constitutions. Given that state judges seem intent on interpreting their constitutions narrowly or in lockstep with federal judges, constitutional amendments are needed to force judges to grant remedies where state actors, or even private actors, disproportionately

¹⁴⁹ See, e.g., Elosiebo, *supra* note 12, at 490 (proposing a standard of disparate impact plus discriminatory negligence); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 887–90 (2004) (proposing a four-part test to determine whether a racially disparate impact imposes an unconstitutional risk of stigmatic harm).

¹⁵⁰ *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

¹⁵¹ This is akin to the “foreseeable consequences” test that was used by lower courts before *Feeney*. See, e.g., *United States v. Bd. of Sch. Comm'rs*, 573 F.2d 400, 413 (7th Cir. 1978). For more on reviving the foreseeability test in light of human intuitions of what it means to be intentional, see generally Kobick, *supra* note 19. Kobick explains that “a philosophical principle known as the ‘Knobe Effect’ predicts that people are very likely to ascribe intentionality to an actor who can foresee morally bad consequences before acting.” *Id.* at 517 (citing Joshua Knobe, *The Concept of Intentional Action: A Case Study in the Uses of Folk Psychology*, 130 PHIL. STUD. 203, 211 (2006); Joshua Knobe, *Intentional Action and Side Effects in Ordinary Language*, 63 ANALYSIS 190, 192–93 (2003)).

¹⁵² Again, the lingering question is whether a state constitutional guarantee of equal protection encompassing disparate impact discrimination would be found to violate the Equal Protection Clause of the Fourteenth Amendment. See *supra* note 8.

harm racial minorities. Constitutional amendments can help us fight new challenges, such as discriminatory algorithms, and also finally remedy old harms that the Fourteenth Amendment has proven ineffective to redress.

