

BREAKING LOCKSTEP: ELEVATING DEMOCRACY IN STATE CONSTITUTIONAL LAW

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*State constitutions promise what the federal Constitution does not: affirmative guarantees of democratic participation, among a broad array of positive rights. But state courts tasked with enforcing those rights routinely fail to properly engage with their constitutions, defaulting instead to the federal judiciary's clause-isolation and tiered scrutiny. The result is a methodological mismatch that allows state legislatures, many of them elected by a plurality or minority of their state's voters, to erode democratic rights unchecked. This Note argues that the Michigan Supreme Court charted an independent path in *Mothering Justice v. Attorney General*, where it struck down an unaccountable legislature's gutting of two voter-initiated laws by reasoning holistically about Michigan's constitutional commitment to democracy. Drawing on the work of Professors Bulman-Pozen and Seifter—who identified the democracy principle as a synthesis of state constitutional commitments to popular sovereignty, majority rule, and political equality; proposed democratic proportionality review, which asks whether the burdens a law places on democratic participation are proportionate to and justified by the government's legitimate objective, as an alternative to federal methods; and coined the term “methodological lockstepping” to describe the problem—this Note uses *Mothering Justice* as a prototype of the judicial application of a new framework.*

*Upon the foundation that *Mothering Justice* laid, this Note constructs a three-part doctrinal test: (1) assess the strength of the state constitution's commitment to the democracy principle; (2) balance the burden on a democratic right against the legislature's justification for imposing it; and (3) craft a “remedy-plus” that resolves the immediate dispute while establishing prospective safeguards against recurrence. Applied to voter identification laws and partisan gerrymandering, the test reveals at once its range and its aim: to equip state courts with a structured, state-grounded framework for curbing legislatures that have themselves sought to limit the sovereignty and power of the very people who elect them and whose rights their constitutions enshrine.*

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INTRODUCTION

In May 2018, the people of Michigan sent two voter initiatives to their state legislature. The first sought to raise the state’s minimum wage from \$9.25 to \$12 per hour by 2022.¹ The second aimed to mandate an hour of paid sick leave for every thirty hours worked.² The Legislature adopted both without amendment in September, allowing the initiatives

¹ Jonathan Oosting, *Group Submits 373k Signatures for \$12 Michigan Minimum Wage Ballot Initiative*, DETROIT NEWS (May 21, 2018, at 15:46 ET), <https://www.detroitnews.com/story/news/local/michigan/2018/05/21/signatures-michigan-minimum-wage-ballot-initiative/629749002> [<https://perma.cc/LG9Z-5TJT>].

² Alice Yin, *Group Submits Signatures for Paid Sick Leave in Michigan*, LANSING ST. J. (May 29, 2018, at 21:02 ET), <https://www.lansingstatejournal.com/story/news/local/>

to bypass voters.³ However, just months later, despite an election that signaled voter backlash against Republican control,⁴ the lame-duck⁵ Legislature disemboweled the laws, delaying the minimum wage increase to 2030 (though increasing it by a nickel to \$12.05), exempting from the sick leave law companies with fewer than fifty employees, and capping the number of sick leave hours to forty.⁶

Michigan's story raises the question: How could a governmental body that is ostensibly the nearest to the people it represents⁷ effectively destroy the intended policy outcomes of those very people? A possible answer is that Americans live in a representative republic and not a pure plebiscitary democracy,⁸ so they elect others to execute their will—and if those elected do not do so, they can soon be thrown out of office.⁹ And that may well be true for the federal government, as the

michigan/2018/05/29/paid-sick-time-bill-could-november-ballot-michigan/654156002 [https://perma.cc/RUV4-85GS].

³ Jonathan Oosting & Beth LeBlanc, *Michigan GOP Lawmakers Adopt Minimum Wage, Sick Leave Plans with Aim to Amend*, DETROIT NEWS (Sep. 5, 2018, at 20:23 ET), <https://www.detroitnews.com/story/news/local/michigan/2018/09/05/michigan-legislature-wage-sick-leave-initiatives/1201948002> [https://perma.cc/WZ87-UYHB]. Presciently, many Democratic legislators voted against the adoption despite supporting their policies, fearing that not forcing the initiatives to confront voters would allow an opportunistic Republican majority to gut the laws. *Id.*

⁴ See, e.g., Alexander Burns, *A Week After the Election, Democratic Gains Grow Stronger*, N.Y. TIMES (Nov. 13, 2018), <https://www.nytimes.com/2018/11/13/us/politics/midterm-results-democratic-gains.html> [https://perma.cc/8CF3-7FNM] (explaining that the 2018 midterms retold a difficult reelection for President Trump in 2020).

⁵ In the American political context, “lame-duck” is an adjective meaning “an elected official or group continuing to hold political office during the period between the election and the inauguration of a successor.” *Lame Duck*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/lame%20duck> [https://perma.cc/8YJ7-NYQ6]. In between November 2018 and the new legislature's inauguration, many incumbent legislators had been voted out of office. Therefore, they could not be further held accountable for their actions—they already had been.

⁶ David Eggert, *Michigan Legislature OKs Gutting Wage, Paid Sick Time Laws*, ASSOCIATED PRESS (Dec. 4, 2018, at 21:50 ET), <https://apnews.com/michigan-legislature-oks-gutting-wage-paid-sick-time-laws-c0f3286e8edb4cce8185013978a84d76> [https://perma.cc/UT66-PBJ3]. About one million workers would thus be exempt from the paid sick leave law. *Id.*

⁷ Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1734, 1744 (2021) [hereinafter Seifter, *Countermajoritarian Legislatures*] (citations omitted) (noting that “popular discourse ha[s] cast state legislatures in a hero's role” and noting claims that state legislatures are “closest to the people”).

⁸ See SANFORD LEVINSON, *FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 76 (2012) (arguing that the Founders “never intended to establish a ‘democracy’”); *id.* at 81–82 (discussing the positions of proponents of constitutional limits on plebiscitary power).

⁹ But see Nicholas O. Stephanopoulos, *The Causes and Consequences of Gerrymandering*, 59 WM. & MARY L. REV. 2115, 2143–44 (2018) (“[U]nified control of the redistricting process significantly benefits the party in charge . . . [T]he partisan fairness of congressional plans dramatically influences the representational distortion of House delegations.”).

Constitution vests Congress with “[a]ll legislative powers”¹⁰ and grants no legislative role to the people. Framed in such a way, there would be nothing identifiably wrong with the parting actions of Michigan’s 99th Legislature. However, state constitutions operate differently.

In Michigan and many other states, charters confer on their citizens significant checks on their elected representatives,¹¹ who often find themselves at odds with their constituents and seek to render them toothless.¹² Those checks are part of a broader commitment to popular sovereignty, majority rule, and political equality—three concepts that Professors Bulman-Pozen and Seifter have aggregated and called the democracy principle.¹³ These structural commitments are embedded in state constitutions and designed to ensure direct public control over government action, especially where representative institutions fail to reflect the majority’s will.¹⁴

When the Michigan Supreme Court reviewed the legislature’s actions in *Mothering Justice v. Attorney General*, it recognized exactly that.¹⁵ The court held that the legislature violated the state constitution by adopting and amending the initiatives in a way that evaded voter ratification.¹⁶ But *Mothering Justice* is important for more than its outcome. The court broke from a longstanding habit in state constitutional adjudication: methodological lockstepping, as termed by Professors Bulman-Pozen and Seifter.¹⁷ Methodological lockstepping describes the instinct of state courts to borrow wholesale the federal judiciary’s analytic playbook: isolating clauses, assigning them to scrutiny tiers, and defaulting to legislative deference.¹⁸ But that method—designed for a federal Constitution steeped in negative rights—sits uneasily atop state charters that promise not just restraints on power but active guarantees

¹⁰ U.S. CONST. art. I, § 1.

¹¹ See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 199 MICH. L. REV. 859, 874, 876–78 (2021) [hereinafter Bulman-Pozen & Seifter, *Democracy Principle*] (explaining paths outlined in nearly all state constitutions allowing citizens to effect change against their legislatures in some form).

¹² See Seifter, *Countermajoritarian Legislatures*, *supra* note 7, at 1735 (calling legislatures state governments’ “least majoritarian branch”).

¹³ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 864.

¹⁴ See *id.* at 874–79 (explaining paths outlined in nearly all state constitutions allowing citizens to effect change against their legislatures).

¹⁵ *Mothering Just. v. Att’y Gen. (Mothering Justice III)*, No. 165325, 2024 WL 3610042, at *6–7 (Mich. July 31, 2024).

¹⁶ See *id.* at *12 (holding that the legislature’s interpretation would intrude on the rights of the people).

¹⁷ Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1858 (2023) [hereinafter Bulman-Pozen & Seifter, *Democratic Proportionality*].

¹⁸ *Id.*

of democratic participation.¹⁹ It is, at bottom, a methodological mismatch. In *Mothering Justice*, the court recognized as much, rejecting methodological lockstepping as insufficient to vindicate Michigan's constitutional commitment to popular sovereignty and political equality.²⁰

This Note argues that state courts should follow the *Mothering Justice* court's lead by rejecting methodological lockstepping when core democratic rights are at stake. This Note makes two contributions. First, it shows that *Mothering Justice* broke from the inertia of methodological lockstepping and implicitly employed a different method: democratic proportionality review.²¹ This review asks whether a burden on democratic participation is justified in light of a state's commitment to popular sovereignty, majority rule, and political equality.²² Connecting *Mothering Justice* to this analytical framework is novel. Second, this Note proposes a three-part doctrinal test that state courts can use to operationalize the democracy principle and democratic proportionality review moving forward—one that offers structure but recognizes and respects the idiosyncrasies between state constitutional texts and traditions.²³

This Note also builds on prior scholarship. Professor Hershkoff has powerfully critiqued the use of federal rational basis review in state courts, particularly where positive rights are at stake.²⁴ Professors Bulman-Pozen and Seifter have introduced the democracy principle and articulated democratic proportionality as a more faithful interpretive approach for state courts.²⁵ But while their work lays essential theoretical groundwork, this Note goes further by deploying democratic proportionality as a doctrinal test that state courts could adopt and apply. Rather than treating proportionality review as an abstract alternative, this Note identifies it as an emerging method in practice—as seen in *Mothering Justice*—and offers courts a concrete, structured framework to evaluate legislative burdens on democratic rights. Ultimately, the test is a possible avenue state courts can pursue to more fully develop and interpret their state constitutional law in the face of state legislatures entrenched in minoritarian rule.²⁶

¹⁹ *Id.* at 1859–90.

²⁰ *Mothering Justice III*, 2024 WL 3610042, at *6–7.

²¹ This framework is yet another contribution by Professors Bulman-Pozen and Seifter. See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1895–96 (defining the concept and outlining the process of democratic proportionality review).

²² See *infra* Section I.C.2.

²³ See *infra* Section III.A.

²⁴ See *infra* Section I.C.1.

²⁵ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 862 (introducing the democracy principle); Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1895 (articulating democratic proportionality as more faithful to state constitutions).

²⁶ See generally Seifter, *Countermajoritarian Legislatures*, *supra* note 7 (arguing that state legislatures are more likely to be controlled by a minority party while state courts are more majoritarian).

Crucially, this Note situates its argument within and beyond the tradition of New Judicial Federalism.²⁷ That movement urges state courts to interpret their constitutions independently of the U.S. Constitution, leading to many decisions that expanded rights beyond federal baselines.²⁸ But it has largely focused on substantive divergence, not interpretive method. As a result, courts often recognize broader rights under state law but still analyze them using federal tools like strict scrutiny or rational basis review. *Mothering Justice* models a different approach—one that reflects the structure, values, and democratic commitments of state constitutional law. This Note posits that the democracy principle and democratic proportionality review are comfortably at home in the broader doctrine of New Judicial Federalism and evolved from its beginnings.

This Note proceeds in three parts. Part I delves deeper into New Judicial Federalism, the democracy principle, and democratic proportionality to provide a helpful background. Part II analyzes *Mothering Justice* as a case study in democratic proportionality and shows how the court’s reasoning diverged from federal methods. Finally, Part III provides an operationalizable test rooted in *Mothering Justice* for state courts to employ in the future and applies it to voter ID laws and partisan gerrymandering.

I

THE EVEN NEWER NEW JUDICIAL FEDERALISM

This Part offers a background for the uninitiated on New Judicial Federalism, the methods of state constitutional interpretation that fall under its umbrella, and the work of Professors Bulman-Pozen and Seifter. This Note views the democracy principle and democratic proportionality review as offshoots of New Judicial Federalism. When framed this way, the analysis of *Mothering Justice*, although novel in many ways, can be placed within a distinct judicial tradition. For judges anxious about policymaking from the bench, this link may provide the comfort necessary to meaningfully develop state constitutional law.

²⁷ See *infra* Section I.A.

²⁸ See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (“[D]ecisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . [S]tate court judges and members of the bar seriously err if they so treat them.”).

A. *The Original New Judicial Federalism*

New Judicial Federalism underscores the critical role that state courts play in independently analyzing their constitutions. State courts have a responsibility to ensure that their founding charters, which promote democratic accountability and majoritarianism, furnish their citizens with the protection that the federal Constitution may lack. The intellectual history of New Judicial Federalism emphasizes that state constitutions are not mere facsimiles of their federal analogue, subsidiary to the pronouncements that come down from on high by the Court in Washington. Rather, they are independent and powerful sources of law, capable of expanding rights and deepening democracy itself.

New Judicial Federalism, first articulated by Oregon Supreme Court Justice Hans Linde,²⁹ was popularized by Justice Brennan in a 1977 *Harvard Law Review* piece.³⁰ There, Justice Brennan lambasted the Burger Court's flight from the civil-liberties- and political-equality-oriented decisions of the Warren Court,³¹ abandoning Justice Bradley's command in *Boyd v. United States* that the Court "be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon."³²

To stop the bleeding, Justice Brennan beseeched state courts to continue on the paths of California and New Jersey, whose supreme courts had drawn upon their own local constitutions to resist the Burger Court's backsliding.³³ While that Court seemed to feel that state charters were written to reflect the Bill of Rights, Justice Brennan recognized instead that "the drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions."³⁴

²⁹ See Hans A. Linde, *Book Review*, 52 OR. L. REV. 325, 332–35 (1973) (reviewing BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* (1971)) (noting the idiosyncrasies of state constitutions between each other and the federal Constitution and rejecting the theory of uniformity among state constitutions). See generally Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) [hereinafter Linde, *Unconstitutional Law*] (arguing that Oregon courts must ground judicial review in their own constitution rather than importing federal due process).

³⁰ See generally Brennan, *supra* note 28, at 502–03 (asserting that one of the strengths of American federalism is its "double source of protection" for rights and calling on state courts to assume a more prominent role in protecting citizens "from governmental intrusions on their freedoms").

³¹ *Id.* at 495–98.

³² *Id.* at 494 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

³³ Brennan, *supra* note 28, at 498–500 (first citing *People v. Disbrow*, 545 P.2d 272 (Cal. 1976), *superseded by constitutional amendment*, CAL. CONST., art. I, § 28, subd. (d), *as recognized in*, *People v. May*, 748 P.2d 307, 307–08 (Cal. 1988); and then citing *State v. Johnson*, 346 A.2d 66 (N.J. 1975)).

³⁴ *Id.* at 501.

But the Burger Court misread history and saw state constitutions as derivative.³⁵ Before the incorporation of the federal Bill of Rights onto the states through the Fourteenth Amendment, the “state bills of rights, independently interpreted, were the primary restraints on state action.”³⁶

The Burger Court also too quickly invoked notions of “Our Federalism” to justify restraint even when state action violated federal rights.³⁷ That term was used by Justice Black in *Younger v. Harris*, which held that federal courts should generally not intervene in state proceedings, even if there is a federal right at stake.³⁸ In *Younger*, Justice Black described that principle as mutual respect between state governments and the federal government, properly balancing the competing interests of dual sovereignty under American federalism.³⁹ Justice Brennan saw it as an excuse for judicial inaction.⁴⁰

Justice Brennan bemoaned that Our Federalism had become a tool to prevent federal courts from protecting citizens against state abuse.⁴¹ Just as Our Federalism may hamstring federal oversight, it should empower state courts to deploy their state constitutions as both shields against shrinking federal rights and swords to expand state rights.⁴² That is the promise of New Judicial Federalism: state courts turning Our Federalism on its head, using principles of comity to protect civil rights and liberties. Justices Brennan and Linde’s vision reflects this Note’s contention that state courts must not only assert their independence but actively develop doctrines grounded in their own constitutions rather than mirror federal courts.

This vision takes doctrinal form in what Justice Hans Linde called the primacy approach, a method for structuring how and when state courts interpret their constitutions in cases involving federal rights.⁴³ Justice Linde was one of the first to argue that “[c]laims raised under the state constitution should always be dealt with” before federal

³⁵ See *infra* note 43 and accompanying text.

³⁶ Brennan, *supra* note 28, at 502.

³⁷ *Id.*

³⁸ 401 U.S. 37, 44 (1971) (defining “Our Federalism”).

³⁹ *Id.*

⁴⁰ Brennan, *supra* note 28, at 502–03.

⁴¹ *Id.*

⁴² See *id.* at 503 (“Federalism . . . must necessarily be furthered significantly when state courts thrust themselves into a position of prominence in the struggle to protect the people . . . from governmental intrusions on their freedoms.”).

⁴³ See Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 PENN ST. L. REV. 837, 845–47 (2011) (defending the primacy approach); see also *id.* at 845 n.35 (crediting Justice Linde for the “first-things-first approach”).

constitutional claims.⁴⁴ That sequence came to be known as the primacy approach.⁴⁵ It is about more than temporal factors, though. It has such a dedication to state law principles that it holds that courts should consider even subconstitutional state doctrines before invoking federal rights.⁴⁶ As Justice Linde put it, “[s]tate bills of rights are first in two senses: first in time and first in logic.”⁴⁷

For example, in *State v. Short*, the Iowa Supreme Court forcefully defended the primacy model.⁴⁸ The defendant had challenged the admissibility of evidence obtained during a search of his home authorized by a warrant that originally had the incorrect address and was later physically altered by police with telephonic judicial approval.⁴⁹ In holding that the search violated Iowa’s prohibition against unreasonable search and seizure,⁵⁰ the court explicitly “reach[ed] [its] conclusions independently of federal constitutional analysis”⁵¹—rejecting lockstepping and embracing state constitutional autonomy. The court framed state constitutions as “the original protector of rights” and the federal one “as the follower of state tradition.”⁵² And it walked through Iowa’s constitutional conventions, finding that the state’s constitution has a “strong emphasis on individual rights.”⁵³

By rejecting lockstepping, *Short* stressed that state courts must interpret their constitutions independently, not in pursuit of

⁴⁴ Linde, *Unconstitutional Law*, *supra* note 29, at 135. Indeed, the Oregon Supreme Court officially adopted this model in *Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981), during Justice Linde’s tenure. The U.S. Supreme Court also implicitly approved the primacy approach by upholding the California Supreme Court’s interpretation of its free speech rights in *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980) (stating that states have a “sovereign right to adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution”).

⁴⁵ See Landau, *supra* note 43, at 837.

⁴⁶ ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 170 (2d ed. 2023).

⁴⁷ Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379, 380 (1980).

⁴⁸ 851 N.W.2d 474 (Iowa 2014).

⁴⁹ *Id.* at 476–77.

⁵⁰ *Id.* at 506; *see also* IOWA CONST. art. I, § 8 (“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause . . . particularly describing the place to be searched, and the persons and things to be seized.”).

⁵¹ *Short*, 851 N.W.2d at 481.

⁵² *Id.* It also noted an “emerging consensus” on the matter. *Id.* at 482 (citing Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 541 (1989)); *see also id.* at 487 (urging that it “is doubtful that uniformity is a constitutional value in a federal system” and that “diversity of constitutional analysis is baked into” the federal system).

⁵³ *Id.* at 482.

uniformity. *Short* thus exemplifies the need for a model, like democratic proportionality,⁵⁴ that ensures constitutional principles are actively enforced, rather than eroded through blind injection of federal law into the states.

While some states have fully adopted the primacy approach, others have chosen a more deferential model—the interstitial approach, in which courts first analyze a claim under federal law and only turn to state constitutional provisions if the federal claim fails.⁵⁵ Proponents argue that this model promotes efficiency and a unified national identity, but it ultimately subordinates state constitutions to federal doctrine and limits the development of independent state constitutional jurisprudence.⁵⁶ Proponents’ urged benefits—if they exist at all—pale in comparison to a state supreme court’s “solemn duty” to interpret its own constitution.⁵⁷ As the Supreme Court of Wisconsin put it: “[T]he state constitution is not the poor stepchild of its federal counterpart.”⁵⁸

New Judicial Federalism has given state courts the vocabulary and legitimacy to chart their own constitutional paths. But to fully realize its potential, courts require guiding principles rooted in the democratic commitments that distinguish state constitutions from their federal counterpart. This Note turns to one such principle: a doctrinal synthesis of political equality, popular sovereignty, and majority rule. Known as the democracy principle, it provides a structured, textually grounded approach for interpreting state constitutions in ways that deepen

⁵⁴ See *infra* Section I.C.

⁵⁵ See, e.g., *State v. Gomez*, 932 P.2d 1, 7 (N.M. 1997) (adopting interstitialism as New Mexico’s preferred method, citing efficiency and national unity as justifications); see also WILLIAMS & FRIEDMAN, *supra* note 46, at 172 (defining interstitialism). Additionally, some judges and scholars advocate for the dual sovereignty approach, under which state courts analyze their state constitution in tandem with its federal counterpart. *Id.* at 173.

⁵⁶ Proponents argue that federal constitutional guarantees provide a baseline “national identity” of rights, ensuring consistency across the states. 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, 986 (1985). However, this approach runs counter to New Judicial Federalism, which recognizes that federal constitutional guarantees serve as a floor, not a ceiling. See, e.g., William F. Swindler, *Minimum Standards of Constitutional Justice: Federal Floor and State Ceiling*, 49 MO. L. REV. 1, 13 (1984) (noting the “*minimum standards* identified and relied upon by the Supreme Court of the United States” (emphasis added)); *Florida v. Powell*, 559 U.S. 50, 59 (2010) (authorizing state supreme courts to “impose, based on the State’s Constitution, any additional protections . . . deem[ed] appropriate”).

⁵⁷ *State v. Baldon*, 829 N.W.2d 785, 815 (Iowa 2013); see also *Burling v. Chandler*, 804 A.2d 471, 476 (N.H. 2002) (per curiam) (noting that state supreme court justices take oaths to the *state* constitution as well as the federal one); *Commonwealth v. Gaffney*, 733 A.2d 616, 621 (Pa. 1999) (quoting *Commonwealth v. Gaffney*, 702 A.2d 565, 569 (Pa. Super. Ct. 1997)) (stating that the Pennsylvania Supreme Court must interpret the state’s constitution whenever one of its provisions is invoked).

⁵⁸ *State v. Johnson*, 729 N.W.2d 182, 189 n.7 (Wis. 2007).

democratic participation and resist passive lockstep with federal doctrine.⁵⁹

B. *The Democracy Principle*

According to the democracy principle, state constitutions have a unique tripartite commitment to political equality, popular sovereignty, and majority rule.⁶⁰ This idea was developed by Professors Bulman-Pozen and Seifter in their groundbreaking 2021 article *The Democracy Principle in State Constitutions*.⁶¹ This Section explains each of the components and how they apply to state constitutions. As *Mothering Justice* shows, courts can use the democracy principle and proportionality review together to redefine a state's constitutional commitment to democracy.

1. *Political Equality*

State constitutions' fidelity to political equality grants popular authority to the idea that state courts can and should interpret their constitutions in a way that swells democratic participation and enforces the popular will.⁶² Political equality has rightly been termed the "most important . . . principle embodied in the democratic ideal."⁶³ It is the manifestation of citizens' respect for one another, and of the state's respect for its citizens, which allows democracies to realize its members' "capacity for moral judgment and practical reason."⁶⁴ That animating belief prompts states to endorse the ideal that decisions about justice and the common good belong to *all* members of society, not the few or the many alone.⁶⁵ Indeed, democracy can live up to its promise only if the most numerous can be prevented from rendering the minority powerless and moot.⁶⁶

⁵⁹ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 862 (presenting the democracy principle as a textually and structurally grounded interpretational approach for preserving democratic participation).

⁶⁰ *Id.* at 864.

⁶¹ See generally Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 881–94 (explaining that state constitutions have committed to majority rule in support of popular sovereignty, while fears of government capture by minority factions resulted in commitments to political equality).

⁶² See *id.* at 890.

⁶³ Jeremy Waldron, *Democracy*, in *THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY* 187, 191 (David Estlund ed., 2012).

⁶⁴ *Id.* at 193.

⁶⁵ *Id.* at 194 ("When decisions about justice or the common good need to be made in a given society, all the members of that society are empowered to form a view and contribute to the process of public decision.")

⁶⁶ JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 170 (Harper & Brothers 1862) ("Democracy is not the ideally best form of government unless . . . it can be

While state constitutions from the Founding were aspirational about political equality (like Virginia’s original Constitution enshrining “equal” elections), it is obvious that they did not actually expect equality for anyone except white men.⁶⁷ However, after the passage of the Voting and Civil Rights Acts, political equality became, at least on paper, a full-fledged commitment in the states—even if there is much work to be done to realize it in practice.⁶⁸ But starting in the 1800s, even before the Civil Rights Movement, states began a tradition of “promoting the common good” by preventing legislatures from acting in favor of well-connected groups of individuals and against the will of the people (or from trampling on minorities).⁶⁹ Many states began passing full-fledged equal protection clauses. Oregon’s 1859 constitution, for example, stated that “[n]o 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.”⁷⁰

Today, political equality is the cornerstone of state democratic projects. As described later, it is the reason why a majority is barred from holding hostage a minority—political, racial, sexual, or any other—in a march toward complete dominance.⁷¹ While popular sovereignty and majority rule are limited by political equality, they hold no less import in upholding the democratic rights of the states’ citizens. Indeed, they are both cabined by and enhanced by commitments to political equality.

At the same time, history shows that popular sovereignty and majority rule have not always produced justice. As Professors Bulman-Pozen and Seifter warn, states have often used them to uphold slavery and racial subjugation.⁷² Notoriously, the concept of states’ rights was asserted by the Confederacy in the antebellum period and during the Civil War.⁷³ Even today, supporters of the “Lost Cause” maintain that the Civil War had little to do with the Southern desire to perpetuate the

so organized that no class, not even the most numerous, shall be able to reduce all but itself to political insignificance . . .”).

⁶⁷ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 890.

⁶⁸ *Id.* at 891; *see also id.* at 891 n.187 (discussing state voter ID laws and disenfranchisement of felons).

⁶⁹ *Id.* at 892–93.

⁷⁰ *Id.* at 893 (quoting OR. CONST. art. I, § 20).

⁷¹ *See infra* Section III.A.1.

⁷² Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 862 (“State majorities’ invocations of sovereignty, in particular, are indelibly connected to slavery and persisting racial injustice.”).

⁷³ *See, e.g.*, Paul Finkelman, *Slavery, the Constitution, and the Origins of the Civil War*, ORG. AM. HISTORIANS MAG. HIST., Apr. 2011, at 14, 14 (explaining that South Carolina seceded because the federal government had “violated the ‘compact’ underlying the Constitution” regarding protection of institutional slavery and noting that “Southerners wanted states’ rights for *their* states, but not for the Northern states”).

enslavement of human beings, but everything to do with the need for states to operate without interference from the federal government.⁷⁴ And similar states' rights claims were used after the Civil War and into the Jim Crow era to destroy Black enfranchisement and promote segregation,⁷⁵ twin evils that were only seriously abated by the Voting and Civil Rights Acts in the 1960s, allowing the United States for the first time to become a true democratic republic.⁷⁶

Political equality may define the foundation of democratic participation, but it is popular sovereignty that animates the structure of state constitutional governance.⁷⁷ It is the people themselves—not abstract principles or distant institutions—who grant legitimacy to state power.⁷⁸ State constitutions reflect this premise not only in theory, but in design: They presume that the governed remain the ultimate authors and editors of their own basic law.⁷⁹

2. Popular Sovereignty

State constitutions typically emphasize the state's reliance on popular sovereignty—that is, that the state's power is drawn exclusively from the governed. Indeed, “[e]very state constitution except New York’s includes an express commitment to popular sovereignty.”⁸⁰ For example, the Constitution of Delaware, the first state, declares: “[A]ll just authority in the institutions of political society is derived

⁷⁴ See, e.g., Grace Elizabeth Hale, *The Lost Cause and the Meaning of History*, ORG. AM. HISTORIANS MAG. HIST., Jan. 2013, at 13, 14 (noting that after the rise of the Ku Klux Klan in the late 19th century, soon after the end of the Civil War, “amateur and professional historians, many with ties to the Confederacy, worked to rewrite [the War’s] history as a noble fight for states’ rights and a celebration of the sacrifice of Confederate soldiers”); Scott Calvert & Cameron McWhirter, *The Civil War Still Echoes in the South, Forcing Towns to Take Sides*, WALL ST. J. (Sep. 21, 2024, at 21:00 ET), <https://www.wsj.com/us-news/confederate-monument-protests-civil-war-06347a2e> [<https://perma.cc/S5RX-XQ6P>] (discussing some Southerners who oppose taking down Confederate statues because they believe the Confederacy “pursued a noble cause about states’ rights, not preserving slavery”).

⁷⁵ See, e.g., Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 302–03 (2000) (noting the racist suffrage requirements of the Alabama Constitution of 1901 and discussing the “immediate and devastating” effect of similar ones throughout the Jim Crow South).

⁷⁶ See, e.g., Andrea Bernini, Giovanni Facchini, Marco Tebellini & Cecilia Testa, *Sixty Years of the Voting Rights Act: Progress and Pitfalls*, 40 OXFORD REV. ECON. POL’Y 486, 490–93 (2024) (explaining the positive effects of the VRA, including a marked increase in Black political participation, Black office holders, and Black quality of life, the latter one brought on by the former two). *But see id.* at 494–95 (discussing backsliding on VRA issues by the U.S. Supreme Court and how there is more work to be done to secure Black voting rights).

⁷⁷ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 869–70.

⁷⁸ *Id.*

⁷⁹ *Id.* at 870.

⁸⁰ *Id.* at 869.

from the people, and established with their consent, to advance their happiness.”⁸¹ California’s states: “All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.”⁸² And Georgia’s proclaims: “All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people and are at all times amenable to them.”⁸³

State constitutions further allow a certain ease of amendment that epitomizes the people’s sovereignty in a way that differs from the federal Constitution. By design, the federal Constitution’s amendment process is brutal and difficult.⁸⁴ The Framers were divided on how amendable the Constitution would be, with Madison seeking to make the process arduous and Jefferson urging a smoother procedure.⁸⁵ Jefferson proposed regular updates to the Constitution, though not so frequent as to render American law unstable—he settled on “every generation.”⁸⁶ However, Jefferson did not win the day on that issue. Madison’s “[c]onstitutional veneration,”⁸⁷ according to him, ensured protection from wild vacillations but still prevented “that extreme difficulty, which might perpetuate its discovered faults.”⁸⁸

Madison’s hope that a difficult amendment process would protect the federal Constitution from instability while allowing needed reform has proven misplaced: The Constitution is nigh impossible to amend,⁸⁹ therefore near-immortalizing its “discovered faults.”⁹⁰ State constitutions, on the other hand, are not. “[I]n the early twentieth century, [states] began to embrace the constitutional initiative, which

⁸¹ DEL. CONST. pmbl.

⁸² CAL. CONST. art. II, § 1.

⁸³ GA. CONST. art. I, § 2, ¶ 1.

⁸⁴ See Richard Albert, *The World’s Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2007 (2022) (noting that just twenty-seven of twelve thousand proposed amendments have been ratified).

⁸⁵ *Id.* at 2020–21.

⁸⁶ *Id.* at 2021 (quoting Thomas Jefferson, *Proposals to Revise the Virginia Constitution: I. Thomas Jefferson to “Henry Tompkinson” (Samuel Kercheval), 12 July 1816*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/03-10-02-0128-0002> [https://perma.cc/8HNH-SKA3] (last visited July 21, 2025)).

⁸⁷ *Id.* at 2020.

⁸⁸ THE FEDERALIST No. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

⁸⁹ DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 170 (2006) (ranking the U.S. Constitution as the hardest to amend in the world of any democracy); cf. David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317, 2372, 2395 (2021) (arguing, after a historic survey, that most amendments have not followed the rigid formalism often attributed to Article V).

⁹⁰ THE FEDERALIST No. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

allows the people to propose and ratify amendments without the legislature.”⁹¹ Many states also have periodic constitutional conventions, allowing the people to partake directly in amending their fundamental law.⁹² At those conventions, delegates do not hesitate to revise their state charters. They see them as living documents, and they want to ensure that progress breathes new life into their constitutions.⁹³ The relative ease of amendment in state constitutions reflects their commitment to popular sovereignty—it should be the people currently living under a basic law who decide what it says, not bygone drafters who simply (and obviously) do not experience the problems of those who must face that law’s consequences.⁹⁴ In imploring Madison to recognize the notion of generational sovereignty, Jefferson wrote: “[T]he earth belongs in usufruct to the living . . . the dead have neither powers nor rights over it.”⁹⁵ It seems, for now, only the states have recognized the truth in Jefferson’s argument.

The states’ embrace of direct democracy is also vital to their adherence to popular sovereignty.⁹⁶ While the federal Constitution lacks a mechanism for a direct expression of the people’s will (outside voting for representatives and senators), state constitutions are replete with them. Several state constitutions, like that of Michigan,⁹⁷ provide not only for constitutional initiative but statutory initiative as well. Such provisions allow the people themselves to bypass their representatives and draft bills for approval by their legislature or their fellow citizens. They might be especially useful where state legislatures are either unresponsive or downright hostile to their constituents.⁹⁸

⁹¹ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 883.

⁹² *Id.* at 882–83 (noting that state constitutions have been amended collectively 7,500 times since the 18th century, and that multiple states submit the question of whether to hold a constitutional convention to voters every twenty years). Jefferson believed that a constitution’s lifespan was nineteen years before it had to be rewritten. *To James Madison from Thomas Jefferson*, 6 September 1789, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-12-02-0248> [<https://perma.cc/L9G5-EDSA>] (last visited July 13, 2025).

⁹³ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11 at 883 (internal quotation marks and citations omitted).

⁹⁴ See generally Andrew Coan, *The Dead Hand Revisited*, 70 EMORY L.J. ONLINE 1 (2020) (explaining the importance of what has been labeled the dead hand problem).

⁹⁵ *To James Madison from Thomas Jefferson*, *supra* note 92 (internal quotation marks and italics omitted).

⁹⁶ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 883–84 (describing the growth of constitutional initiatives and referenda during the early twentieth century).

⁹⁷ See *infra* Section II.A.

⁹⁸ See Seifter, *Countermajoritarian Legislatures*, *supra* note 7, at 1733 (“Across the nation, the vast majority of states in recent memory have had legislatures controlled by either a clear or probable minority party.”).

3. *Majority Rule*

As a final arrow in the states' democratic quiver, and unlike the federal charter,⁹⁹ “[e]very state constitution confers the right to vote” and “furnish further electoral protections.”¹⁰⁰ The state constitutional commitment to majority rule is so firm that many of them explicitly state that the state’s citizens have the right to abolish the state’s government should they deem it necessary. For example, Tennessee’s constitution affords its people the “unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper”¹⁰¹ and Kentucky’s gives its citizens the same.¹⁰² Meanwhile, states have many more popularly elected officers than does the federal government. While Americans can vote directly for their members of Congress, they may not vote directly for President.¹⁰³ By contrast, the states have a slew of directly elected officials—governors, state legislators, judges and supreme court justices, and cabinet officials.¹⁰⁴ Largely to combat unrepresentative legislatures, states created so many elected offices to establish a counterweight to lawmakers who cared little for their constituents—gerrymandered lawmakers could effectively be checked by officials accountable to the whole electorate of the state.¹⁰⁵

This structural emphasis on electoral accountability is inexorably tied to the principle of majority rule. For one, all but eleven states require only a simple majority of voters to amend their constitution.¹⁰⁶ That resolves the dead hand problem, or what Professors Bulman-Pozen and Seifter call “the [p]roblem of [p]resent [c]onsent.”¹⁰⁷ Further, state constitutions have a “nearly universal” mandate that elected

⁹⁹ See, e.g., *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“The individual citizen has no federal constitutional right to vote for electors for the President of the United States . . .”).

¹⁰⁰ *Id.* at 870–71.

¹⁰¹ TENN. CONST. art. I, § 1.

¹⁰² See KY. CONST. § 4.

¹⁰³ See *supra* notes 8–9, 99 and accompanying text (discussing America as a representative republic).

¹⁰⁴ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 872–73 (listing elected offices filled by statewide vote).

¹⁰⁵ *Id.* at 886.

¹⁰⁶ See John Dinan, *Constitutional Amendment Process in the 50 States*, STATE CT. REP. (July 24, 2023), <https://statecourtreport.org/our-work/analysis-opinion/constitutional-amendment-processes-50-states> [https://perma.cc/S62V-N6DE] (explaining that Delaware has no ratification requirement; New Hampshire requires two-thirds; Florida requires three-fifths; Colorado requires fifty-five percent; Hawai‘i, Minnesota, Tennessee, and Wyoming require approval by a majority of all election voters (so abstentions count as “no” votes); and Illinois permits ratification either by three-fifths of amendment voters or a majority of all election voters).

¹⁰⁷ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 896.

officials are anointed only by receiving the highest number of votes.¹⁰⁸ Such mechanisms reflect a conscious choice to prioritize majority rule as a means of embodying the democratic ideal.

4. *Addressing Skepticism*

Like any theory of constitutional law, the democracy principle is not without critique. Some may argue that it is too abstract to serve as a doctrinal tool, and that it functions as a value-laden aspiration—one that could allow judges to substitute their political preferences for constitutional meaning. But that critique misunderstands both the principle's content and its constitutional grounding. The democracy principle is not a free-floating ideological lens; it is a synthesis of commitments explicitly or implicitly embedded in every state constitution.¹⁰⁹ Unlike appeals to abstract liberty or federalism, it draws on enumerated rights, procedural structures, and a widespread design logic that recognizes the people's sovereign power and enforces political equality.

To be sure, not every state court will derive identical values from its constitution. New Judicial Federalism does not demand uniformity—it authorizes courts to reason from their own texts, histories, and structures.¹¹⁰ The democracy principle is one such articulation: a doctrinal coalescence grounded in widespread commitments to political equality, popular sovereignty, and majority rule. It does not exhaust the possible paths under New Judicial Federalism, but it exemplifies the kind of constitutional reasoning that New Judicial Federalism makes possible. In this sense, the democracy principle is not an external theory imposed from above, but an interpretive method grown from within.

Just as federal courts have derived interpretive doctrines from the separation of powers¹¹¹ or federalism¹¹² (concepts, by the way, nowhere textually defined in the U.S. Constitution) so too can state courts reason from the democracy principle. The democracy principle does not guarantee any one ideological outcome; indeed, its tripartite

¹⁰⁸ *Id.* at 889.

¹⁰⁹ See *supra* Sections I.B.1–I.B.3. See generally Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11 (arguing that state constitutions embody a “democracy principle” grounded in text, history, and structure, reflecting commitments to popular sovereignty, majority rule, and political equality).

¹¹⁰ See *supra* Section I.A.

¹¹¹ See, e.g., *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273–75 (2024) (Thomas, J., concurring) (discussing why judicial deference to reasonable agency action violated the separation of powers).

¹¹² See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (“The independent power of the States also serves as a check on the power of the Federal Government . . .”).

structure resists capture by majoritarian excess or elites.¹¹³ Instead, it offers a framework by which state courts can uphold the participatory anatomy of their constitutions while respecting constitutional variation across states. In that sense, the democracy principle is not a theory but a judicial responsibility. To reject it because of its contestability would be to treat state constitutional law as a field where only uncontroversial principles may govern—a standard that federal constitutional law has never met (and certainly does not now meet),¹¹⁴ and one that would deny the people of the states the full benefit of their own basic law.

In any case, as important as the democracy principle is, the three pillars can crumble absent an enforceable doctrinal framework. Without one, courts risk allowing legislatures to manipulate democratic structures while claiming to uphold them. When that happens—as it did when Michigan’s legislature destroyed the intent of its constituents in 2018¹¹⁵—courts cannot simply rely on existing federal-tiered scrutiny or vague commitments to democracy. They must have a structured method for evaluating legislative actions that infringe on democratic rights. That is where democratic proportionality review becomes essential. The next Section will examine how state courts can and should draw on the concept of proportionality review, rooted in foreign jurisprudence, to push back against legislatures entrenched in minoritarian rule.

C. *Democratic Proportionality Review*

Despite their unique commitments to positive rights and democratic self-governance, state courts often interpret their constitutions by mimicking federal methods—a practice known as methodological lockstepping. This Section critiques that approach and argues for a more fitting alternative: democratic proportionality review. Grounded in the values of popular sovereignty, majority rule, and political equality, this framework empowers state courts to interpret rights holistically and hold governments accountable to their constitutional obligations. The framework proceeds in three steps: (1) determining whether the government’s objective is permissible; (2) assessing

¹¹³ See Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 880 (explaining the three defining features of the democracy principle); *id.* at 892–94 (describing state responses to legislatures acting for the benefit of special interests in the nineteenth and twentieth centuries).

¹¹⁴ See generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017) (urging that the nondelegation doctrine was never truly a constraint on Congress). *But see* Gundy v. United States, 588 U.S. 128, 152–70 (2019) (Gorsuch, J., dissenting) (arguing the opposite).

¹¹⁵ See *supra* notes 1–6 and accompanying text; see also *infra* notes 214–20 and accompanying text.

whether the means used are suitable and whether there are less restrictive alternatives available; and (3) evaluating whether the benefits of the government's action outweigh the harms to the right. These steps can work in tandem with the democracy principle to build out a more honest body of state constitutional law, anchored to the promises of New Judicial Federalism.

1. *The Problem of Methodological Lockstepping*

Individual rights, unlike in the federal Constitution, stand squarely in the state constitutional spotlight.¹¹⁶ The states not only have a litany of enumerated rights for their citizens, but those rights also tend to be framed positively—as opposed to the exclusively negative rights in the U.S. Constitution. For example, almost every state has a positive right to “pursue happiness or safety,” to “public education,” and to “access government records and deliberations.”¹¹⁷ Many have a right to privacy, to “sex equality or freedom from sex-based discrimination,” to hunt and fish, to “enjoy clean air and water,” and more.¹¹⁸

States also, in exchange for affording citizens individual rights, expect those living within their borders to “bear[] responsibilities to others.”¹¹⁹ As part of the project to support the public weal, states “situate the individual in the community” as a whole.¹²⁰ Almost all state constitutions contain a common benefits or common good clause that indicate the agreement that residents are part of a political community, and as such exchange some liberties for individual rights—they cannot abuse those rights to defeat the public good; the rights can be invoked only to cultivate it.¹²¹ And, of course, state constitutions place self-determination at the forefront.¹²²

Despite state constitutions' distinctiveness from the federal Constitution, many state supreme courts have decided to march in lockstep with the U.S. Supreme Court when interpreting analogue

¹¹⁶ Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1864 (“If individual rights were a postscript to the framing of the U.S. Constitution, state constitutions that both preceded and followed the federal document have always foregrounded such rights.”).

¹¹⁷ *Id.* at 1866–68.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1869.

¹²⁰ *Id.*

¹²¹ *Id.* at 1871; *see also, e.g.*, OHIO CONST. art. I, § 11 (“Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of the right . . .*” (emphasis added)).

¹²² *See supra* Section I.B.2; *see also, e.g.*, Advisory Op. to the Att’y Gen. re Right to Treatment & Rehab. for Non-Violent Drug Offenses, 818 So. 2d 491, 494 (Fla. 2002) (“[T]he Florida Constitution embodies the right of self-determination for *all* Florida’s citizens.”).

individual rights.¹²³ Many have also engaged in what Professors Bulman-Pozen and Seifter call *methodological lockstepping*: state court judges shutting their eyes to holistic state constitutional interpretation and following the Supreme Court's procedure in identifying and isolating a right's clause, then deciding which tier of scrutiny a lawsuit should get. This formulaic method often prioritizes the appearance of judicial restraint over the substantive interpretation of state constitutional commitments—even in states where the countermajoritarian difficulty is largely a fiction.¹²⁴

United States Supreme Court decisions often follow a formula: “[I]dentifying the constitutional provision most relevant to the case, looking up the clause-specific doctrinal rules associated with that provision, and then resolving the case in accordance with those rules.”¹²⁵ However well that may work for federal courts—and there are arguments that it does not¹²⁶—“it is an error when it comes to state constitutions.”¹²⁷ Professors Bulman-Pozen and Seifter contend that state constitutional clauses must be read together if they are to effectuate their purpose.¹²⁸ And overlapping rights have enhanced each other in other ways—for example, principles of equality and liberty have combined to allow for same-sex marriage.¹²⁹

The three tiers of scrutiny—rational basis, intermediate, and strict—are utilized in federal cases by federal courts when discerning whether legislation comports with a constitutional right or violates that right. Typically, rational basis review is chosen when a right is not

¹²³ See, e.g., *supra* notes 17–18 and accompanying text.

¹²⁴ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1882.

¹²⁵ Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1069 (2016). See generally *Craig v. Boren*, 429 U.S. 190, 197–200 (1976) (identifying Equal Protection Clause jurisprudence and applying intermediate scrutiny to sex-based discrimination); *Washington v. Glucksberg*, 521 U.S. 702, 720–21, 728–35 (1997) (deciding that because assisted suicide is not deeply rooted in the Nation's history and tradition, a law forbidding it should get rational scrutiny, and the law is therefore constitutional).

¹²⁶ See Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1262 (2001) (urging that holistic interpretation “will make for better constitutional interpretation than one that narrowly focuses on particular clauses or words considered apart from their position and presence in the overall constitutional structure”).

¹²⁷ Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1883, 1897 (“[State] courts have held that children's educational rights are informed not only by clauses focused on schools and educational adequacy but also by clauses requiring equal protection or prohibiting segregation.”).

¹²⁸ *Id.* at 1883 (describing “state constitutions’ emphasis on democratic constitutional change”).

¹²⁹ See, e.g., *id.* at 1898 (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003) (stating that the Commonwealth's liberty clause would be “hollow” if same-sex marriage remained illegal)).

enumerated or not deemed fundamental—mostly economic rights—and legislation that is analyzed under rational basis is likely to survive so long as it is rationally related to a legitimate government interest—courts may even generate their own reasoning for the legislation when a government fails to do so.¹³⁰ On the opposite end, strict scrutiny for racial classifications has been called “strict in theory, but fatal in fact”¹³¹—it is vanishingly rare for a law to withstand strict scrutiny absent it being narrowly tailored to achieve a compelling governmental objective if it encroaches on an enumerated or fundamental right. In fact, the *only* compelling objectives recognized by the Supreme Court have been national security,¹³² enumerated rights and unenumerated fundamental rights like privacy¹³³ and travel,¹³⁴ and (formerly) diversity in higher education.¹³⁵ Intermediate scrutiny, meanwhile, has been used for quasi-suspect classifications, such as sex discrimination or discrimination on the basis of child-legitimacy status.¹³⁶

While the tiers can sometimes act as a sliding scale more than actually distinct levels,¹³⁷ they are wholly inappropriate for state constitutional analysis.¹³⁸ Much of the reason lies in the fact that many, if not most, state constitutional rights are framed positively. Professor Hershkoff wrote that under rationality review, “the Court functions as an umpire whose sole job is to maintain legislative power within institutional limits, not

¹³⁰ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (listing conclusions Oklahoma’s legislature “might have” made).

¹³¹ *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Marshall, J., concurring).

¹³² See *Korematsu v. United States*, 323 U.S. 214, 219–20 (1944) (upholding detention if “commensurate with threatened danger”), *overruled on other grounds by Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (overruling *Korematsu* due to the sole racial nature of Japanese detention).

¹³³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 565, 578 (2003) (holding that the right to liberty includes the right to engage in private sexual conduct).

¹³⁴ See *Saenz v. Roe*, 526 U.S. 489, 503–04 (1999) (recognizing the right to interstate travel).

¹³⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003) (recognizing diversity in higher education as a compelling governmental objective), *abrogated by Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 214–15 (2023).

¹³⁶ See *Craig v. Boren*, 429 U.S. 190, 198–99 (1976) (applying intermediate scrutiny to invalidate an Oklahoma law prohibiting the sale of nonintoxicating beer to men under twenty-one and women under eighteen); *Clark v. Jeter*, 486 U.S. 456, 461–63 (1988) (holding that a Pennsylvania law requiring illegitimate children to prove paternity before seeking support violated the Equal Protection Clause).

¹³⁷ See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534–38 (1973) (invalidating an act of Congress despite it being analyzed under rational basis scrutiny); *Craig*, 429 U.S. at 212 (Stevens, J., concurring) (“[W]hat has become known as the [t]iered analysis of equal protection claims does not describe a completely logical method of deciding cases, but . . . is a method . . . to explain decisions that actually apply a single standard in a reasonably consistent fashion.”).

¹³⁸ See *Bulman-Pozen & Seifter, Democratic Proportionality*, *supra* note 17, at 1885–88.

to ensure that power is used to reach a prescribed end.”¹³⁹ To the extent that rationality review was developed to address Justice Holmes’s concern in his *Lochner* dissent that “the 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics”¹⁴⁰—that is to say, that the Justices would interpret the law based on their preferred economic policies—that justification is greatly diminished by the fact that most state judges, including state supreme court justices, are either popularly elected or face retention elections after gubernatorial appointment.¹⁴¹

That electoral accountability is why the countermajoritarian difficulty, for its part, is simply not extant in the states. While it may be a “constitutional ‘obsession’” for the federal courts, state courts need not be bound by it.¹⁴² State judges, time and time again, have failed to recognize that the vast majority of them are not granted lifetime appointments. They thus believe that judicial restraint is a virtue at the state level. It is not, especially if a legislature seeks to defeat the will of the people. Judicial *activism* is a virtue in such a scenario. State high court decisions are ratified by the people who reelect justices or choose to retain them, and the same people put a check on state justices through popular elections that federal judges do not face.¹⁴³ Even where judicial elections are nonexistent, state justices are likely to confront term limits or mandatory retirement.¹⁴⁴ And their decisions may be overturned by popular referendum, where that is possible.

This accountability is especially important given the economic nature of state rights. Many enumerated and positive rights in state charters *require* the government to do something.¹⁴⁵ Since the Fourteenth Amendment and the rest of the Constitution *prohibits* the federal government from acting, rational basis makes sense. The federal judiciary, given its lifetime appointments and desire to remain removed

¹³⁹ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1154 (1999).

¹⁴⁰ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹⁴¹ See *Judicial Selections: An Interactive Map*, BRENNAN CTR. FOR JUST. (Aug. 20, 2024), <https://www.brennancenter.org/judicial-selection-map> [<https://perma.cc/CVG6-NRP6>]; see also, e.g., B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 LOY. L.A. L. REV. 1429, 1429 (2001) (describing the popularity of judicial retention elections).

¹⁴² Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1888 (citing Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155–59 (2002)).

¹⁴³ See Hershkoff, *supra* note 139, at 1158–59 (citing Burt Neuborne, Foreword, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900 (1989)).

¹⁴⁴ Rhode Island is the only state with life tenure. Michael Milov-Cordoba, *Life Tenure Is a Rarity on State Supreme Courts*, BRENNAN CTR. FOR JUST. (updated Oct. 2, 2024), <https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts> [<https://perma.cc/6NQY-QG32>].

¹⁴⁵ See *supra* notes 116–22 and accompanying text.

from the “political thicket,”¹⁴⁶ not to mention the sheer impossibility of political accountability, would be naturally uncomfortable with substituting its judgment for that of Congress, an elected legislative body.¹⁴⁷ Because of the “kind of popular veto” to which state judges are subjected,¹⁴⁸ they should—and if they are to interpret their constitutions faithfully—*must* step into this thicket; it is mandatory that they decide whether the government is doing enough to fulfill its obligations.

But just as rational basis is too deferential, strict scrutiny is too rigid for state constitutions. Presuming a state statute to be invalid just because it encroaches on an enumerated right makes little sense, especially when they overlap and there are simply so many of them. Additionally, many rights are “expressed as principles rather than rules.”¹⁴⁹ What does it really mean to ensure welfare or to protect the environment? That is for state courts to discern in interpreting their basic law. A legislature passing a statute that regulates a river may protect the environment or may harm it. Automatically setting it aside as not being narrowly tailored to a compelling state interest would “short-circuit meaningful judicial engagement” with state charters.¹⁵⁰

In sum, then, it is plainly nonsensical for state supreme courts to model their jurisprudence off the U.S. Supreme Court. When state judges adopt federal methods by default, they neglect their core responsibility: to give independent meaning to the guarantees enshrined in their own constitutions.

2. *Introducing Democratic Proportionality*

Instead, Professors Bulman-Pozen and Seifter contend that state supreme courts should adopt a proportionality review that centers on democratic rights. Familiar around the world if not in the United States,¹⁵¹ proportionality review consists of identifying a right, analyzing government action or inaction by determining whether it was arbitrary, improper, or insufficient, and balancing that right against the government (in)action, while ensuring the government can defend what

¹⁴⁶ *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion).

¹⁴⁷ For an illustration of this discomfort, see *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) (“Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments.”).

¹⁴⁸ Hershkoff, *supra* note 139, at 1158.

¹⁴⁹ Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1887.

¹⁵⁰ *Id.* at 1888.

¹⁵¹ See MOSHE COHEN-ELIYA & IDDO PORAT, *PROPORTIONALITY AND CONSTITUTIONAL CULTURE* 10–14 (2013) (describing the international spread of proportionality review from its roots in Germany, through its trunk in Europe, to its branches in Latin America, South Africa, Israel, India, Canada, and elsewhere).

it has or has not done.¹⁵² It consists typically of three stages: First, the government must show that its aim is permissible; second, it must show that its means were suitable to meet its end and that there were no “less drastic means . . . available”; and, finally, it must show that the benefits exceed the harms to the right.¹⁵³ For instance, the Israeli Supreme Court held that an ultra-Orthodox neighborhood could only ban cars from its street during Shabbat by first recognizing a restriction on the right to free movement, as well as a permissible government interest in protecting religious rights.¹⁵⁴ It then asked whether the neighborhood’s means were suitable and least restrictive, and whether the benefit to religious rights outweighed the harm to the freedom of movement.¹⁵⁵ Ultimately, the court concluded that the benefit outweighed the harm to the extent that the street could be blocked to traffic during prayers, but not for all of Shabbat.¹⁵⁶

Generally, proportionality review rests on what has been termed epistemological optimism (rooted in German political philosophy), which asserts that humanity is generally able to achieve moral progress through the separation of morally correct from morally wrong actions;¹⁵⁷ the rub, though, lies in the idea that such morality is proffered through “top-down social regulation.”¹⁵⁸ Under epistemological optimism, higher courts prefer to allow judges on lower courts to employ their own reasoning to discover law, making it ripe for proportionality.¹⁵⁹ The United States, though, does not reside in that legal culture. Instead, we live in an “epistemologically skeptical” legal society, in which judges are suspicious of top-down pronouncements of morality.¹⁶⁰ Given the plural opinions of the American federal judiciary, especially on the

¹⁵² *Id.* at 2 (defining proportionality review, describing its stages, and noting that it is “standard-based rather than categorical, and it is results-oriented rather than being a formal and conceptual doctrine”).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 17 (discussing HCJ 5016/96 Horev v. Minister of Transp., 51(4) PD 153 (1997) (Isr.)).

¹⁵⁵ *Id.* (identifying and applying the “three subtests of proportionality: (1) whether the means chosen (the detour) furthered the government’s end (protecting religious feelings), . . . (2) whether those means were the least restrictive possible, . . . and (3) whether the harm to the right to free movement was proportional to the benefit from protecting religious feelings”).

¹⁵⁶ *Id.*

¹⁵⁷ *See id.* at 90.

¹⁵⁸ *Id.* at 83.

¹⁵⁹ *See id.* at 90 (“This tradition of rationalism was characterized also by optimism regarding the jurist’s ability to discover the law through the exercise of reason and logic.” (internal quotation marks omitted)).

¹⁶⁰ *See Bulman-Pozen & Seifter, Democratic Proportionality, supra note 17, at 1907.*

Supreme Court,¹⁶¹ that suspicion leads higher courts to prefer rules which lower courts are required to follow.¹⁶² That is especially true given the preference for judicial minimalism in the United States. However, state judges are *part* of the body politic, not separate from it. Thus, they are already accountable to voters just as state legislatures are, and their actions may be effectively overridden by constitutional popular referendum.¹⁶³ Proportionality review in the states, then, does not require the epistemological optimism on which it relies elsewhere.

Further, while proportionality review may be deemed a poor fit for the U.S. Constitution, which is relatively bare and lacks positive rights, state constitutions do not have that problem. The state constitutional cup runneth over with positive rights, making proportionality suitable to state constitutional law.¹⁶⁴ And given the state constitutional commitment to the democracy principle, including autonomy and self-determination,¹⁶⁵ it makes sense to center state proportionality review on democratic rights. It would work as follows.

Democratic proportionality review adapts the traditional proportionality framework to align with the distinctiveness of state constitutional systems. A foundational element of this review is the holistic interpretation of rights.¹⁶⁶ State constitutional provisions are not read in isolation but are analyzed collectively to reflect their interdependence and broader constitutional commitments.¹⁶⁷ However, not all rights are made equal. While European proportionality review typically places human dignity at its center due to legal developments following World War II and the Holocaust,¹⁶⁸ state constitutions are far more likely to lionize autonomy and democracy.¹⁶⁹ Thus, “core rights” would be those related to majority rule, popular sovereignty, and political equality—that is, the democracy principle. Courts employing democratic proportionality review would likely identify the right to vote,

¹⁶¹ See COHEN-ELIYA & PORAT, *supra* note 151, at 100 (“[T]he US system, whereby Supreme Court justices are appointed by the President for an unlimited term, leads to a Court that is divided along party lines and characterized by a great deal of adversarialism.”).

¹⁶² See *id.* at 95 (“Rules allow constitutional court judges vertical control over lower courts, since they provide the latter with relatively clear guidelines as to how to decide cases . . .”).

¹⁶³ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1908.

¹⁶⁴ See *infra* Section III.A.2.

¹⁶⁵ See *supra* Section I.B.

¹⁶⁶ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1897–99.

¹⁶⁷ For example, a right to education might be interpreted alongside equal protection guarantees or environmental provisions to fulfill its full constitutional purpose.

¹⁶⁸ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1900.

¹⁶⁹ *Id.* at 1904–06 (discussing how state constitutions often impose restraints on the legislature to limit or prevent arbitrary government action).

to initiative or referendum, to personal autonomy, to free expression, as those in the heartland of state constitutional law.¹⁷⁰

As a second step, a court would need to evaluate a government action or inaction, which involves two key inquiries. First, a court would assess whether the action is arbitrary, improper, or fails to meet constitutional obligations.¹⁷¹ Legislatures may place limits on rights; none is absolute. However, it is crucial for the legislature to act in a reasonable manner. Courts cannot allow legislatures to arbitrarily curtail democratic rights. State courts may grant deference, but it is important that legislatures deeply engage in the “culture of justification” that accompanies proportionality review.¹⁷² Courts should examine whether the government has fulfilled its affirmative duties under a positive grant to citizens, such as ensuring access to education, public welfare, or environmental protections. These evaluations recognize the central role of positive rights in state constitutions and hold the government accountable for facilitating their enjoyment. State courts must help to “guarantee popular rights in the face of potentially hostile or apathetic government actors.”¹⁷³

Finally, courts must balance the government action against the right. This is something more than just determining whether something is narrowly tailored to achieve a compelling government interest on one end, or is rationally related to a legitimate one on the other. Courts engage in proportionality analysis to ensure that laws and policies align with constitutional mandates while respecting the embedded role of state courts in the democratic process. The process, called proportionality as such, is usually distinct from politics in other countries. However, in the states, that is not possible. State court judges stand within the political system by design—the epistemological skepticism that manifests in American legal culture that might hobble proportionality at the federal level promotes it at the state level. The people can provide a check on judges and justices who create rules that are disliked by the majority. This democratic embeddedness requires state courts to justify their decisions in ways that enhance public understanding, transparency, and engagement.

In general, though, democratic proportionality review would involve courts assessing the importance of the state interest against the right, and, in a way not unfamiliar to federal courts, determining

¹⁷⁰ *Id.* at 1901.

¹⁷¹ *See id.* at 1903–06.

¹⁷² That term stems from South African human rights law and is born of apartheid. Etienne Mureinik, a South African human rights lawyer, coined it in arguing that government must justify *all* actions for them to be legitimate. *Id.* at 1910.

¹⁷³ *Id.* at 1906.

whether the legislation actually effectuates that interest. State courts can actively seek real justification from the government and use their popular authority as a sword against legislatures operating against the popular will or in an arbitrary manner in contravention to constitutional rights, especially positive ones but sometimes negative ones as well. Individual rights are the heartland of proportionality review, but it is apt to be adapted to community- and politically-centered rights such as voting and representation. *Mothering Justice*, as decided by the Michigan Supreme Court, tended to review Michigan's initiative right in such a way. That decision will be analyzed in the next Part.

II

MOTHERING DEMOCRATIC PROPORTIONALITY: A CASE STUDY

Mothering Justice exemplifies the values set out by New Judicial Federalism, the democracy principle, and democratic proportionality review—three ideas that build on one another. New Judicial Federalism encourages state courts to interpret their constitutions independently rather than mirror federal methods. The democracy principle gives that independence a substantive core, rooted in state commitments to popular sovereignty, majority rule, and political equality. Democratic proportionality review draws on that foundation to offer a method of analysis attuned to those commitments. While the Michigan Supreme Court did not explicitly frame *Mothering Justice* in these terms, its reasoning reflected all three. This Part analyzes the case through that lens. It will first situate the case within Michigan's constitutional commitment to the democracy principle. It will then examine the Michigan Supreme Court's reasoning in the context of the democracy principle and democratic proportionality.

A. *Michigan's Fidelity to Democratic Principles*

This Section exemplifies one judicial method for finding a state's democracy principle: a close examination of state constitutional history.¹⁷⁴ Michigan's four constitutions have forged its commitment to the democracy principle.

The state's first constitution, drafted in 1835,¹⁷⁵ reflected a deep fidelity to popular sovereignty and majority rule. That the "power is inherent in the people" was present from the beginning.¹⁷⁶ The document

¹⁷⁴ See *infra* Section III.A.1.

¹⁷⁵ DETROIT MERCY L. LIBRARY, MICHIGAN'S FOUR CONSTITUTIONS (2024), <https://libguides.udmercy.edu/michconst> [<https://perma.cc/5XER-5B6G>].

¹⁷⁶ SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION 9 (2011).

granted the right to vote to *all* white men older than twenty-one, not just landowners.¹⁷⁷ It also provided for the “ultrademocratic” provision that lower court judges be elected by the people,¹⁷⁸ displaying an early commitment to the democracy principle and removing barriers posed by the countermajoritarian difficulty.¹⁷⁹ Further, its second amendment provided that a popular referendum be held for every law “authorizing the borrowing of state money or the issuing of state stocks,” launching a rich tradition of direct democracy in the state and anchoring early Michigan governance in the democratic values that New Judicial Federalism would later aim to protect and uplift.¹⁸⁰

However, due to a lack of corporate regulation and the 1835 constitution’s warmth toward corporate interests, another convention was convened in 1850.¹⁸¹ Suffrage in the new charter was kept from Black Michiganders, but it was extended to Native American men.¹⁸² The constitution also included a requirement that voters consider revising the constitution every sixteen years, enshrining a form of democratic self-renewal and ensuring that the people remained the ultimate arbiters of their basic law.¹⁸³ And positive rights abounded, including state support for the deaf and blind, reflecting a growing commitment to collective welfare as part of the state’s constitutional identity.¹⁸⁴

Black Michiganders finally received the right to vote in 1869.¹⁸⁵ And following several unsuccessful attempts at constitutional overhaul, voters approved a new convention in 1907.¹⁸⁶ The resulting constitution gave women property rights but, while allowing them to vote on some state financial matters, withheld full enfranchisement until the ratification of the U.S. Constitution’s Nineteenth Amendment.¹⁸⁷ Importantly, essential rights were excavated from the labyrinth of the 1850 constitution’s text and placed in a dedicated declaration of rights, a structural affirmation of the state’s growing commitment to individual dignity and legal clarity.¹⁸⁸ These changes—expanding rights across

¹⁷⁷ *Id.* Some delegates wanted to extend suffrage to even resident aliens. *Id.*

¹⁷⁸ *Id.* at 10.

¹⁷⁹ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1888–91 (describing why the countermajoritarian difficulty does not apply to elected state courts).

¹⁸⁰ FINO, *supra* note 176, at 11.

¹⁸¹ *Id.* at 11–12.

¹⁸² *Id.* at 14.

¹⁸³ *Id.* Jefferson had recommended this to Madison. See *supra* note 86 and accompanying text.

¹⁸⁴ FINO, *supra* note 176, at 15.

¹⁸⁵ *Id.* This development greatly expanded the state’s political community, as one step toward the democracy principle’s political equality.

¹⁸⁶ *Id.* at 16–17.

¹⁸⁷ DETROIT MERCY L. LIBRARY, *supra* note 175.

¹⁸⁸ *Id.*

racial, gender, and property lines—reflected an evolving constitutional embrace of political equality, one of the pillars of the democracy principle.

But in the 1913 amendments, direct democracy took center stage. Building on early democratic foci, “initiative, referendum, and recall became Michigan fundamental law in April 1913.”¹⁸⁹ To ensure self-execution, the amendments were quite detailed;¹⁹⁰ due to intense gerrymandering, the legislature could not be trusted to implement the constitution.¹⁹¹ These reforms structurally entrenched popular sovereignty by transferring core legislative functions directly to the people themselves.

Then, in 1947, the constitution was again amended to allow for the nonpartisan popular election of supreme court justices in addition to all lower court judges and local judicial officers.¹⁹² This expanded majority rule within the judiciary and enhanced electoral accountability at every tier of government. And in a final series of amendments, the electorate established several policy provisions showing Michiganders’ “traditional distrust of leaving public policy to a mercurial legislature.”¹⁹³ This impulse to constitutionalize policy choices reflected a deep-seated belief in democratic self-governance and a commitment to limiting the discretion of elected officials when it might threaten that democratic accountability.

The third constitution remained in place for some time until the current one, ratified in 1963 in the throes of the Civil Rights Movement, was enacted. The final convention was called largely due to malapportionment concerns—the Michigan Senate grossly overrepresented rural counties.¹⁹⁴ This structural imbalance undermined majority rule and prompted urgent constitutional correction. The fourth convention helped to inch Michigan closer to fulfillment of its stated

¹⁸⁹ FINO, *supra* note 176, at 18.

¹⁹⁰ *Id.* at 18–19. That may have been out of a fear that an unrepresentative legislature would enact implementing legislation rendering the amendments ineffective. See Seifter, *Countermajoritarian Legislatures*, *supra* note 7, at 1776 (“In the twentieth century, a period of ‘stasis’ fell over districting, but that did not eliminate districting distortions; to the contrary, it locked in malapportionment.”).

¹⁹¹ FINO, *supra* note 176, at 23.

¹⁹² *Id.* at 20.

¹⁹³ *Id.* at 21. The people wrested control of highway funding from the legislature, for example. *Id.*

¹⁹⁴ *Id.* at 23. The state “fac[ed] the prospect of state politics being controlled by the three counties of the southeastern corner of the state.” *Id.* This was a common problem at the time throughout the country: “[I]n 1947 residents of urban areas made up 59 per cent of the United States population but elected only about 25 per cent of the state legislators in the country.” Seifter, *Countermajoritarian Legislatures*, *supra* note 7, at 1776 (citing Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1064 (1958)).

commitment to political equality,¹⁹⁵ with several Black delegates helping to draft the constitution.¹⁹⁶ An equal protection clause was added, mirroring the federal clause, along with a constitutionally-authorized civil rights commission insulated from legislative interference.¹⁹⁷ This institutional safeguard demonstrated a heightened commitment to both political equality and the integrity of democratic participation. And after *Baker v. Carr*,¹⁹⁸ delegates compromised on apportionment, reinforcing majority rule by ensuring that each citizen's vote would carry more equal weight.¹⁹⁹

Regarding the provisions invoked in *Mothering Justice*, Michigan's constitution begins with a statement that “[a]ll political power is inherent in the people.”²⁰⁰ This foundational clause places popular sovereignty at the core of Michigan's constitutional identity. The democracy principle is refracted through that section, with the second and final sentence stating: “Government is instituted for their equal benefit, security and protection.”²⁰¹ That section alone helped enshrine political equality, as the Michigan Supreme Court held in 1960 that it was to be construed as the federal Equal Protection Clause had been.²⁰² Importantly, political power is only ceded by the people when delegated “by Constitution or statute.”²⁰³ Read together, these provisions reflect the animating force of all three pillars of the democracy principle—sovereignty lies with the people, it is exercised to achieve political equality, and it is structured to ensure majority rule.

Section 9 of Article II grants to the voters the initiative and referendum powers.²⁰⁴ It explains the process required to send an

¹⁹⁵ See *supra* Section I.B.1 (discussing political equality in context of the democracy principle and the Civil Rights Movement).

¹⁹⁶ This was not nearly proportionate to the state's Black population. About nine percent of Michigan's population was Black in 1960. See BUREAU OF THE CENSUS, U.S. DEP'T OF COM., NEGRO POPULATION, BY COUNTY: 1960 AND 1950, at 2 (1960), <https://www2.census.gov/library/publications/decennial/1960/pc-s1-supplementary-reports/pc-s1-52.pdf> [<https://perma.cc/TH4Z-9FAT>].

¹⁹⁷ FINO, *supra* note 176, at 26.

¹⁹⁸ 369 U.S. 186 (1962).

¹⁹⁹ The Michigan House of Representatives was apportioned by population and the Senate by both population and land area. FINO, *supra* note 176, at 26.

²⁰⁰ MICH. CONST. art. I, § 1.

²⁰¹ *Id.*

²⁰² *Gauthier v. Campbell, Wyant & Cannon Foundry Co.*, 104 N.W.2d 182, 183 (Mich. 1960) (citing *Naudzius v. Lahr*, 253 Mich. 216, 222 (1931); *Cook Coffee Co. v. Vill. of Flushing*, 267 Mich. 131, 134 (1934)). This was before an explicit equal protection clause was ratified. FINO, *supra* note 176, at 26.

²⁰³ *Pub. Schs. of Battle Creek v. Kennedy*, 223 N.W. 359, 360 (Mich. 1929).

²⁰⁴ MICH. CONST. art. II, § 9. Initiative is the “power to propose laws and to enact and reject laws” while referendum is “the power to approve or reject laws enacted by the legislature.” *Id.*

initiative to the legislature or place a referendum on the ballot²⁰⁵ and lays out that initiatives and referenda cannot be vetoed. Crucially, it describes the legislature's three options when referred an initiative by voters: adopt, amend and place on the ballot, or reject and place on the ballot.²⁰⁶ While legislation originating in initiative and referenda are on "equal footing" with legislation drafted by the legislature,²⁰⁷ the section is "liberally construed" to ensure it provides a voice to the people, who reserved to themselves the power of initiative and referendum.²⁰⁸ The provision thereby enshrines both popular sovereignty and majority rule by treating the electorate as an independent lawmaking body—one not subordinate to the legislature, but coequal with it.

Finally for *Mothering Justice*, Section 1 of Article IV of the Michigan Constitution vests legislative power in "a senate and a house of representatives."²⁰⁹ The power is plenary except as restricted by the state and federal constitutions.²¹⁰ But imperatively, that plenary power does not override the structural commitments Michigan's Constitution makes to the people themselves. It was that power, potentially at odds with the legislature's constitutionally mandated procedure in Article II, Section 9, that was at issue in *Mothering Justice*. The case would test the limits of legislative authority in light of the state's deep constitutional commitment to popular sovereignty and direct democracy.

B. *How Mothering Justice Made the Democracy Principle Official*

*Mothering Justice v. Attorney General*²¹¹ exemplifies the sua sponte, though quiet and tepid, embrace of democratic proportionality. Part of this Note's novel contribution is to read *Mothering Justice* as an early model of what democratic proportionality review can look like when rooted in the democracy principle. While the court did not name proportionality, the structure of its reasoning mirrors this Note's later proposal.²¹²

²⁰⁵ *Id.* ("To invoke the initiative or referendum, petitions signed by a number of registered electors, not less than eight percent for initiative and five percent for referendum of the total vote cast for all candidates for governor at the last preceding general election . . . shall be required.").

²⁰⁶ *Id.*

²⁰⁷ Advisory Op. on Constitutionality of 1982 PA 47, 340 N.W.2d 817, 825 (Mich. 1983) (quoting *Luker v. Curtis*, 136 P.2d 978, 979 (Idaho 1943)).

²⁰⁸ *Kuhn v. Dep't of Treasury*, 183 N.W.2d 796, 799 (Mich. 1971).

²⁰⁹ MICH. CONST. art. IV, § 1.

²¹⁰ *Oakland Cnty. Taxpayers' League v. Bd. of Supervisors*, 94 N.W.2d 875, 885 (Mich. 1959).

²¹¹ *Mothering Justice III*, No. 165325, 2024 WL 3610042 (Mich. July 31, 2024).

²¹² See *infra* Part III.

At bottom, *Mothering Justice* was a battle between an unrepresentative state legislature that sought to circumvent the popular will and the tripartite principles of political equality, popular sovereignty, and majority rule. In the 2016 election, whose results led to the composition of the legislature from whence *Mothering Justice* came, state House results were virtually tied—49.19% for Republicans and 49.13% for Democrats—but Republicans won *sixty-three* of 110 seats, or 57.2% of seats.²¹³ Similarly, in the state Senate, Republicans won the 2014 election's²¹⁴ popular vote by just a 1.5 percentage point plurality but won a massive 71% of the seats in the legislature.²¹⁵ Professor Seifter calls this a “manufactured majority,” a phrase she borrows from Professors Issacharoff, Karlan, Pildes, and Persily.²¹⁶ It is when a party is unable to find majority support among the voting electorate—for one reason or another, whether geographic sorting or political gerrymandering—but gains basically unrivaled political power.²¹⁷ While the 2014 state Senate and 2016 state House elections were not strictly *minoritarian*—i.e., Democrats did not receive *more* votes than Republicans—that a party is rewarded with complete legislative control for failing to win a majority of the popular vote certainly does not respect the state constitutional commitment to popular sovereignty and majority rule.²¹⁸

Therefore, when the lame-duck legislature failed to comport itself according to the procedure outlined in the state constitution regarding the treatment of voter initiatives, it was under the auspices of expansive legislative power—“as broad, comprehensive, absolute, and unlimited as that of the parliament of England”²¹⁹—that the legislature did so.

²¹³ See *Michigan House of Representatives Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Michigan_House_of_Representatives_elections,_2016 [https://perma.cc/42DA-2GR4] (last visited Aug. 31, 2025) (showing number of seats and vote totals for individual elections, which were summed by the author to find overall party percentages).

²¹⁴ Michigan state senators are elected every four years, while state representatives are elected every two years. See MICH. CONST. art. IV, §§ 2–3.

²¹⁵ See *Michigan State Senate Elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Michigan_State_Senate_elections,_2014 [https://perma.cc/B93A-GQUX] (last visited Aug. 31, 2025) (showing number of seats and vote totals for individual elections, which were summed by the author to find overall party percentages).

²¹⁶ Seifter, *Countermajoritarian Legislatures*, *supra* note 7, at 1762 (quoting SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1267 (5th ed. 2016)).

²¹⁷ *Id.*

²¹⁸ See *Michigan State Senate Elections, 2014*, BALLOTPEDIA, https://ballotpedia.org/Michigan_State_Senate_elections,_2014 [https://perma.cc/MD66-WX8S] (last visited Aug. 31, 2025); *Michigan House of Representatives Elections, 2016*, BALLOTPEDIA, https://ballotpedia.org/Michigan_House_of_Representatives_elections,_2016 [https://perma.cc/B3UH-RBRX] (last visited Aug. 31, 2025).

²¹⁹ *Sessa v. State Treasurer*, 323 N.W.2d 586, 590–91 (Mich. App. 1982) (quoting *Young v. City of Ann Arbor*, 255 N.W. 579, 581 (Mich. 1934)).

Before the case reached the Michigan Supreme Court, the lower courts upheld the legislature's action, emphasizing its plenary power and reading Article II, Section 9 narrowly—despite concerns that the adopt-and-amend maneuver subverted the popular will.²²⁰

It was against that backdrop that the Michigan Supreme Court heard the case challenging the Michigan Legislature's amendments of the voter initiatives.²²¹ In its opinion, the supreme court—though likely unknowingly and certainly not expressly—tepidly embraced democratic proportionality review. Professors Bulman-Pozen and Seifter have acknowledged that proportionality review is already part of case law in many of the states, mostly between individual rights holders.²²² However, they also explain that denials of voting rights reflect something closer to the arbitrary exercises of structural power at issue in *Mothering Justice*.²²³ Key portions of democratic proportionality review are an analysis of the rationality of a legislative action, the fit between that action and its purported objective, and whether the burdens imposed can be justified. In overruling the appellate court, the supreme court decided that the legislature had exceeded the bounds of its power and had done so without sufficient justification and with arbitrary intent.

Perhaps the difference that most captures the gap in mindset between the court of appeals and the Michigan Supreme Court is that the latter began its analysis with a recognition: “Our Constitution provides that ‘[a]ll political power is inherent in the people.’ . . . It is in that context that ‘[t]he people reserve to themselves,’ rather than to the Legislature, ‘the power to propose laws and to enact and reject laws’ through the initiative process.”²²⁴ The court of appeals did not even mention the state constitution's opening grant of power to the people by the people, while, from the outset, the supreme court situated its entire opinion in the context of popular sovereignty: The people are the “Source” and “Ends of” political power.”²²⁵ The supreme court made explicit its placement of paramouncy on that principle by explaining

²²⁰ *Mothering Just. v. Att’y Gen. (Mothering Justice II)*, 5 N.W.3d 54, 74–75 (Mich. App. 2023).

²²¹ *Mothering Justice III*, No. 165325, 2024 WL 3610042 (Mich. July 31, 2024).

²²² See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1912–15 (explaining how proportionality review has been employed by courts facing property rights and free speech issues in New Jersey, in vitro fertilization in Tennessee, and same-sex marriage in Wyoming).

²²³ See *id.* at 1915–18 (discussing how democratic proportionality review can redress legislatures' disenfranchisement of citizens, specifically in Alaska, New Mexico, and Tennessee).

²²⁴ *Mothering Justice III*, 2024 WL 3610042 at *5 (first quoting MICH. CONST. art. I, § 1; and then quoting *id.* art. II, § 9).

²²⁵ Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 869.

that the initiative and referendum provision of the state constitution “reflects [its] commitment to the ‘democracy principle.’”²²⁶ The supreme court saw the democracy principle not just as some abstract notion that democracy is important, but as a “helpful tool to analyze our laws—especially those statutes and constitutional provisions that implicate elections and direct democracy,” which “recognizes that ‘democracy’ itself is core to our Constitution and must inform the lens we use to interpret laws.”²²⁷ Similarly, the supreme court couched the voters’ initiative and referendum power in the notion that the people had grown “tired of unresponsive and corrupt state legislatures. To gain a more responsive government, Michigan voters demanded direct democracy powers.”²²⁸

The *Mothering Justice* court therefore read holistically its state’s constitution, acknowledging that the people were the fountainhead of political power, and thus their reservation to themselves of the initiative power was to be liberally construed.²²⁹ So, though the court decided the section “unambiguously provides three possible options,” to the extent that it could be considered ambiguous, “a liberal construction in the people’s favor surely cuts against that fourth option. Construing Article II, Section 9 in favor of the people requires that we not allow the Legislature to sidestep the people’s reserved power.”²³⁰ Importantly for democratic proportionality, the court held that the legislature placed “an undue burden on voters’ exercise of their direct-democracy rights” because it “deprived the people of access to the process that is guaranteed to them under Article II, Section 9.”²³¹ In doing so, the supreme court identified the voters’ reservation of legislative power as a core right which was “weightier than others even as [the court] decline[d] to replicate rigid tiers of scrutiny.”²³²

²²⁶ *Mothering Justice III*, 2024 WL 3610042, at *5 (quoting Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 862).

²²⁷ *Id.* at *12 n.10 (citing Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 923).

²²⁸ *Id.* at *16 (citation omitted); *cf.* Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1904 (noting the histories of initiative and referendum powers and identifying their roots in Progressive Era attempts to take power from legislatures).

²²⁹ *See id.* at *12 (citing *Kuhn v. Dep’t of Treasury*, 183 N.W.2d 796, 799 (Mich. 1971)).

²³⁰ *Id.* at *14–15 (citing Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 861).

²³¹ *Id.* at *15 (internal citations and quotations omitted).

²³² Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1899. The supreme court also answered the appellate court’s assertion that the constitutional convention supported the opposite conclusion by urging that two delegates, including the one cited by the intermediate court, felt that the initiative power would be useless if the legislature could adopt-and-amend. *See Mothering Justice III*, 2024 WL 3610042, at *9.

The court held further that whatever the legislature's justification was, it was not sufficient to overcome the lack of logic in "bypass[ing] the voters and repeal[ing] the very same law it just passed in the same legislative session [which] thwarts the voters' ability to participate in the lawmaking process."²³³ Such an action was clearly arbitrary—so many of the legislators who voted to adopt the initiatives were outwardly against the policies they contained, and only did so to neuter them once the election had passed.²³⁴ That evasion of electoral accountability weighed heavily on the supreme court; it spent two paragraphs rebutting the dissenting chief justice by explaining that lame-duck sessions occurred highly infrequently when the section was adopted, so this set of facts in the case would have been "inconceivable to the Constitution's drafters and . . . ratifiers."²³⁵ Despite a hypothetical posed by the dissenting chief justice, "in which the Legislature adopts an initiative during an odd-year legislative session and then guts that initiative in January of the even-year legislative session," the majority said that, in such a scenario, "the Legislature would be accountable to voters in the subsequent general election—just as if it had rejected the initiative. In this case, by contrast, the lame duck legislators avoided the democratic accountability that Article II, Section 9 was designed to provide."²³⁶

And, so, with no possible justification given by the legislature for its actions, it was impossible for the legislature's actions to be proportionate to its objective.²³⁷ It did not matter for the supreme court that the legislature's lawmaking powers are otherwise plenary—"the drafters of the Constitution provided three specific pathways for the Legislature when presented with an initiative. Certainly, the drafters did not need to outline what was not permitted when they clearly set forth the permitted pathways."²³⁸ Absent a legitimate objective, the court's task of balancing adopt-and-amend against the initiative right was an easy one: It needed only measure the importance of the right (which it had already framed as crucial²³⁹) against a baldly cynical move

²³³ *Id.* at 28.

²³⁴ See *infra* note 240; cf. Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1859–60 (discussing how democratic proportionality can defeat arbitrary actions by legislatures).

²³⁵ *Mothering Justice III*, 2024 WL 3610042, at *8 n.15.

²³⁶ *Id.* Recall that representatives serve two-year terms and senators serve four-year terms.

²³⁷ Cf. Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1909–12 (exploring the culture of justification required for democratic proportionality to work).

²³⁸ *Mothering Justice III*, 2024 WL 3610042, at *12.

²³⁹ See *id.* at *5–6 (recognizing the importance of Michigan's fidelity to the democracy principle and using it to analyze the text and structure of the initiative right).

by an unrepresentative legislature.²⁴⁰ Therefore, the disposition of its ruling was as follows:

[B]y adopting the Wage Act and the Earned Sick Time Act and then later stripping those acts of their key features in the same legislative session, the Legislature unconstitutionally violated the people's initiative rights. Accordingly, we hold that the Amended Wage Act and the Amended Earned Sick Time Act are unconstitutional.²⁴¹

The supreme court's remedy, though, was interesting. Instead of requiring the legislature to either adopt and leave alone the initiatives or go through one of the other two constitutionally prescribed channels, the court decided that it "must fashion equitable relief that remedies the Legislature's constitutional mischief while remaining mindful of employers' reasonable reliance on the Legislature's unconstitutional acts."²⁴² While voiding the amendments, the court also adjusted the minimum wage provision to begin tolling its annual increases from the date the opinion was issued and ensured it properly accounted for inflation.²⁴³ A concurring justice, who joined the majority in full, wrote that she was "disappoint[ed] that no remedy exists through which we could provide the voters with the constitutional guarantees of the initiative clause by placing this matter on the ballot for a general election."²⁴⁴

In any case, *Mothering Justice* represents a vision of a state supreme court that has tacitly escaped the temptation of methodological lockstepping with the federal courts. The federal Constitution lacks a referendum or initiative process, but it would not have been surprising for a state supreme court in a similar position to that of the *Mothering Justice* court to employ something like strict scrutiny for what it deems to be such an important right. However, the supreme court did not ask whether there was a compelling government interest or whether adopt-and-amend was narrowly tailored to meet that interest. Instead, it applied something much closer to proportionality review: It asked what

²⁴⁰ See Oosting & LeBlanc, *supra* note 3; S. 38-64, 99th Sess., at 1640-41 (Mich. 2018) (statements of Sens. Colbeck, Hertel & Ananich) (recording protests of Michigan state senators, one of whom (a Republican) called the action "a procedural gimmick to go off and try to avoid a three-quarter vote threshold" and one of whom labeled the strategy "undo and screw"); H.R. 109-62, 99th Sess., at 2004 (Mich. 2018) (statement of Rep. Rabhi) (explaining the legislature was engaging in a "legislative maneuver to sabotage the intent of the hundreds of thousands of voters").

²⁴¹ *Mothering Justice III*, 2024 WL 3610042, at *14.

²⁴² *Id.*

²⁴³ *Id.* at *16.

²⁴⁴ *Id.* at *19 (Bolden, J., concurring).

the constitutional right at stake was, whether the government interfered with that right, and whether that interference was logically proportionate to a legitimate goal.²⁴⁵ The supreme court also rejected arguments about legislative deference, perhaps out of a subtle recognition that its own justices are elected, and that its decisions could be overturned by the people in a referendum—two important modes of accountability.²⁴⁶ And the supreme court read its constitution holistically, refusing to isolate the initiative provision from the one ensuring that the people were the genesis, exercisers, and object of Michigan's sovereign political power.²⁴⁷

In doing so, the court modeled precisely the kind of analysis this Note proposes: a departure from federal tiers of scrutiny, an embrace of constitutional structure and purpose, and a proportionality-driven adjudication that reflects the state's democratic commitments. In this way, *Mothering Justice* begins the crystallization of a framework that other state courts can adopt—and that this Note now seeks to formalize. Out of *Mothering Justice*, the next and final Part of this Note seeks to spring a three-part test operationalizing the democracy principle and democratic proportionality review for state supreme courts which approach both individual-rights cases and collective-rights cases (like *Mothering Justice*).

III

EFFECTUATING THE DEMOCRACY PRINCIPLE AND DEMOCRATIC PROPORTIONALITY

This Part will describe a novel three-part test, devised to make the democracy principle and democratic proportionality review easily applicable by state courts, especially state courts of last resort. The Part will also provide examples of real cases in which the test could have—or, as this Note will argue, should have—been applied.

A. *The Test*

The test, as noted, will be composed of three parts, partially rooted in *Mothering Justice* and partially rooted in the general principles explained by Professors Bulman-Pozen and Seifter in their articles. Since state constitutions are idiosyncratic, the test is meant to be at a high enough level of abstraction for judges and justices to utilize some of their discretion based on their particular state. The first step will be

²⁴⁵ *Id.* at *11.

²⁴⁶ *Id.* at *25.

²⁴⁷ *Id.* at *25–27.

for courts to decide just how much of a commitment to the democracy principle their state constitution maintains. Some states have a stronger fidelity to it than others. The second step will be a true and explicit application of democratic proportionality as outlined in Section I.C.2—identification of a democratic right, justification from the legislature, and balancing. The final step will function as a kind of remedy-plus, in which the court both provides an immediate remedy in the particular case, and also outlines requirements for the legislature to take in the future for it to be in accordance with the democracy principle and each state's commitment to it. The test should be used only for cases concerning core democratic rights, such as the right to vote (and relevant procedural issues, like voter ID requirements), the right to not have one's vote diluted (as in partisan or racial gerrymandering), and the right to directly check the legislature (if such a right exists, as in *Mothering Justice*).

1. Step One: Finding the Democracy Principle

The initial step for courts will be to determine just how much of a commitment to the democracy principle their respective state constitution has. Every state constitution maintains at least some commitment to the three principles of majority rule, popular sovereignty, and political equality. However, each state may have more or less of a textual or purposive commitment to them, and whether that fidelity is stronger or weaker will color the democratic proportionality analysis and the remedies which a state court chooses to enforce. That variation is not a bug but a feature: State constitutions are idiosyncratic and reflect local values, institutional histories, and structural choices. The test is designed to accommodate that diversity while still requiring rigor: A court applying this framework must engage with constitutional text, structure, and history and must justify its conclusions publicly. And although the test permits discretion, it is not standardless; it requires loyalty and accountability to the constitutional commitments of the state.

Giving license to state courts to determine how much their constitutions are dedicated to the triad of popular sovereignty, majority rule, and political equality could raise legitimate concerns that the framework invites ideological overreach—could a judge not just decide what they want the constitution to look like? However, the test shuts the door on such freewheeling by demanding strict engagement with state constitutional text, history, and structure. Under the test, judges will not be permitted to conjure democracy commitments out of thin air (or destroy existing ones), but they will be obligated to surface and

operationalize ones their constitutions already contain. That inquiry, by design, requires reasoned decision-making, transparency, and a strong link to the state constitution itself. Judicial misconduct is always possible, but it is more likely to flourish in an environment without doctrinal structure, or one that allows judges to hide their work—like the tiers of scrutiny. And, as always, judges are tethered to the normal bounds of *stare decisis* in their states: Precedent illuminates constitutional meaning without fossilizing it.

A major fountainhead of knowledge for state courts to determine what the strength of their state’s commitment to the tripartite democracy principle is the records of a state’s constitutional convention. As this Note has urged, state judges and justices must uphold their oaths of office by fully engaging with their constitutions, and that includes, in part, understanding how their constitutions came to be and why certain provisions were enacted and why others failed to be. State courts have an obligation to, for example, determine what it means when Oklahoma’s constitution declares that “[a]ll political power is inherent in the people” or when New York’s proclaims that “[n]o member of this state shall be disenfranchised.”²⁴⁸ Every state in the union has a rich—though complicated and controversial—history of democratic and voting rights, especially the ones admitted before the Civil War. The states who were admitted after the Civil War may have borrowed language from the federal Constitution in, for example, drafting equal protection clauses.²⁴⁹ That might especially be so for states which had constitutional conventions in the throes of the Civil Rights Movement, making unlawful Jim Crow policies.

The trouble, though, is the lack of constitutional records in some states. While it has been suggested that state constitutional conventions be digitized and collated for scholarly and judicial use to better effectuate the purposes of constitutions,²⁵⁰ some states have unreliable

²⁴⁸ OKLA. CONST. art. II, § 1; N.Y. CONST. art. XIX, § 1.

²⁴⁹ See, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 42, 95 (2008) (noting that equal protection clauses are “relatively modern” compared to, say, free expression clauses, in part because former Confederate states were required to include equal protection clauses to be readmitted to the Union); see also, e.g., NEB. CONST. art. I, § 3 (1875) (equal protection clause in Nebraska’s first post-statehood constitution, adopted shortly after the adoption of the federal Fourteenth Amendment).

²⁵⁰ See Nicholas P. S. Cole, *Forward—Writing America’s Constitutions: Understanding the Drafting and Redrafting of America’s Foundational Texts*, 75 RUTGERS UNIV. L. REV. 1069, 1089–92 (2023).

records, if they have any at all.²⁵¹ Further, a concern has been voiced that placing a premium on the records of state conventions reinforces a potentially detrimental emphasis on originalism.²⁵² To the extent that originalism is a response to the federal countermajoritarian difficulty that cannot be found in most states,²⁵³ a close reading of state convention records may be unnecessary or even undesirable. However, an attempt to discern the original meaning or public understanding is just one of many tools a state judge or justice has. One Maryland judge has stated that he deploys, in service of constitutional interpretation, “textualism, structuralism, moral interpretive theory, critical race theory, comparative constitutionalism, common law constitutional interpretation, as well as originalism.”²⁵⁴ Such a pluralist technique²⁵⁵ is well-suited to state courts, where constitutional provisions should be read holistically to determine overlapping rights and ensure that the public receives its constitutionally guaranteed benefit of government and pays its constitutionally mandated dues.²⁵⁶

Thus, state judges and justices should utilize all tools to ensure they are properly realizing all of the democratic rights in their constitutions such that the legislature or executive cannot harm them. Also, judges should be allowed to imbue their rulings with their state’s unique constitutional and cultural history. State court judges and justices should not be wary of inserting themselves into the business of politics—most are elected and subject to retention elections, many of their cases can be overturned by citizen- or legislature-initiated referenda in states where that is available (or by constitutional revision commissions), and many judges and justices—even where appointed—have mandatory term limits and retirement ages. In short, those judges are politically accountable. They should therefore engage deeply with clauses of their state constitutions dealing with democratic rights to understand just how much of a commitment to majority rule, popular sovereignty, and political equality their respective constitution has.

²⁵¹ See Dan Friedman, *Miles to Go: A Response to Dr. Nicholas Cole’s Speech at the Third Annual Robert F. Williams Lecture on State Constitutional Law*, 76 RUTGERS UNIV. L. REV. 895, 899 (2024) (“I am concerned that Dr. Cole has significantly overestimated the quality, reliability, and frankly, the interpretive value of constitutional convention records in Maryland.”).

²⁵² See *id.* at 908–11.

²⁵³ See *id.* at 909 n.70; see also *supra* notes 142–44 and accompanying text.

²⁵⁴ Friedman, *supra* note 251, at 910.

²⁵⁵ See *id.* at n.70 (citing Michael L. Smith, *Idaho’s Law of Constitutional Interpretation: Lessons from Planned Parenthood Great Northwest v. State*, 59 IDAHO L. REV. 411, 419–20 (2023)).

²⁵⁶ See Bulman-Pozen & Seifter, *Democratic Proportionality*, *supra* note 17, at 1869–72 (explaining constitutional community rights and obligations).

The Michigan Supreme Court did just that in *Mothering Justice*. For one thing, the court conducted a brief, but deep, analysis of the text and structure of the Michigan constitution.²⁵⁷ It identified a strong commitment to popular sovereignty through an acknowledgement of the constitution's text.²⁵⁸ The court also walked through state constitutional convention records and history, using that context to discuss why the initiative process was added in the first place.²⁵⁹ And by reading the constitution holistically—interpreting the initiative process clause alongside the popular sovereignty clause—the court found that the people have an equal voice in government as legislators, or equal access to lawmaking, thereby enshrining political equality.²⁶⁰

By way of another example, California Supreme Court justices might conclude their state constitutions have a relatively strong commitment to the democracy principle. California has a rich history of direct democracy due to a bare majority being required to adopt voter-initiated referenda,²⁶¹ and it has an explicit commitment to popular sovereignty and a right to reform the government if necessary.²⁶² However, California lacks a clause designating voting as a fundamental right. It does, though, have an explicit equal protection clause mirroring the federal Fourteenth Amendment²⁶³ and prohibits state discrimination based on race and sex.²⁶⁴

Judges on the New York Court of Appeals, by contrast, might decide that their constitution has a weaker commitment to the pillars of the democracy principle. The New York constitution is the only state constitution which lacks an express popular sovereignty clause stating that all power is inherent in the people.²⁶⁵ Further, unlike most states, the constitutional amendment process is long and arduous. Amendments to the New York constitution can only be enacted if they are approved by two consecutive legislatures, centering elected officials in the least majoritarian branch at the center of the constitutional process.²⁶⁶

²⁵⁷ *Mothering Justice III*, No. 165325, 2024 WL 3610042, at *5–7 (Mich. July 31, 2024).

²⁵⁸ *See id.* at *5.

²⁵⁹ *See id.* at *7–9.

²⁶⁰ *See id.* at *12.

²⁶¹ *See* CAL. CONST. art. II, § 10.

²⁶² *See id.* § 1; *see also* David A. Carrillo, Stephen M. Duvernay, Benjamin Gevercer & Meghan Fenzel, *California Constitutional Law: Direct Democracy*, 92 S. CALIF. L. REV. 557, 564–70 (explaining how California's commitment to the people's right to amend the constitution was not effectuated until the Progressive Era and describing the direct democracy process in the state).

²⁶³ CAL. CONST. art. I, § 7.

²⁶⁴ *See id.* art. I, § 31.

²⁶⁵ *See* Bulman-Pozen & Seifter, *Democracy Principle*, *supra* note 11, at 869.

²⁶⁶ N.Y. CONST. art. XIX, § 1.

It also lacks a referendum process. That stands in stark contrast to states like Michigan and California that have robust amendment processes that underline the role of the people. Finally, New York has an explicit equal protection clause,²⁶⁷ but does not define voting as a fundamental right or guarantee political—as opposed to civil—equality. A weaker commitment to the democracy principle, though, does not foreclose judicial engagement. It only constrains how far courts can go in balancing or remedying burdens on democratic rights. The test ensures proportionality is tied to constitutional values, not policy whims. Therefore, New York judges would be harder pressed, in the second and third steps, to intervene in democracy-related cases against the legislature.

Meanwhile, justices on the Montana Supreme Court are likely to determine that their constitution has one of the strongest commitments to the democracy principle in the nation. Like most states, Montana's constitution contains an explicit acknowledgement that all political power “is vested in and derived from the people,” and that the government is instituted “solely for the benefit of the whole.”²⁶⁸ Further, constitutional conventions in Montana can be called by a simple majority vote and amendments can be proposed by citizen initiative.²⁶⁹ Finally, Montana's equal protection clause expressly guarantees political equal protection,²⁷⁰ unlike many states whose constitutions guarantee only a lack of discrimination or do not specify the kind of equal protection citizens are promised.²⁷¹ So, Montana justices can be sure that they can put a stop to limits placed by the legislature on democratic rights.

Some may worry that the democracy principle could be turned against itself—that a strong judicial emphasis on majority rule might justify majoritarian suppression of rights. But the test proposed here rejects that possibility precisely because it does not treat majority rule in isolation. The democracy principle is tripartite: Popular sovereignty, majority rule, and political equality must all be read together. A state

²⁶⁷ See *id.* art. I, § 11.

²⁶⁸ MONT. CONST. art. II, § 1.

²⁶⁹ See *id.* art. XIV §§ 2, 9; art. III, §§ 4–5.

²⁷⁰ See *id.* art. II, § 4.

²⁷¹ For example, Alabama has no explicit equal protection clause. See Keisha Stokes-Hough, *The Alabama Constitution: Despite a Century of Updates, Traces of Its Racist Past Still Linger*, STATE COURT REPORT (July 16, 2025), <https://statecourtreport.org/our-work/analysis-opinion/alabama-constitution-despite-century-updates-traces-its-racist-past> [<https://perma.cc/L9VK-X53G>]. Meanwhile, other state constitutions have only general gestures toward equal protection, leaving the hard work of deciding exactly what kind of equal protection is required to the state courts. See, e.g., MASS. CONST. art. CVI (stating only that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin”).

action that entrenches majority will while undermining political equality is not faithful to the democracy principle. The first step of the test requires courts to identify all three pillars and assess how deeply the state is committed to them. That means courts cannot treat any one principle—especially majority rule—as dispositive. They must interpret their constitutions holistically and reject outcomes that would systemically disenfranchise, marginalize, or exclude. And even where a state's democracy principle is underdeveloped or underenforced, federal constitutional law still operates as a floor. No state may strip political rights on the basis of race, gender, or other protected status. But the point of this test is to go further. Its aim is to ensure that state constitutions, in their full richness, become not tools for democratic erosion but instruments of democratic renewal.

2. *Step Two: Balancing Democratic Rights Against Justifications*

The second step of the test is for state courts to conduct a democratic proportionality test, balancing the democratic right at issue against justifications issued by a legislature for limiting democratic rights. Naturally, this step will be executed in the shadow of step one: Holding all else equal, if a court finds a stronger commitment to the democracy principle, this step is more likely to be resolved in favor of the challenger; if a court finds a weaker commitment, this step is more likely to be resolved in favor of the legislature.

There are a few steps within this step that courts must consider. The first is identifying the democratic right at issue. The *Mothering Justice* court did this by identifying voter-initiated laws as the core right at issue.²⁷² Secondly, a court must examine the burden on the right placed on it by the action or inaction of the legislature. In *Mothering Justice*, the majority did this by analyzing how the legislature's adopt-and-amend strategy essentially nullified the initiative process.²⁷³ The burden, therefore, was that the initiative process may well have not existed.

Then, a state court would hear the legislature's justification and balance it against the right, using the state's commitment to the democracy principle as a guide. It must balance the nature of the right, the severity of the burden, and the legitimacy of the government's justification. The Michigan Legislature's justification for adopt-and-amend was that all legislative power resided in the legislature,²⁷⁴ but the *Mothering Justice* court did not accept that justification.²⁷⁵ Instead,

²⁷² *Mothering Justice III*, No. 165325, 2024 WL 3610042, at *1–2 (Mich. July 31, 2024).

²⁷³ *Id.* at *12–14.

²⁷⁴ *Id.* at *12.

²⁷⁵ *Id.* at *12–13.

against the backdrop of its finding of an especially strong constitutional commitment to the democracy principle, the court determined that the legislature's justification was unpersuasive—neither the text and structure,²⁷⁶ nor the history,²⁷⁷ of the state constitution showed the legislature was correct, and the burden posed by the legislature's action was far more significant than the persuasiveness of its justification. Because *Mothering Justice* did not explicitly say it was using the democratic proportionality analysis (likely because it did not know it was doing so), it makes for a good proto-example of what state courts can do with the framework.

Unlike federal tiers of scrutiny, democratic proportionality allows for significantly more flexibility by requiring contextual balancing. Based on the discovered strength of commitment to the democracy principle, the outcome is likely to change. If a state court decides that the legislature's justification is strong enough to overcome the burden placed on the democratic right (whether because the state has a weaker commitment to the democracy principle or because of something else), the inquiry ends. But once a court finds that a legislative action has imposed an unjustified burden on democracy, it must determine how to remedy that violation in a way that restores democratic participation without exceeding its judicial role. The next Section examines how courts should craft remedies that align with a state's commitment to the democracy principle.

3. *Step Three: Remedy-Plus*

The final step of the test will be for courts to design a remedy that allows them to not only resolve the case at bar but implement safeguards to make sure that the legislature cannot impede on the democratic right in the same way again. Courts that decide to use this test will design remedies that reinforce democratic rights in their states and align with either a stronger or weaker conception of the democracy principle, whichever their state adheres to. Since the court will provide an instant remedy *and* install prospective guardrails or requirements, this step of the test is called “remedy-plus.” To be sure, this is the part of the test that is likely to receive the most pushback, but I describe it and advocate for it nonetheless.

The “remedy-plus” component of democratic proportionality review draws directly from *Mothering Justice* and exemplifies how courts can craft forward-looking, democracy-repairing remedies

²⁷⁶ *Id.* at *6–7.

²⁷⁷ *Id.* at *7–9.

grounded in state constitutional law. In *Mothering Justice*, the court's remedy was threefold: It struck the laws as enacted by the legislature, it revived the minimum wage and paid sick leave initiatives as written before amendment, and it held that the minimum wage increases would immediately begin tolling and ensured it was adjusted for inflation²⁷⁸—effectively repairing the timeline that was cleaved by the legislature's amendment of the initiative. While the final piece of that remedy was vociferously challenged by one of the dissents,²⁷⁹ the bulk of it is something courts do all the time: strike a law it has found unconstitutional, substantively or, as here, procedurally.

So, where is the plus in remedy-plus? The inflation adjustment could count as prospective enough to capture what this Note recommends; it retooled the law to work from the date of the court's decision into the future. But it was more of an interpretation of the initiative's intent than a way to prevent the legislature from acting in contravention to the state's strong commitment to the democracy principle. Consider it a weak version of remedy-plus—*Mothering Justice* took a step toward this Note's preferred version of an effective remedy, but it is not all the way there. Remedy-plus would allow courts to go a step further.

A concurring justice was dismayed that the court could not put the initiatives on the ballot.²⁸⁰ Under remedy-plus, though, it could do not only that but also require procedural guardrails should a lame-duck legislature attempt to adopt-and-amend again. For example (and this is highly dependent on a state's constitutional insulations for the legislature), through this Note's remedy-plus, the court may be able to require that the legislature provide notice and hold hearings before doing so, or simply place all initiatives on the ballot if it wishes to do so (effectively, that is what the constitution already requires).

One major and legitimate argument against remedy-plus is that judges should not sit as a superlegislature, deciding policy from the bench and prescribing rules for legislatures to follow. Even if, as this Note has stressed, the countermajoritarian difficulty does not apply to most state judges and they are politically accountable, voters may neither expect nor want courts to police lawmakers so aggressively. But many state courts already operate prospectively: Advisory opinions—available in

²⁷⁸ *Id.* at *14–17.

²⁷⁹ *See id.* at *32–41 (Zahra, J., dissenting).

²⁸⁰ *See supra* note 241 and accompanying text.

Florida,²⁸¹ Michigan,²⁸² and Massachusetts,²⁸³ for instance—allow courts to offer legal guidance before harm occurs. Remedy-plus plays a similar role. It provides democratic stability and forward-looking protection, especially in states with stronger commitments to the democracy principle.

Even in states that do not allow advisory opinions, this Note urges courts to see that simply striking a law and walking away—particularly in states where judges are directly elected or subject to retention—is no less a policy choice than requiring prospective guardrails. Remedy-plus recognizes that courts have a role in the policy-driven order of state governance. It prepares them to prevent democratic backsliding by unrepresentative or gerrymandered legislatures, repudiating the false tale of state legislative supremacy and democratic accountability.

And if a court (perhaps one with a weaker democracy principle) still hesitates, it might take solace in the fact that remedy-plus can be merely procedural. A court does not legislate from the bench by requiring, say, public hearings before a certain legislative action. Remedy-plus does not seek to eviscerate legislative discretion; it ensures that laws cannot impede core democratic rights enshrined in state constitutions. In doing so, it preserves democratic integrity by requiring legislatures to respect constitutional restraints—especially when their interests run the other way. Remedy-plus affirms that courts have a role in upholding structural commitments to democracy—a role that becomes especially vital when other branches prove unwilling to self-restrain.

B. *The Test in Action*

Having sketched the three-step test for courts to assess cases spotlighting democratic rights, this final Section applies the test to two hotly contested issues—voter ID laws and partisan gerrymandering—through the test’s framework to present its flexibility: It can be used to evaluate burdens on individual democratic rights like the former, and collective, structural democratic rights like the latter. Together, they illustrate the proposed test’s doctrinal range and its potential as a tool for constitutional adjudication.

²⁸¹ See FLA. CONST. art. IV, § 1(c) (authorizing the Governor to request advisory opinions from the state supreme court); see also *id.* art. IV, § 10 (authorizing the Attorney General to request advisory opinions regarding ballot initiatives from the state supreme court).

²⁸² See MICH. CONST. art. III, § 8 (authorizing the Governor and the Legislature to request advisory opinions from the state supreme court).

²⁸³ See MASS. CONST., pt. 2, ch. 3, art. II (authorizing the General Court, Governor, or Executive Council to request advisory opinions from the commonwealth’s Supreme Judicial Court).

1. Voter Identification

Voter ID laws are prevalent in many states—identification is required in Arkansas, Georgia, Indiana, Kansas, Mississippi, New Hampshire, North Carolina, Ohio, Tennessee, and Wisconsin.²⁸⁴ Federally, voter ID laws are constitutionally sound when legislatures claim they want to prevent voter fraud.²⁸⁵ But state courts need not imitate their federal counterparts; the *Anderson-Burdick* test,²⁸⁶ while reflecting values visible in democratic proportionality, is rooted in the federal Constitution, not those of the states.

Challengers to voter ID laws might claim in state court that the laws erect barriers to voting, something in the heartland of democratic rights. Thus, the challenger could argue, this Note's test would be triggered. When that occurs, the court's first step is to determine the state constitution's fidelity to the democracy principle, a process described above.²⁸⁷ The result of that process, though, has crucial implications for the rest of the test. For example, a constitution with a weaker commitment is likely to make a state court defer, while one with a stronger commitment might lead the court to intervene and provide a strong prospective remedy.

Take Indiana. After *Crawford*, the federal case upholding Indiana's voter ID law, the League of Women Voters filed suit in state court alleging that the law violated the state constitution as an impermissible substantive voting qualification and an unequal treatment of absentee and in-person voters under the state's equal protection clause.²⁸⁸ The Indiana Supreme Court, though, held that the law was merely a procedural requirement (over which the legislature has broad powers), not a substantive voter qualification, and it did not violate the state's equal protection clause because absentee and in-person voters could rationally be treated differently.²⁸⁹ The dissent urged that voting rights

²⁸⁴ *Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/elections-and-campaigns/voter-id> [<https://perma.cc/X7WH-ETQ9>] (last updated July 2, 2025).

²⁸⁵ See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197–200 (2008) (holding that the voter ID justification withstands scrutiny placed on it by the *Anderson-Burdick* test).

²⁸⁶ The *Anderson-Burdick* balancing test is a framework used to evaluate the constitutionality of state election laws that may burden voting rights. Established through the U.S. Supreme Court cases *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), the test requires federal courts to weigh the character and magnitude of the asserted injury to voting rights against the state's justifications for the rule. The differences between this Note's test and *Anderson-Burdick* are clarified below.

²⁸⁷ See *supra* Section III.A.1.

²⁸⁸ See *League of Women Voters of Ind. v. Rokita*, 929 N.E.2d 758, 760–61 (Ind. 2010).

²⁸⁹ *Id.* at 763–67, 769–71.

are fundamental and thus deserved strict scrutiny, but it did not engage in a robust analysis of Indiana's constitution.²⁹⁰

After the threshold step of deciding that this Note's test should apply, an Indiana court would engage in step one: finding the democracy principle. It is likely that the court would recognize that Indiana's constitution, while certainly having *some* commitment to the democracy principle, has a tenuous one. For example, the Indiana constitution states that the people are sovereign,²⁹¹ that they have rights to assemble for the common good and redress grievances,²⁹² and a right to free and equal elections.²⁹³ So there is at least a nominal commitment to popular sovereignty. However, Indiana lacks any sort of democratic check on the legislature: There is no right to popular referendum or initiative and the only way the constitution may be amended is (like New York) through two majority votes of consecutive legislatures.²⁹⁴ The constitution is therefore weak on majority rule. Finally, Indiana lacks a political equality clause. While all elections are guaranteed to be free and equal, Indiana jurisprudence has not given that clause much power.²⁹⁵ Political equality, too, is weak in Indiana. Thus, the constitution's commitment to the democracy principle is weak.²⁹⁶

Having established that step, the court would move on to step two: democratic proportionality. Here, the court would measure the right at issue—voting rights—against the burden placed on it by the legislature's action, as well as the legislature's justification. In *Rokita*, the legislature's justification was threefold: preventing voter fraud, modernizing elections, and enhancing public confidence in voting.²⁹⁷ Based on the court's finding of a weak commitment to the democracy principle, the court is likely to require an extremely high burden for it

²⁹⁰ *Id.* at 775 (Boehm, J., dissenting).

²⁹¹ IND. CONST. art. I, § 1.

²⁹² *Id.* § 31.

²⁹³ *Id.* art. II, § 1.

²⁹⁴ *Id.* art. XVI, § 1.

²⁹⁵ *See, e.g., Rokita*, 929 N.E.2d at 767 (discussing the Indiana legislature's power to enact voter registration laws so long as they are uniform and reasonable); *Horseman v. Keller*, 841 N.E.2d 164 (Ind. 2006) (holding that a county's closed primary system does not violate the free and equal elections clause). The clause has mostly been cited to reflect state courts' reluctance to remove duly elected officials. *See White v. Ind. Democratic Party ex rel. Parker*, 963 N.E.2d 481, 486–90 (Ind. 2012) (affirming the Indiana Recount Commission's dismissal of a post-election disqualification challenge that could have judicially nullified the votes of hundreds of thousands of Indiana citizens).

²⁹⁶ A real Indiana court finding the democracy principle would conduct a deep dive into Indiana's constitutional convention and rely on other constitutional values and precedent, as well. *See supra* Section III.A.1 (explaining that judges should use all tools available to find the democracy principle). The example here, focusing on text, is merely illustrative.

²⁹⁷ *Rokita*, 929 N.E.2d at 766–68.

to intervene. The right to vote is fundamental to all democracies, and Indiana's constitution makes clear that power resides in the people. However, given that the voter ID law does not prohibit voting outright, and Indiana offered free photo IDs to those able to establish residence and identity,²⁹⁸ the burden is likely to be seen as insubstantial. Even though the justifications may be seen as weak—there was no actual evidence of voter fraud; modernizing elections seems a poor reason to place a burden on voting—a court in a state with a weak commitment to the democracy principle may still find them sufficient. That is likely especially so in Indiana, where the legislature has significant power over voter registration.²⁹⁹

So, having found that deference to the legislature is appropriate on this issue, the inquiry would end, and the legislature would win. However, if Indiana had a stronger democracy principle, the court's inquiry would not end there. Instead, it would need to consider how to protect the right while respecting election integrity. As a remedy-plus, an Indiana court could require that free photo ID registration be mailed automatically to all registered in the state, ensuring that individuals do not have to use public transit to get to a DMV and get a license. A court could also mandate that, to mitigate the burden on low-income and elderly voters, individuals without photo IDs could sign affidavits testifying they are who they say they are when they vote. Further, a court might require empirical evidence of voter fraud for any voter ID law in the future. These measures would properly balance election integrity with the fundamental right to vote so that legislative voter regulations do not act as *de facto* prohibitions on voting for the poor and the elderly in Indiana.

2. *Partisan Gerrymandering*

Partisan gerrymandering—the drawing of districts to give an advantage to the party in power (or to incumbents)—is pervasive throughout the country. Such malicious line-drawing dilutes the power of voters through cracking them into several districts or packing them into one.³⁰⁰ Since the U.S. Supreme Court's decision in *Rucho v. Common Cause*, holding that partisan gerrymandering claims were

²⁹⁸ *Id.* at 761 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186 (2008)).

²⁹⁹ See Elizabeth M. Hyde, Note, *A Bipartisan Policy for Democracy: Why Automatic Voter Registration is Right for Indiana*, 52 *IND. L. REV.* 481, 498 (2019) (explaining that the Indiana legislature has broad power to fulfill its duty to provide a uniform voter registration system in the state).

³⁰⁰ See Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST. (June 9, 2023), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> [<https://perma.cc/AK9C-VXX7>].

nonjusticiable political questions in federal courts, the states have been the sole venue where individuals can claim a partisan gerrymander has diluted their votes.³⁰¹ Some state constitutions, like those of New York³⁰² and Florida,³⁰³ have explicit bans on (at least the intent of) partisan gerrymandering. Many others require independent commissions to draw the lines.³⁰⁴ Still many others provide their legislatures with plenary power to design and implement legislative and congressional districts.³⁰⁵

Given the inability to bring federal vote dilution claims caused by partisan gerrymandering in the federal court, this Note provides state courts with an apparatus to adjudicate partisan gerrymandering claims. Because such suits by their nature implicate the value of one's vote, they reside at the center of the test's purpose: to resolve claims about democratic rights. Thus, such claims would trigger this Note's test at the threshold.

To illustrate, this Section focuses on Florida, which has a complicated history of direct democracy. Florida's constitution bars the intent of partisan and racial gerrymandering, though not its effect. It therefore has a high evidentiary burden: Plaintiffs must prove that the legislature purposefully drew lines to favor one party or another.³⁰⁶ In doing so, Florida courts consider *all* evidence—direct and circumstantial—to determine whether the Legislature sought to draw a map with a partisan bias.³⁰⁷ That barrier means that the constitutional prohibition is essentially inoperable against anything but the most explicitly blatant partisan gerrymander, and Florida politicians have learned how to game the system since their map was thrown out in 2015.³⁰⁸ Indeed, Florida's

³⁰¹ 139 S. Ct. 2484 (2019).

³⁰² N.Y. CONST. art. III, § 4(c).

³⁰³ FLA. CONST. art. III, §§ 20–21.

³⁰⁴ See *Independent and Advisory Citizen Redistricting Commissions*, COMMON CAUSE <https://www.commoncause.org/work/independent-and-advisory-citizen-redistricting-commissions> [<https://perma.cc/6N9V-JGJ5>] (last visited July 23, 2025) (explaining the structure and function of independent and advisory citizen redistricting commissions across states).

³⁰⁵ See Chris Leaverton, *Who Controlled Redistricting in Every State?*, BRENNAN CT. FOR JUST. (Oct. 5, 2022), <https://www.brennancenter.org/our-work/research-reports/who-controlled-redistricting-every-state> [<https://perma.cc/4K4G-MPE2>].

³⁰⁶ See *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 371 (Fla. 2012) (“Once a direct violation of the Florida Constitution’s prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.”).

³⁰⁷ See *id.* at 375–76 (“Florida’s constitutional provision prohibits intent, not effect, which is to say that a map that has the effect or result of favoring one political party over another is not per se unconstitutional in the absence of improper intent.” (quoting *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597, 617 (Fla. 2015))).

³⁰⁸ See *Detzner*, 179 So.3d 258, 297 (approving new congressional map); see also Gary Fineout, *Florida’s High Court Poised to Protect DeSantis’ Congressional Map that Helps*

2022 congressional map has been hotly litigated for both racial and partisan gerrymandering; it received an F grade from Common Cause, with a significant Republican advantage despite the constitutional bar.³⁰⁹ This Note's test offers an alternative to the intense burden put on plaintiffs who allege partisan vote dilution.

At the first step, a Florida court is likely to find that the state's constitution has a relatively strong commitment to the democracy principle. Like most other states, it declares that, "[a]ll political power is inherent in the people,"³¹⁰ but it also has several methods by which the people may check the legislature, including citizen-initiated constitutional³¹¹ amendments and a vicennial constitutional revision commission. The ease of constitutional amendment suggests a strong textual commitment to majority rule and popular sovereignty. Further, Florida does have an explicit equal protection clause but lacks a provision expressly guaranteeing general political equality.³¹² That said, the constitution has recently gained a critical component bolstering political equality: the restoration of voting rights to felons who have completed their sentences.³¹³ So at least based on the words of the constitution, Florida has a pretty strong commitment to the democracy principle.³¹⁴

GOP, POLITICO (Sep. 12, 2024, at 15:00 ET), <https://www.politico.com/news/2024/09/12/florida-redistricting-court-challenge-latest-00178892> [<https://perma.cc/C8YJ-YXN7>].

³⁰⁹ See Katie Scally, *50 State Report: Florida Earns "F" for 2020 Redistricting from Common Cause*, COMMON CAUSE FLA. (Oct. 11, 2023), <https://www.commoncause.org/florida/press/50-state-report-florida-earns-f-for-2020-redistricting-from-common-cause> [<https://perma.cc/33DN-6FAW>] (reporting that justices in Florida's state Supreme Court were largely receptive to a congressional map, which "dismantled a North Florida seat held by former Rep. Al Lawson, a Black Democrat, and split Black voters into four districts.").

³¹⁰ FLA. CONST. art. I, § 1.

³¹¹ *Id.* art. XI, § 3.

³¹² See *id.* art. I, § 2.

³¹³ FLA. CONST. art. VI, § 4. The Florida legislature's treatment of this amendment—all but eviscerating it—is yet another reason why state courts should embrace this Note's test. If Florida courts had, the state's legislation would likely have been invalidated, but the story is too similar to that of *Mothering Justice* for it to be an elucidating scenario on which this Note can elaborate. For a look at Amendment Four's tragic history, see generally Recent Cases, *Constitutional Law—Equal Protection—Eleventh Circuit Upholds Statute Limiting Constitutional Amendment on Felon Reenfranchisement*. Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020), 134 HARV. L. REV. 2291 (2021) (criticizing the Eleventh Circuit's decision to uphold the Florida legislature's statute, which "condition[ed] reenfranchisement on the payment of hundreds, sometimes thousands, of dollars in court fees—effectively barring from voting the vast majority of the 1.4 million people whom the constitutional amendment sought to reenfranchise").

³¹⁴ There is a small wrinkle here: A sixty percent vote is required to pass constitutional amendments. Ironically, that prerequisite was ratified by Florida voters by simple majority. Thus, Florida judges may have greater difficulty discerning Florida's commitment to majority rule under the democracy principle. That is why state courts need to deeply engage with their state's idiosyncratic constitutional history and culture. Again, courts should use all the

The next step, then, is democratic proportionality. As a reminder, this requires the court to balance the right at issue with the legislature's justification and the burden imposed by its action, all colored by the finding of a strong commitment to the democracy principle. A challenger to the real 2022 map³¹⁵ might assert that the partisan bent favored Republicans so much that there could be no other explanation than the one that the legislature intended to draw the lines to advantage the GOP.³¹⁶ Thus, the right at issue would be the right to not have a diluted vote that is implicit in Florida's prohibition on intentional partisan gerrymanders.³¹⁷ The burden on that right is quite severe under the 2022 map: It added four Republican seats to Congress even if there had not been additional GOP votes and had an efficiency gap of twenty points in favor of the Republican Party,³¹⁸ thereby heavily watering down Democrats' voting power in the state.

In *Byrd v. Black Voters Matter Capacity Building Institute, Inc.*, the state justified its map by averring that it employed neutral districting principles—like compactness, contiguity, and the preservation of communities of interest—emphasizing the high burden plaintiffs must meet to prove intent to draw partisan gerrymanders.³¹⁹ Additional justifications might include that proportional districts are not necessarily

tools at their disposal when determining their state constitutional fidelity to the democracy principle. They should not just base it on text and structure, though that is a good place to start. See *supra* Section III.A.1.

³¹⁵ The real litigation involving the map, *Byrd v. Black Voters Matter Capacity Building Inst., Inc.*, 375 So.3d 335 (Fla. App. 2023), involves claims of racial gerrymandering as well. This Section engages only with potential partisan gerrymandering claims, especially since the former is, at the time of writing, still adjudicable by the federal courts.

³¹⁶ Republicans won twenty U.S. House seats—71% of Florida's delegation—despite winning just 58% of the statewide vote. See Fla. Div. of Elections, *2022 General Election Official Election Results: US Representative*, FLA. ELECTION WATCH, <https://floridaelectionwatch.gov/FederalOffices/USRepresentative> [<https://perma.cc/7JX2-8CVJ?type=image>] (last visited Aug. 30, 2025).

³¹⁷ FLA. CONST. art. III, § 20. Even without a bar on partisan districting, a state court could read its constitution holistically, especially any political equality or free and equal elections provisions, to require that maps be drawn roughly proportionately based on, say, each party's share in the last statewide election. The Pennsylvania Supreme Court did something similar recently. See *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018). However, if a state has a weaker constitutional commitment to the democracy principle, it might defer to the legislature for a murky or less intense gerrymander (if a party won 55% of the seats but won 52% of the vote, for example) under democratic proportionality.

³¹⁸ The efficiency gap is a measure of asymmetric wasted votes (anything above the 50%-plus-one victory threshold for the winning candidate and any votes for the losing candidate). A twenty-point gap in favor of Republicans means that the party would be expected to win 20% more seats than they would under a proportional map. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–63 (2015) (explaining the efficiency gap as a measure of partisan gerrymandering based on the difference in wasted votes between parties).

³¹⁹ *Byrd*, 375 So.3d at 342–43 (discussing the legislature's justifications).

required, incumbency protection, or that it merely followed natural and municipal boundaries and the advantage was a simple consequence of partisan geographic sorting.³²⁰ However, given Florida's compelling commitment to the democracy principle and the heavy load placed on the right at issue by the 2022 map, it is likely that a Florida court would not easily defer to the legislature—maybe even without direct evidence of intent if it read the districting provision to implicitly prohibit actual partisan gerrymandering as well.

At the final step, the court would execute its remedy-plus. Florida happens to be one of the states that allows advisory opinions, and one in which judges are elected (and justices are subject to retention) and can be checked by constitutional referendum and the vicennial constitutional revision commission.³²¹ Given that the state's justifications would fail to outweigh the burden placed on a core democratic right, the court would craft a remedy under this test that strikes the map as unconstitutional *and* ensures that any future redistricting acts align with the state's commitment to the democracy principle. For example, the court could mandate future maps be proportional to partisan vote share, require it to have a minimal efficiency gap,³²² or require the map to go through a bipartisan joint committee in the legislature and receive support from both parties.³²³ These safeguards would institutionalize full voting power for each member of Florida's electorate.

At the end of the day, the court would refuse to methodologically lockstep with the federal courts and would undertake an intense examination of its state constitution, deploying all judicial tools and canons to do so. It would then measure that analysis against the

³²⁰ See Steven Webster, *Partisan Geographic Sorting*, CTR. FOR POL.: SABATO'S CRYSTAL BALL (Dec. 15, 2016), <https://centerforpolitics.org/crystalball/partisan-geographic-sorting> [<https://perma.cc/J9ZJ-LNGC>] (arguing that partisan geographic sorting is limited and largely driven by nonpolitical factors, but that residential context can influence individuals' political affiliation over time).

³²¹ Florida allows advisory opinions only upon request of the Governor (or, for constitutional amendments on the ballot, the Attorney General). See FLA. CONST. art. IV, § 1(c) ("The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties."); *id.* art. IV, § 10 (stating that the attorney general shall request advisory opinions from the supreme court regarding petitions for constitutional amendments); *id.* art. V, § 10 (explaining the election process for Florida's circuit and county court judges and stating that all Florida judges, including justices on the Florida Supreme Court, are subject to retention elections); *id.* art. XI, § 2 (describing Florida's constitution revision commission).

³²² See Stephanopoulos & McGhee, *supra* note 318.

³²³ This is different than mandating an independent commission as is present in Michigan or Arizona because ultimate districting power would reside in the legislature. It is highly unlikely even under this Note's framework that a state court could *sua sponte* strip a legislature of its constitutional districting power.

legislature's actions and justifications, ultimately deferring to it or refusing to do so. If it does not, it would invoke equitable powers to ensure that whatever the legislature does with regards to democratic rights is consistent with the state's commitment to the democracy principle, resting assured that it can be held to account by external actors.

CONCLUSION

For too long, state courts have been happy to mirror their federal counterparts in method, applying rigid federal frameworks to constitutions that demand a different approach. That lockstepping is dangerous—especially as state legislatures, often profoundly unrepresentative of their constituents, entrench their power while claiming to speak for the people. When courts fail to interrogate their own constitutions, they violate their oaths and commit a dereliction of duty.

Every state constitution reflects some commitment—strong or weak—to popular sovereignty, majority rule, and political equality. Most state judges are politically accountable. And yet, too many courts defer reflexively to legislatures, even when the legislatures themselves are gerrymandered, captured, or actively working to suppress participation. That passivity allows legislative authority to grow unchecked, usually at the expense of the very people from whom legislatures are supposed to derive their power.

This Note proposes a different path: a three-part test that operationalizes the democracy principle through democratic proportionality. Rooted in the tradition of New Judicial Federalism, this test encourages state courts to interpret their constitutions as independent sources of meaning as opposed to echoes of federal doctrine. Where federal tiers of scrutiny are rigid and clause-bound, democratic proportionality demands holistic constitutional reasoning, justification from the legislature, and balancing in light of a state's own democratic commitments. It commands that courts interpret—not import—their constitutional obligations, offering their states' citizens the complete benefit of their foundational texts when legislatures attempt to vex their rights.

Mothering Justice v. Attorney General shows this method already exists in practice. This Note gives it a name, structure, and future. By embracing democratic proportionality and rejecting methodological lockstepping, state courts can actualize their most important role: to give full effect to their constitutions as living, independent documents—not shadows of the federal one.