Laboratories of Democracy

Strategic electoral impact litigation through state courts









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About Campaign Legal Center

CLC seeks a future in which the American political process is accessible to all citizens, resulting in representative, responsive, and accountable government. Through litigation, policy analysis, and public education, CLC works as a nonpartisan, nonprofit organization to protect and strengthen the U.S. democratic process across all levels of government. CLC strategies include:

1. **Developing solutions that enhance our democracy:** CLC works with state and local governments, Congress, national organizations, and grassroots advocates to draft model legislation and offer legal advice on how to pass the most effective and sound laws and regulations.

2. **Demanding enforcement of laws that protect our democracy:** CLC serves as a watchdog, applying pressure to governmental agencies that fail to enforce campaign finance laws and voting protections.

3. **Defending and advancing our democracy in courts:** CLC's lawyers litigate cases across the nation protecting voting rights, fighting unconstitutional gerrymandering, and defending against attacks on campaign finance and disclosure laws.

4. **Disseminating educational materials that highlight ongoing threats to our democracy:** CLC issues reports, fact sheets, and other materials to educate reporters, partner organizations, and the general public about current laws protecting our democracy and any threats to these laws.

About FairVote

FairVote is a nonpartisan champion of electoral reforms that give voters greater choice, a stronger voice, and a representative democracy that works for all Americans. FairVote has a proven record since 1992 as a nonpartisan trailblazer that advances and wins bold electoral reforms at the local, state, and national level through strategic research, communications and collaboration. FairVote is the driving force behind advancing ranked choice voting and multi-winner legislative districts that together will open up our elections to better choices, fairer representation and more civil campaigns.

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Executive Summary

Current federal jurisprudence does not protect the right to vote with the same level of scrutiny as other constitutional rights, including the right to spend money to influence elections. The result is a serious gap in available federal judicial protections for our most precious right, the right that is "preservative of all rights."[1] Ultimately, federal voting rights jurisprudence has proven to be insufficient to meet the rising tide of voting restrictions and growing dysfunctions in our electoral systems.

However, in our federal system, democracy advocates need not look solely to federal courts for protection. This report explores the foundations of a state court strategy for protecting and improving our elections. As this report outlines, there are textual, structural, and historical reasons why a diverse state court strategy for electoral impact litigation should provide opportunities for reform where the federal courts have not acted.

First, in contrast to the U.S. Constitution, 49 state constitutions have explicit provisions providing an affirmative right to vote to their citizens. 25 states also have a constitutional provision guaranteeing free and equal elections. The recent decision by the Pennsylvania Supreme Court to strike its congressional map as a partisan gerrymander shows the vitality of these provisions. Second, our federal constitutional structure also supports the view that access to the right to vote and the structure and administration of elections could be sensibly afforded broader protection at the state level. Indeed, the federal Constitution specifically delegates much of electoral administration to the states. And precisely because of the federalist structure of our democracy, the doctrinal foundations of election law are actually rooted in state law. State courts have a well-established "democracy canon," which directs courts to draw inferences and ambiguities in favor of the right to vote, including favoring the enfranchisement of voters, free, competitive elections, ballot access for candidates, and public participation generally.

This report outlines the rationale for a state court strategy to improve our elections, explores recent state court decisions that demonstrate the potential success of this strategy, and discusses the important strategic considerations to implementing such a strategy. While state court litigation will not be a panacea for all our democracy's ills, state courts are an important and underused tool in advocates' arsenal. States—through their courts and legislatures—can and should serve as literal "laboratories of democracy" in reforming, improving, and protecting our electoral systems to build representative and responsive governments at all levels.

1. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

I. The Federal Voting Rights Gap

Federal constitutional jurisprudence around the right to vote has developed unevenly over the past sixty years. Unfortunately, current federal jurisprudence does not protect the right to vote with the same level of scrutiny as other constitutional rights, including the right to spend money to influence elections. The result is a serious gap in available federal judicial protections for our most precious right, the right that is "preservative of all rights." Federal voting rights jurisprudence has proven to be insufficient to meet the current rising tide of voting restrictions and growing dysfunctions in our electoral systems.

The reasons for this gap are manifold. First, the U.S. Constitution has no explicit clause granting all eligible citizens the right to vote. The right to vote is implied by Article 1, Section 2 (providing for elections for House of Representatives) and the 17th Amendment (providing for elections for Senate), but no separate grant of the right to vote can be found in the U.S. Constitution. The Constitution does protect the right to vote but its provisions are negative protections—barring discrimination based on race, sex, age, or wealth in the 15th, 19th, 24th, and 26th Amendments, respectively—rather than a positive one guaranteeing access to the right to vote.

The result is a serious gap in available federal judicial protections for our most precious right, the right that is preservative of all rights.

The Supreme Court has correctly recognized that the right to vote is fundamental in our system[2] and implicates both the First Amendment, which protects political expression, and the Fourteenth Amendment, which protects due process and guarantees equal protection under the law.[3] However, this recognition has not translated into equivalent protection of the right to vote as other fundamental constitutional rights.[4] Ordinarily, burdens on fundamental constitutional rights are subjected to strict scrutiny and therefore must be justified by compelling governmental interests.[5] For example, the money spent to influence votes in elections is protected by strict scrutiny under the First Amendment.[6]

2. *Id.*
3. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").
4. *See, e.g.*, Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471 (2016); Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 335-39 (1993); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y 143 (2008); James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*, 8 HARV. L. & POL'Y REV. 39 (2014).
5. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (applying strict scrutiny to sterilization that denied the fundamental right to procreation); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to right to travel restriction); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("The [Due Process] Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests."); *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) ("[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (emphasis in original)).
6. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) (holding that laws that burden political speech are "subject to strict scrutiny").

In the 1960s, as the Supreme Court was first addressing many outright restrictions on the right to vote—including poll taxes, durational residency requirements, and property requirements—the Court applied "close scrutiny" to voting restrictions and struck most of them down.[7] However, as the Court has grappled with voting laws that burden the right to vote but do not necessarily bar voters outright, it has drastically lowered the scrutiny it applies. Rather than developing a framework that allows necessary regulation of elections but still closely scrutinizes burdens on the right to vote—such as the time, place, and manner framework in the First Amendment context[8]—the Court has developed a one-size-fits-all balancing test for all laws that relate to the right to vote. This standard applies equally to direct burdens on the right to vote, to candidate restrictions such as sore loser laws and third-party ballot access requirements, and to method-of-election restrictions such as write-in candidate prohibitions.

In Crawford v. Marion County Election Board, a case addressing one of the first voter photo ID laws, the Court's analysis amounted to little more than rational basis review even though the law threatened to disenfranchise many eligible voters.

Pursuant to that balancing test, federal courts are instructed to weigh the "character and magnitude of the asserted injury to the rights" against the "precise interests put forward by the State as justifications for the burden imposed by its rule," considering "the legitimacy and strength of each of those interests . . . [and] the extent to which those interests make it necessary to burden the plaintiff's rights."[9] In *Burdick v. Takushi*, the Court made clear that strict scrutiny should only apply to "severe" restrictions on the right to vote.[10] The Court has further opined that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[11] This language has often been relied upon as a default for upholding state regulations that burden the right to vote.

The malleability of this balancing test in its recent applications is particularly problematic. In *Crawford v. Marion County Election Board*,[12] a case addressing one of the first voter photo ID laws, the Court's analysis amounted to little more than rational basis review even though the law threatened to disenfranchise many eligible voters. The Court recognized that the new photo

7. *Dunn v. Blumstein*, 405 U.S. 330, 357 (1972) (finding durational residency requirements unconstitutional); *see also Wesberry v. Sanders*, 376 U.S. 1 (1964) (malapportioned districts); *Carrington v. Rash*, 380 U.S. 89 (1965) (provision barring military personnel stationed on bases from voting); *Harper v. Va. State Bd. Of Elections*, 383 U.S. 663 (1966) (poll tax); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (property requirement).
8. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (internal quotation marks omitted)).
9. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).
10. 504 U.S. 428, 434 (1992).
11. *Id.* (quoting *Anderson*, 460 U.S. at 788).
12. 553 U.S. 181 (2008).

ID law in Indiana would only address "in-person voter impersonation at polling places" and that the "record contain[ed] no evidence of any such fraud actually occurring in Indiana at any time in its history."[13] Nonetheless, it upheld the requirement based on Indiana's general legitimate interest in protecting against voter fraud without engaging in any analysis of how the law was tailored to any precise interest or balancing it against the harm to voters. There are many lessons to be learned from *Crawford*—including the importance of building a strong factual record of burdens on voters[14]—but *Crawford* made clear that the current Supreme Court does not apply a strict standard to voting restrictions.[15]

The loss of a key provision of the Voting Rights Act (VRA) in 2013 has seriously compounded the problem of the constitutional lax standard for reviewing burdens on voting established in *Crawford*. From 1965 to 2013, section 5 of the VRA required states

> In one fell swoop, the Supreme Court gutted the single most effective mechanism for eliminating the scourge of racial discrimination from our elections.

and localities with a history of discrimination to submit all voting changes to either the Department of Justice or a federal court for approval.[16] Voting changes could only be approved if the jurisdiction could show that they would not harm minority voters.[17] By imposing a preclearance requirement on jurisdictions with a history of discrimination, the VRA "shift[ed] the advantage of time and inertia from the perpetrators of the evil to the victims" and stopped discriminatory laws *before* they could affect elections.[18] Indeed, section 5 preclearance was largely responsible for the unquestionable progress in meaningful access to the franchise for minority voters.[19]

But in 2013, in *Shelby County v. Holder*,[20] the Supreme Court struck down the section of the Voting Rights Act that determined what jurisdictions were subject to preclearance and therefore, gutted the preclearance regime. By removing preclearance, the *Shelby* Court nullified the VRA's ex ante protections and left minority voters to fend for

13. *Id. At 194.*
14. *Id.* at 201 ("The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed.").
15. Under the current administration, this trend away from robust federal constitutional protections for the right to vote is likely to continue. There are currently 148 vacant seats in the federal judiciary. *Judicial Vacancies*, U.S. Cts. (Jan. 11, 2018), http://www.uscourts.gov/judges-judgeships/judicial-vacancies. That is about 17% of total seats. *See id.* Many of these seats are likely to be filled by President Trump in the coming years. Judging by his prior nominations, they will likely be filled by the type of staunch judicial conservatives that have in the past narrowed voting rights.
16. Voting Rights Act of 1965, § 3(b), 52 U.S.C. §§ 10303(b), 10304(a).
17. 52 U.S.C. § 10304(a) (requiring a determination that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" for preclearance).
18. *City of Rome v. United States*, 446 U.S. 156, 182 (1980) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)).
19. *See* Khalilah Brown-Dean et al., *50 Years of the Voting Rights Act: The State of Race in Politics*, Joint Ctr. for Pol. & Econ. Stud. 4 (2015), http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28updated%29.pdf [http://perma.cc/6NB5-9XMK] ("Since 1965, ... African Americans went from holding fewer than 1,000 offices nationwide to over 10,000 . . . .").
20. 570 U.S. 529 (2013).

themselves through affirmative litigation. In one fell swoop, the Supreme Court gutted the single most effective mechanism for eliminating the scourge of racial discrimination from our elections. Despite the Voting Rights Act's sweeping bipartisan support in the past, attempts to restore its most powerful provision are stalled. [21]

Finally, at the same time that federal statutory and constitutional protections for our electoral system are diminishing, the problems plaguing our democracy are increasing. Voting restrictions are multiplying across the country,[22] political polarization is on the rise,[23] Congressional gridlock seems incurable,[24] and trust of the federal government

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is at some of the lowest levels in recent history.[25] The need for greater protection for the right to vote and innovative electoral solutions has never been greater. While the prospects for progress at the federal level are limited, state constitutions, statutes, and courts are an outlet of opportunity.

II. Shifting to a 50-State Strategy

Traditionally, the vast majority of scholarly attention and voting rights litigation resources have been devoted to federal litigation.[26] No doubt, federal litigation and federal voting rights protections will still be a critical backstop, particularly in states with less than progressive views on democratic institutions. But the time has come to explore the diversity of state level options to move our democracy forward.

Across the board, many scholars and litigators are belatedly exploring the opportunities for a "new" or "progressive" federalism that sees states as engines for change and innovation.[27] Heather Gerken, a prominent new federalism scholar, has argued that state

21. Alicia Petska & Tiffany Holland, *Goodlatte: Voting Rights Act Remains Strong Without Amendment*, Roanoke Times (June 22, 2015), http://www.roanoke.com/news/local/goodlatte-voting-rights-act-remains-strong-without-amendment/article_5bbff2ca-dae2-58ed-9930-f652b9317913.html [https://perma.cc/4JW5-VQNH].
22. Derfner & Hebert, *supra* note 4, at 473-76.
23. *Political Polarization in the American Public*, Pew Res. Ctr. (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.
24. Josh Huder, *Our Very Unproductive Congress*, Gov't Aff. Inst. at Geo. U., gai.georgetown.edu/our-very-unproductive-congress/; Fred Dews, *3 Charts that Capture the Rise in Congressional Gridlock*, Brookings Inst. (May 30, 2014), https://www.brookings.edu/blog/brookings-now/2014/05/30/3-charts-that-capture-the-rise-in-congressional-gridlock/.
25. *Beyond Distrust: How Americans View Their Government*, Pew Res. Ctr. (Nov. 23, 2015), www.people-press.org/2015/11/23/beyond-distrust-how-americans-view-their-government/.
26. Joshua A. Douglas, *State Judges and the Right to Vote*, 77 Ohio St. L. J. 1, 11 (2016).
27. *See, e.g.*, Heather K. Gerken, *A New Progressive Federalism*, 24 Democracy J. 37 (2012), https://democracyjournal.org/magazine/24/a-new-progressive-federalism/; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L. J. 1889 (2014); Cristina Rodriguez, *Law and Borders*, 33 Democracy J. (2014), https://democracyjournal.org/magazine/33/law-and-borders/ (arguing for a federalism approach to immigration policy); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation*, 121 Yale L. J. 534, 564 (2011); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 Harv. L. & Pol'y Rev. 33, 51 (2009) ("The primary driver of blue state federalism is the democratic activity of the states or the initiatives of state courts.").

level initiatives can create dialogue about important national issues and, ultimately, serve national ends.[28] The idea of state courts ensuring that the formal structures of democracy itself (i.e., voting and its attendant structures) are functioning as they should fits neatly into this framework.

Indeed, there are textual, structural, and historical reasons why a diverse state court level strategy for electoral impact litigation could provide opportunities to improve and protect our democracy where the federal courts have not. States—through their courts and legislatures—can and should serve as literal "laboratories of democracy"[29] in reforming, improving, and protecting our electoral systems to build representative and responsive governments at all levels.[30]

A. Text: Right to Vote in State Constitutions

First, in contrast to the U.S. Constitution, 49 state constitutions have explicit provisions providing an affirmative right to vote to their citizens.[31] These "right to vote" provisions in state constitutions are laid out in Table 1 in the Appendix. They provide a solid textual foundation for electoral litigation on behalf of voters. Many of these provisions delineate the only permissible voter qualifications in the state—ordinarily citizenship, residency, and age[32]—and forbid all additional qualifications. As long as an individual meets those qualifications, the provisions guarantee that she "may vote,"[33] "shall be entitled to vote,"[34] "shall have the right to vote,"[35] or other similar language.

> 49 states have constitutional provisions guaranteeing the right to vote. 25 states have a constitutional provision guaranteeing free and equal elections.

28. Gerken, *Federalism as the New Nationalism*, *supra* note 27.
29. *Introduction*, 19 Stan. L. & Pol'y Rev. 359, 360 n.1 (2008) (*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The famous phrase, "laboratories of democracy," derives from Brandeis's commentary on the virtues of a federalism: "[T]he happy incidents . . . of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory." Id.).
30. This report focuses primarily on opportunities to enforce state constitutional protections in state courts. However, the opportunities at the state level for democracy reform are broader. For example, six states have adopted independent redistricting commissions, in which the drawing of legislative districts is insulated from political influence. Justin Levitt, *Who draws the lines?*, All About Redistricting, http://redistricting.lls.edu/who.php. These commissions have been successful in changing political outcomes in these states, creating significantly more competitive races. Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, N.Y. Times (July 1, 2015), https://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html. Automatic voter registration, a system where states automatically register citizens based on already available data, is another opportunity for state-level reform. Currently nine states and the District of Columbia have such a system and 32 others are considering it. *Automatic Voter Registration*, Brennan Ctr. (Aug. 28, 2017), https://www.brennancenter.org/analysis/automatic-voter-registration. After Oregon instituted such a system, it registered 225,000 previously unregistered people, 100,000 of which voted in the next election. Niraj Chokshi, *Automatic Voter Registration a 'Success' in Oregon*, N.Y. Times (Dec. 2, 2016), https://www.nytimes.com/2016/12/02/us/politics/oregon-voter-registration.html. Another possibility is increasing the option to vote by mail. Oregon, which has a vote by mail only system in addition to automatic voter registration system, increased its turnout more than any other state and increased the diversity of its electorate at the same time. Sean McElwee, Brian Schaffner & Jesse Rhodes, *How Oregon Increased Voter Turnout More than any Other State*, Nation (July 27, 2017), https://www.thenation.com/article/how-oregon-increased-voter-turnout-more-than-any-other-state/. Twenty states still require some excuse to vote absentee. Absentee and Early Voting, Nat'l Conf. of St. Legislatures (Aug. 17, 2017), http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.
31. Arizona has a constitutional provision that addresses the right to vote in the negative rather than the positive but could still be a source of constitutional protection. Ariz. Const. art. 7, §2.
32. Most also include provisions of differing magnitudes related to people with convictions. See, e.g., Ariz. Const. art. 7, §2(C).
33. *E.g.*, Ind. Const. art. 2, § 2.
34. Iowa Const. art. 2, § 1.
35. Ala. Const. art. 8, § 177.

While the provisions across the states are generally similar, a few differences may be meaningful in selecting test states for impact litigation. One difference is between what may be termed "rights granting clauses" versus "regulation clauses." Ten of the clauses affirmatively grant either the "right to vote" or "right of suffrage" while others lay out the qualifications and state that all people who meet those qualifications "may vote" or "shall be a qualified elector." Somewhere in between these two categories are clauses that state that a citizen shall be "entitled" to vote. These categories arguably serve no functional difference (similar to a number of Congress's powers in the federal Constitution that are phrased as "may"). However, the rights granting clauses are couched in the strongest language possible. Therefore, all else being equal, advocates may wish to focus on states with "rights granting" language first when building up state-level voting rights jurisprudence.

Twenty-five state constitutions go further. In addition to clauses granting the right to vote to qualified electors, separate constitutional provisions in those states demand that all elections be "free," "free and equal," or "free and open."[36] These provisions are "mandatory" and provide an even stronger foundation for robust state court protection of our democratic structures.[37] The requirement that elections be equal has been interpreted, at least in some states, to mean that "the vote of each voter [must be] equal in its influence upon the result to the vote of every other elector—where each ballot is as effective as every other ballot."[38] Such an expansive equality provision for voters may provide a basis for challenges to vote diluting practices such as partisan gerrymandering. These provisions are catalogued in Table 2 in the Appendix.

Finally, there are a few state constitutional provisions with additional protections for voting and political rights. For example, Nebraska's Constitution provides that "there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."[39] Illinois' Constitution ensures that the right to vote cannot be denied "based on race, color, ethnicity, status as a member of a language minority, national origin, religion, sex, sexual orientation, or income,"[40] a far longer list of prohibitions than the federal Constitution. California's Constitution contains a provision guaranteeing that "[a] voter who casts a vote in an election … shall have that vote counted."[41] Massachusetts' Constitution stresses that voters "have an *equal* right to elect officers"[42](emphasis added), and Florida's Constitution grants "equal civil and political rights to all."[43] As litigators develop individual cases in states across the country, they would be wise to pay heed to these nuances in language. For example, based on constitutional language only (and all other factors being equal), advocates may choose to push forward a voter ID or similar barrier challenge in

36. In Montana, this provision was debated before its adoption and the floor debate demonstrates that the drafters intended the provision to provide meaningful accessibility to all voters: "Not only are elections to be free, but they are also to be open. They should be open to all persons who are legally entitled to vote. The polls should be open to all persons, who, under the laws of this Territory and the United States, are entitled to the right of franchise. I believe that the words should be left in, because the right may be protected by their remaining in the place where they are now." Hannah Tokerud, *The Right of Suffrage in Montana: Voting Protections Under the State Constitution*, 74 MONT. L. REV. 417, 419 (2013).
37. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103 (2014) ("For example, the New Mexico Supreme Court explained that a state constitution's 'free and equal' or 'free and open' elections clause 'connotes [that] all eligible voters should have the chance to vote.' As Kentucky's highest court long ago explained--in a passage that several other courts have cited--a constitutional provision declaring elections to be 'free and equal' is 'mandatory': 'It applies to all elections, and no election can be free and equal, within its meaning, if any substantial number of persons entitled to vote are denied the right to do so.'")
38. *Chavez v. Brewer*, 214 P.3d 397, 407 (Ariz. Ct. App. 2009) (quoting *Moran v. Bowley*, 179 N.E. 526, 531 (Ill. 1932)).
39. NEB. CONST. art. 1, § 22.
40. ILL. CONST. art. III, § 8.
41. CAL. CONST. art. II, § 2.5.
42. MASS. CONST. pt. 1, art. IX.
43. FLA. CONST. pmbl.

Nebraska, a language access challenge in Illinois, and a partisan gerrymandering challenge in Massachusetts.

B. Structure: State Control of Elections

Our federal constitutional structure also supports the view that access to the right to vote and the structure and administration of elections could be sensibly afforded broader protection at the state level. The federal Constitution specifically delegates much of electoral administration to the states. Article 1, Section 2 and the 17th Amendment delegate to the states the definition of voter qualifications for U.S. House and Senate elections.[44] Moreover, while Congress has the ability to dictate the "Time, Places, or Manner" of federal elections, election administration is left in the first instance to the states.[45] For as long as our democracy has existed, it has been a highly decentralized system. Each state has its own highest election official and its own distinct election laws and practices.[46]

The federal Constitution provides a floor not a ceiling on the protection of individual rights.

More generally, one of the virtues of our federalist system is that the federal Constitution provides a floor not a ceiling on the protection of individual rights.[47] After all, state protections of individual liberties preceded the Bill of Rights, not the other way around.[48] In common modern parlance, federalism is often interpreted as a limiting force on federal courts rather than an empowering force for state ones. But this need not be the case. Indeed, the idea of turning to state constitutions to provide a larger ambit of protection for individual rights is not novel. In 1977, Justice Brennan wrote an article encouraging a focus on developing state constitutional protections for civil liberties:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed. [49]

44. *See* U.S. Const. art. I, § 2; id., amend. XVII; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013) ("[T]he Elections Clause empowers Congress to regulate how federal elections are held, but not who may vote in them" (emphasis in original)); *Branch v. Smith*, 538 U.S. 254, 280 (2003) ("[T]he state legislature's obligation to prescribe the 'Times, Places and Manner' of holding congressional elections is grounded in Article I, § 4, cl. 1, of the Constitution itself . . . ."); *Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections"); *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) ("It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress. The reason for the scheme is not hard to find. In the Constitutional Convention, Madison expressed the view that: 'The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution.'"). These qualifications, of course, are subject to the restrictions of the 14th, 15th, 19th, 24th and 26th Amendments.
45. U.S. Const. art. I, § 4.
46. For an overview, see, *Election Administration at State and Local Levels*, Nat'l Conf. of St. Legislatures (June 15, 2016), http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx.
47. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").
48. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).
49. *Id.* at 491.

Thus, our federalist structure ensures that state courts and constitutions can (and should) differ in their approaches to increasing access to the right to vote and protection of a meaningful right to vote through electoral structures.

C. History: Doctrinal Foundations of Election Law in State Courts

Precisely because of the federalist structure of our democracy, the doctrinal foundations of election law are actually rooted in state rather than federal law.[50] Adam Winkler, one of the few historians to research early state courts and election laws, explains that state courts were the first institutions to build a jurisprudence to address not only the individual right to cast a ballot but also how electoral structures can empower or disempower voters.[51]

In 1892, the Pennsylvania Supreme Court issued an early declaration of a standard for voting rights infringements in *DeWalt v. Bartley*:

> An election, to be free, must be without coercion of every description. An election may be held in strict accordance with every legal requirement as to form, yet if . . . the voter casts the ballot as the result of intimidation; if he is deterred from the exercise of his free will by means of any influence whatever, . . . it is not a free and equal election, within the spirit of the constitution.[52]

Kentucky announced another formulation, one that is often cited by courts to this day in *Wallbrecht v. Ingram*: "[N]o election can be free and equal . . . if any substantial number of persons entitled to vote are denied the right to do so."[53]

During the progressive era, state courts were the early arbiters of electoral structures and parties' role in the electoral system. While the courts upheld many ballot access regulations, Winkler explains that they approached these cases with a skepticism toward political parties and the goal of protecting individuals' rights to meaningful participation.[54] Thus, ballot access regulations were imposed, for example, to constrain party corruption and protect voter participation in the nomination process, not to limit voter choice. As Winkler writes:

> Expansion backwards to party nomination was also necessary to make the right effective in light of the corruption of party leaders who formerly controlled nomination processes. If party leaders could easily manipulate the machinery

Because of the federalist structure of our democracy, the doctrinal foundations of election law are actually rooted in state rather than federal law.

50. *See* Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts 1886-1915*, 100 COLUM. L. REV. 873, 873 (2000) ("Not only is state law a diverse, plentiful, and untapped lode for study, but state courts have historically exercised the responsibility to decide the constitutionality of state-level electoral reforms prior to the federal courts. It is to the state courts, therefore, that one must often look to discover the doctrinal foundations of election law, laid by state judges when first confronted with challenges to reforms.").
51. *Id.*
52. 24 A. 185, 146 Pa. 529, 540-41 (Pa. 1892).
53. 175 S.W. 1022, 1026–27 (Ky. Ct. App. 1915).
54. Winkler, *supra* note 50, at 873.

of the party to nominate favored candidates, the ability of voters to have a meaningful say in who gets elected was diminished. As stated elegantly by the Oregon Supreme Court: "Once the stream is polluted at its source, access to its waters, however free, will not serve to purify it."[55]

Thus, well before the federal courts waded meaningfully into the arena of voting rights regulation, state courts had developed a framework for addressing not only individual access issues but also structural electoral issues that impacted voters' meaningful voice in the system.

III. State Courts and Elections

Having laid the foundation for why a shift to state court litigation may be possible and desirable, this section outlines some of the doctrinal support advocates can rely upon in developing electoral cases in the states.

A. The Democracy Canon

State courts, as regular arbiters of individual electoral disputes, have a well-established "democracy canon."[56] The democracy canon directs courts to draw inferences and ambiguities in favor of the right to vote, including the enfranchisement of legal voters, favoring free, competitive elections, ballot access for candidates, and public participation generally.[57] This canon—although ordinarily used as a rule of interpretation in statutory election law cases—is based on an underlying commitment to protecting the right to vote and can therefore be relied upon in various electoral contexts.

The democracy canon dates back to the 19th century and has been used frequently in election law cases.[58] In all, at least thirty-two states have relied on some form of the democra-

The democracy canon stands for the basic proposition that courts, in adjudicating election law cases, should favor enfranchisement and access to the ballot box. At least 32 states, as outlined in Table 4, rely on it.

55. *Id.* at 882 (citations omitted) (quoting *Ladd v. Holmes*, 66 P. 714, 721 (Or. 1901)).
56. Richard L. Hasen, *The Democracy Canon*, 62 Stan. L. Rev. 69 (2009).
57. *Id.* at 77.
58. *Carr v. Thomas*, 586 P.2d 622, 626-27 (Alaska 1978) ("If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms.") (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952); *League of Women Voters of Cal. v. McPherson*, 52 Cal. Rptr. 3d 585, 588 (Cal. Ct. App. 2006); *Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000) (using the canon to extend time for vote recount in 2000 presidential election); *Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky. 1955) ("It is a fundamental principle that the courts will construe election statutes liberally in favor of the citizens whose right to choose their public officers is challenged."); *Silberstein v. Prince*, 149 N.W. 653, 654 (Minn. 1914) ("[I]t is a rule of universal application that all statutes tending to limit the citizen in the exercise of his right of suffrage must be construed liberally in his favor."); *State ex rel. Myles v. Brunner*, 899 N.E.2d 120, 124 (Ohio 2008) (applying the canon to ambiguous registration deadline statute); Owens v. State ex rel. Jennett, 64 Tex. 500, 509 (Tex. 1885) ("All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor."); Hasen, *supra* note 56, at 71.

cy canon in their case law or statutes. A reference guide to democracy canon cases and statutes across the states is included in Table 4 in the Appendix. While some of the democracy canon cases are quite old, the democracy canon has had continued vitality in the 21st century. And old cases need not be discarded as out-of-date. Several state courts have revived decades-old democracy canon case law in more recent decisions.[59]

The democracy canon stands for the basic proposition that courts, in adjudicating election law cases, should favor enfranchisement and access to the ballot box. For example, in 2006, in *League of Women Voters of California v. McPherson*, plaintiffs sought an order compelling the California Secretary of State to accept voter registrations from people confined in local jails as a condition of felony probation.[60] The California Constitution disenfranchised people while "imprisoned or on parole for the conviction of a felony."[61] The court found that the statute should not apply to those in jail.[62] It did so for several reasons, including the democracy canon, stating that:

> [I]n the absence of any clear intent by the Legislature or the voters, we apply the principle that [t]he exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning.[63]

Likewise, in *May v. Carlton*, a state prisoner used a state habeas corpus petition to challenge his disenfranchisement.[64] The Tennessee Constitution disenfranchised only those convicted of infamous crimes.[65] The plaintiff was convicted of murder, which was not classified as an infamous crime at the time of his conviction.[66] The Tennessee Supreme Court emphasized the importance of the right to vote in holding that the prisoner could seek habeas relief for the infringement on his right to vote, even though habeas relief is not available for infringement on all rights.[67] This case makes clear that the democracy canon can have fairly wide application.

B. The State Court Strategy in Action

The success of this proposed model depends on state courts interpreting the state constitutional provisions outlined above to be more expansive than the implicit right to vote protections of the federal Constitution. This method of state constitutional interpretation is often referred to as "primacy," meaning that the state courts give their state constitutional text "primacy" before considering or importing federal standards into state doctrine. This approach "exemplifies 'judicial federalism.'"[68] This section outlines several cases in which state

59. *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 806 (8th Cir. 2007) (applying 94-year-old democracy canon precedent); *Wilbourn v. Hobson*, 608 So. 2d 1187, 1193 (Miss. 1992) (applying 63-year-old democracy canon precedent).
60. 52 Cal. Rptr. 3d at 587, 592.
61. Cal. Const. art. 2, § 4; *League of Women Voters of Cal.*, 52 Cal. Rptr. 3d at 591.
62. *League of Women Voters of Cal.*, 52 Cal. Rptr. 3d at 596.
63. *Id.* at 594 (citing *Otsuka v. Hite*, 414 P.2d 412, 417 (Cal. 1966)) (internal quotation marks omitted).
64. 245 S.W.3d 340, 342 (Tenn. 2008).
65. Tenn. Const. art. 1, § 5; *May*, 245 S.W.3d at 342.
66. *May*, 245 S.W.3d at 342.
67. *Id.* at 347 ("[A]s a matter of precedent applicable to all citizens, the writ should be available to those whose liberties are restrained by an illegality in a judgment. The right to vote, so precious to Tennesseans during the Reconstruction Era, qualifies today as a fundamental liberty in a representative government and, when illegally abridged, should be restored through the 'Great Writ.'").
68. Douglas, *supra* note 37, at 115. The alternative approach, lockstepping state constitutional interpretation with federal standards, is discussed further below.

courts adopted a primacy approach and accorded broad protection to the right to vote in recent election law cases. These states may be promising targets for building on an already-established primacy approach to adjudicating electoral cases.

I. Massachusetts

One of the most recent and most notable successes of the state court strategy is a Massachusetts case challenging a 20-day voter registration cutoff, *Chelsea Collaborative v. Galvin*.[69] Early voter registration cutoffs regularly disenfranchise unquestionably eligible voters who do not take notice of an upcoming election until the deadline has already passed or are otherwise not able to register in time.[70] Yet, challenges to cutoffs of 30 days or less are not viable at the federal level.[71] Using the state court strategy, the ACLU challenged the law under the Massachusetts Constitution.

The state court recognized that there are several Massachusetts constitutional provisions guaranteeing citizens the right to vote and eligible voters' "equal right to elect officers" and thus applied a strict standard for additional voting regulations beyond those in the state constitution:

> Any legislation by which the exercise of his [i.e. a citizen constitutionally qualified to vote] rights is postponed diminishes them, and must be unconstitutional, unless it can be defended on the ground that it is reasonable and necessary, in order that the rights of the proposed voter may be ascertained and proved, and thus the rights of others (which are to be protected as well as his own) guarded against the danger of illegal voting.[72]

The court applied this test, terming it the "necessity test," and determined, in short, that 20 days was more than what was necessary to ensure that voters were registering accurately. [73]

II. New Hampshire

In 2012, New Hampshire passed a law that added language to the affirmation portion of the voter registration form. In relevant part, it conflated the definition of "domicile"—the type of current residence required to be eligible to vote in New Hampshire—with legal "residence," which requires a more permanent and indefinite state of residence—and required a voter to affirm the latter.[74] Plaintiffs challenged the requirement under the state's constitutional provision guaranteeing free elections and the "equal right to vote" to all eligible "inhabitant[s] of the state."[75]

In addressing the level of scrutiny applied to voting restrictions, the Supreme Court of New Hampshire considered both federal and state cases. The court noted that the U.S. Su-

69. Civil No. 16-3354-D (Mass. Sup. Ct. July 24, 2017), https://aclum.org/wp-content/uploads/2016/11/Decision-and-Order.pdf.
70. *See* Fair Elections Legal Network, *Voter Registration Deadlines* (2015), http://fairelectionsnetwork.com/wp-content/uploads/Voter-Registration-Deadlines-Brief.pdf.
71. Section 8 of the National Voter Registration Act requires states to accept voter registration applications within 30 days of a federal election, suggesting that there is no viable claim that a later cutoff violates federal law. 52 U.S.C. § 20507(a)(1).
72. *Chelsea Collaborative*, slip op. at 50 (quoting *Kineen v. Wells*, 11 N.E. 916, 920 (Mass. 1887)).
73. *Id.* at 51, 57-58.
74. *Guare v. State*, 117 A.3d 731, 735-36 (N.H. 2015).
75. N.H. Const. art. 1, § 11; *Guare*, 117 A.3d at 733.

preme Court's jurisprudence was unclear "regarding the issue of whether intermediate scrutiny is available in voting rights cases."[76] But under the New Hampshire Constitution, the court held that restrictions on the right to vote that fall "between the two extremes ('severe' on the one hand and 'reasonable' and 'nondiscriminatory on the other')" still must satisfy "intermediate scrutiny."[77] Under that test, the "State bears the burden of proof" and must show "that a challenged law [is] substantially related to an important governmental objective."[78] The court held that the law failed under intermediate scrutiny and upheld the trial court's injunction of the law.

This standard provides a much clearer roadmap than *Crawford* and other federal cases for how to analyze typical voting restrictions, particularly since "[m]ost cases fall in between the[] two extremes."[79] In 2017, a lower court in New Hampshire applied the intermediate scrutiny standard again and issued a temporary restraining order enjoining new and harsh penalties for failing to provide documentary proof of domicile after registering to vote. [80]

III. Missouri

Weinschenk v. State was a 2006 challenge to Missouri's voter ID law.[81] In evaluating the voter ID provision, the Missouri Supreme Court explained in detail the distinction between the Missouri Constitution's protection of the right to vote and the federal Constitution's implicit protection of the right to vote:

> The express constitutional protection of the right to vote differentiates the Missouri constitution from its federal counterpart. . . . [T]he right to vote in state elections is conferred under federal law only by implication, not by express guarantee. . . .
>
> Moreover, the qualifications for voting under the federal system are left to legislative determination, not constitutionally enshrined, as they are in Missouri. . . .
>
> Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart.[82]

The court found that the law imposed a "substantial burden" on voters and was subject to strict scrutiny.[83] Ultimately, the court held that the voter ID law was not necessary to effectuate the state's compelling interest in combatting fraud because in-person voter fraud was "not a problem" in Missouri.[84]

76. *Guare*, 117 A.3d at 739.
77. *Id.* at 738, 740.
78. *Id.* at 738.
79. *Id.* at 736 (quoting *Obama for America v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012)).
80. *N.H. Democratic Party v. Gardner*, Case No. 226-2017-CV-00432, (N.H. Superior Ct. Sept. 12, 2017), https://www.courts.state.nh.us/caseinfo/pdf/civil/LeaguevNH/091217league-order.pdf.
81. 203 S.W.3d 201, 204 (Mo. 2006).
82. *Id.* at 211-12.
83. *Id.* at 215.
84. *Id.* at 217. The Missouri Supreme Court's decision in this case was overturned by a constitutional amendment requiring voter identification in 2017. Mo. Const. art. 8, § 11. However, the Missouri Supreme Court's strict standard for scrutinizing other electoral regulations remains.

IV. Pennsylvania

In another voter ID challenge in 2014, *Applewhite v. Commonwealth*, a Pennsylvania court struck down Pennsylvania's voter ID law.[85] The court recited the strong Pennsylvania standards for analzying voting restrictions:

> Our Supreme Court has repeatedly held elections are free and equal under our Constitution:
>
> • when they are public and open to all qualified electors alike . . . [;]
>
> • when every voter has the same right as any other voter;
>
> • when each voter under the law has the right to cast his ballot and have it honestly counted;
>
> • when the regulation of the right to exercise the franchise does not deny the franchise itself[;] ... and[,]
>
> • when no constitutional right of the qualified elector is subverted or denied . . . . .
>
> This Court defined the "right to vote guaranteed by the Pennsylvania Constitution [as] the right of suffrage to elect one's representatives."
>
> In Pennsylvania, the right of qualified electors to vote is a fundamental one. . . . At our democratic core, "the right of suffrage is the most treasured prerogative of citizenship" through which other rights flow, it "may not be impaired or infringed upon in any way except through the fault of the voter himself."[86]

Applying these standards, the difference between the Pennsylvania court's analysis under the Pennsylvania Constitution and the U.S. Supreme Court's analysis in Crawford is stark. In light of evidence that "[h]undreds of thousands of electors in Pennsylvania lack[ed] compliant photo ID" and of "burdens . . . to obtaining it at limited locations and during limited times," the court found a "real risk of improper denial of free voting ID."[87] On this basis, the court applied strict scrutiny, which the law could not survive.

Soon before the publication of this report, the Pennsylvania Supreme Court issued a groundbreaking decision striking down Pennsylvania's congressional district map as an unconstitutional partisan gerrymander under the Pennsylvania Constitution.[88] The Court has not yet issued its full opinion but stated in its expedited order: "[T]he Congressional Redistricting Act of 2011 clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania, and, on that sole basis, we hereby strike it as unconstitutional."[89] The court then ordered that a new map be drawn in time for the 2018 primaries.[90]

85. No. 330 M.D. 2012, 2014 WL 184988 (Pa. Commw. Ct. Jan. 17, 2014).
86. *Id.* at *18-19 (internal citations omitted) (emphasis in original).
87. *Id.* at *20.
88. *League of Women Voters of Pennsylvania v. Pennsylvania*, Case No. 159 MM 2017, (Pa. Jan. 22, 2018), http://www.pacourts.us/assets/files/setting-6015/file-6740.pdf.
89. *Id.* at 2.
90. *Id.*

V. Arkansas

In 2014, in *Martin v. Kohls,* the Arkansas Supreme Court reaffirmed a strict interpretation of its right to vote constitutional provision.[91] It held that the Arkansas Constitution sets forth the only qualifications for voting–citizenship, Arkansas residence, 18 years of age or older, and lawful registration[92]– and that any other qualifications, including a proof of identity requirement, would violate the Arkansas Constitution's text and "disenfranchise Arkansas voters."[93] On these grounds, the court struck down Arkansas' voter ID law. The court, adopting a strong primacy approach, rejected the state's reliance on *Crawford* and other voter ID cases in other states "because those courts interpreted the United States Constitution or their respective states' constitutions, and here, we address the present issue solely under the Arkansas Constitution."[94]

VI. Delaware

In 2017, the ACLU of Delaware brought a novel and successful claim under Delaware's Elections Clause, which guarantees "free and equal" elections.[95] In *Young v. Red Clay Consolidated School District*, plaintiffs argued that a school district's conduct in a special election for a school-related property tax increase was in violation of this clause.[96] In particular, the district court found that the school held family-focused events at every school that served as a polling place in order to reward parents (more likely "yes" voters) for voting.[97] These events not only provided a reward to only a certain subset of voters for participating but also had the effect of crowding the polling places, making parking and access especially difficult for elderly and disabled voters.[98]

The Delaware court began its analysis by holding that Delaware's "free and equal" Elections Clause "has independent content that is more protective of electoral rights than the federal regime."[99] The court concluded that "the operative question under [Delaware's] Elections Clause is whether the outcome represented 'a full, fair, and free expression of the popular will.'"[100] This expansive interpretation led the court to two further conclusions about the Elections Clause's scope: (1) "[a]n election in which certain voters receive money or other valuable things as inducements for voting is not 'free and equal,'" and (2) "when widespread electioneering interferes with voters' ability to access the polls, the election has not been 'free and equal' for purposes of the Elections Clause."[101] Based on these two principles, the court held that the school district's activities violated the Elections Clause.[102]

91. 444 S.W.3d 844 (Ark. 2014).
92. *Id.* at 852.
93. *Id.*
94. *Id.* At 853. In 2017, the Arkansas Legislature passed a new voter ID law that differs from the prior law because it allows voters without photo ID to vote a provisional ballot. There is some speculation that, if challenged, this law may survive because several of the Justices who voted in Martin v. Kohls are no longer on the Arkansas Supreme Court. Andrew DeMillo, Arkansas Governor Signs Bill to Reinstate Voter ID Law, PBS (Mar. 24, 2017), https://www.pbs.org/newshour/nation/arkansas-governor- signs-bill-reinstate-voter- id-law.
95. DEL. CONST. art. 1, § 3.
96. 159 A.3d 713 (Del. Ch. 2017).
97. *Id.* at 717-18.
98. *Id.* at 718.
99. *Id.* at 752.
100. *Id.* at 758.
101. *Id.* at 764, 767.
102. *Id.* at 800.

C. Lockstepping: A Barrier to the State Court Strategy

One major hurdle for the state courts strategy is the practice of lockstepping in many state courts. Lockstepping is a general term for when state courts adopt the federal standard for the right at issue in a state law case. It is commonly used in state court cases regarding state constitutional provisions that closely track federal constitutional language.[103] And, despite the difference in state and federal provisions addressing the right to vote—see Section II.A. of this report—lockstepping has also been used by some states in cases regarding the right to vote.[104] A table of state court cases addressing, and either adopting or rejecting, a lockstepping approach to right-to-vote state law challenges is included in the Table 5 in the Appendix.

For states where the highest court of the state has not yet adopted a primacy or lockstepping approach, there are strong arguments advocates can use to persuade courts againt lockstepping in this context. There is a robust debate regarding whether lockstepping is appropriate at all (and if so, when it is).[105] But regardless of that larger debate, lockstepping in the right-to-vote context is inapt. While lockstepping might make some sense in cases with clear federal analogues, such as state constitutional provisions conferring the right to be free from unreasonable search and seizure, it is inappropriate in election law cases. As discussed in Part II, the text of the state constitutions, the structure of our elections, and the history of election law counsel against the automatic convergence of state and federal right-to-vote standards. Advocates can rely on the arguments in Part II of this report as well as the primacy cases in Section III.b. to persuade state courts to chart their own path in establishing right-to-vote standards based on the language in each individual state constitution.

D. Equal Protection and Privileges or Immunities Clauses: Considering Other Constitutional Protections

When implementing the state court strategy in electoral impact cases, advocates need not and should not limit themselves to the right to vote and election clauses. Advocates can also draw upon the more general rights-protecting provisions of state constitutions, including state equal protection, due process, and inherent rights clauses. These provisions are compiled in Table 3 for reference.

For many of the same federalism reasons that state courts apply a more expansive view of the right to vote, many state courts have held that state equal protection standards do not necessarily mirror the federal standard. Indeed, courts in at least twenty-one states have, at one point or another, held that the equal protection standards in those states are more expansive than the federal standard. [106]

In addition to equal protection clauses, many states have provisions barring the grant of special privileges or immunities to any citizen or specific class of citizens. Many states treat

103. Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 Wm. & Mary L. Rev. 1499, 1500, 1502 (2005).
104. Douglas, *supra* note 37, at 107.
105. *See* Williams, *supra* note 100, at 1500.
106. Randall S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights,* 17 L. & Ineq. 239, 254 n.67 (1999) (compiling cases).

these clauses as equivalent to an equal protection clause[107] but others apply distinct standards that might be worth building upon in certain election law cases, particularly in cases challenging electoral structures intended to benefit certain parties or candidates over others.

For example, in North Carolina, the Supreme Court has held that special statutory privileges given to benefit a particular group of persons are unlawful unless "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest."[108] This is a high standard and North Carolina's Supreme Court has never used this standard to strike down an electoral provision. In fact, the state's highest court has twice upheld term limit expansions based on the public interest exception to this test.[109] Nonetheless, there is a state constitutional bar if plaintiffs can demonstrate that a law conferring special benefits to a party or candidate was not done for any public benefit.

Similarly, in 2002, the Washington Supreme Court determined that Washington's Privileges and Immunities Clause provides distinct protection for citizens than the equal protection clause of the United States Constitution.[110] In particular, the court determined that the clause "provides greater protection than the equal protection clause of the United States Constitution when the threat is not of majoritarian tyranny but of a special benefit to a minority and when the issue concerns favoritism rather than discrimination."[111] In a subsequent decision, the court determined that the clause is particularly suitable to address concerns of "undue political influence exercised by those with large concentrations of wealth" and was written, at least in part, to stem "favoritism toward the wealthy."[112] The test under this clause is:

> [F]irst, whether the law applies equally to all persons within a designated class, and second, whether there is a reasonable ground for distinguishing between those who fall within the class and those who do not. . . . To meet the reasonable ground requirement, distinctions must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.[113]

The Washington Supreme Court has held that the right to vote is a privilege protected by this clause.[114] Therefore, Washington's Privileges and Immunities Clause may be a promising route for challenging electoral structures that unduly benefit or preference a political party or parties or set of candidates.

107. See, e.g., *State v. Coleman*, 385 P.3d 420, 422 (Ariz. Ct. App. 2016), review denied (Sept. 12, 2017); State v. Savastano, 309 P.3d 1083, 1102 (Or. 2013) (en banc) (determining that without a discriminatory or illegitimate motive an executive action is proper under this clause if "there is a rational explanation for the differential treatment that is reasonably related to the official's task or to the person's individual situation."); Hooper v. Rockwell, 513 S.E.2d 358, 364 (S.C. 1999). ("Article I, Section 3 ensures the government may not abridge the privileges and immunities of its citizens without due process, and provides for equal protection under the law.").
108. *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 482 (N.C. 1989).
109. *Id.* at 486; Crump v. Snead, 517 S.E.2d 384, 387 (N.C. Ct. App. 1999) (finding that extension of term for City Council not an exclusive emolument).
110. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant I)*, 42 P.3d 394, 408 (Wash. 2002) (en banc).
111. *Id.*
112. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant II)*, 83 P.3d 419, 426 (Wash. 2004) (en banc).
113. *Ockletree v. Franciscan Health Sys.*, 317 P.3d 1009, 1017 (Wash. 2014) (en banc) (internal quotation marks omitted) (quoting *Grant I*, 42 P.3d 394 and *State ex rel. Bacich v. Huse*, 59 P.2d 1101 (Wash. 1936) (en banc)).
114. *Madison v. State*, 163 P.3d 757, 765 (Wash. 2007) (en banc).

IV. Changing the Law

This report has focused on litigation based on state constitutional provisions as they stand. However, advocates should also keep in mind opportunities for combining a litigation strategy with a mobilization strategy to change or improve the law in a particular state, either through statutes or constitutional amendments. Those opportunities are both viable and promising.

California provides an instructive case study. After two large scale and expensive cases were lost by private plaintiffs in 1992, challenges to at-large voting schemes in California came to a halt.[115] These difficulties lead to the push for and passage of the California Voting Rights Act,[116] which is stronger than the federal VRA, since it removes several of the preconditions for federal cases.[117] Further, the remedies section is written to allow for different types of remedies for violations, explicitly not limiting courts to creating single member districts.[118] This, along with the elimination of the compactness requirement, allows California to experiment with different set ups such as cumulative voting, ranked choice voting, and limited voting.[119] Similarly, in 2010, Florida voters added an anti-gerrymandering amendment to the Florida Constitution through the ballot initiative process.[117] This amendment was put into action when the Florida Supreme Court struck down eight districts due to partisan intent in their drawing.[120]

V. Strategic Considerations

This report only provides the initial background for more exploration of this topic. After all, "[s]tate supreme courts decide around 2,000 constitutional law cases every year"[121] and state courts decide approximately half of election law cases.[123] One report cannot and should not canvass them all. Individual state studies are necessary as advocates explore state-specific strategies.

The breadth of state constitutional provisions and case law discussed above demonstrates that there is no one-size-fits-all approach to a state court strategy for litigating election law cases. Indeed, that is the benefit of the strategy; it allows for flexibility and experimentation. A different strategy is likely appropriate in each state depending on the pressing needs and electoral problems within, its current laws, constitutional text and history, courts' interpretation methods, composition of its highest court, and other innumerable factors.

When considering electoral litigation in a particular state, advocates should research and consider the following questions:

115. Joaquin G. Avila, Eugene Lee & Terry M. Ao, *Voting Rights in California: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 131, 149 (2007).
116. Id. at 152.
117. *The California Voting Rights Act*, Lawyers' Comm. for Civil Rights of the S.F. Bay Area (2014), https://www.lccr.com/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf.
118. *Id.*; Cal. Elec. Code § 14029.
119. *The California Voting Rights Act*, Lawyers' Comm. for Civil Rights of the S.F. Bay Area (2014), https://www.lccr.com/wp-content/uploads/2014_CVRA_Fact_Sheet.pdf; Paige A. Epstein, Addressing Minority Vote Dilution Through State Voting Rights Acts 9-11 (Univ. of Chi. Pub. Law & Legal Theory Working Paper No. 474, 2014).
120. Fla. Const. art. III, § 20(a); Jordan Lewis, Note, *Fair Districts Florida: A Meaningful Redistricting Reform?*, 5 U. Miami Race & Soc. Just. L. Rev. 189, 200 (2015).
121. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 372 (Fla. 2015).
122. Douglas, *supra* note 26, at 5.
123. Hasen, *supra* note 56, at 92.

1. What state constitutional provisions are relevant? Consider a broad range of provisions, not just the elections or right–to-vote provisions.
2. What is the legislative history of these provisions? Does this history provide support for our theory?
3. Has the state court applied a primacy or lockstep approach to interpreting those provisions?
4. Can we borrow from the democracy canon in supporting our theory?
5. What is the current makeup of the highest court in the state? Has that court been receptive to rights-expanding cases or has it limited civil or political rights in recent years?
6. Is this the right first case to build precedent in this state? An incrementalist approach—bringing challenges to more serious or obvious intrusions on the right to vote before bringing more novel claims—may be the best long-term strategy in a state that does not yet have a robust right-to-vote jurisprudence.

Conclusion

For too long, election law scholars and litigators have focused their energy almost exclusively on federal courts. However, in recent years, there has been a tide of new scholarship exploring the opportunities at the state level for innovation and change where federal systems have stalled. State courts have largely been left out of that conversation but they should not be.

Our democracy faces a host of serious challenges from entrenched gerrymandering that dilutes and distorts voters' influence in their own democracy to barriers to voting participation among historically disenfranchised communities. Litigators and scholars alike should set their sights on exploring the opportunities for experimentation in state courts to build a better democracy and a more perfect union.

Project Background from FairVote

This research and report is part of a larger FairVote project that began in 2015 to identify the most promising opportunities for impactful electoral reform. FairVote consulted with a team of scholars, including several of the nation's leading election law professors, in order to identify the most important conditions to improve the likelihood of favorable litigation. Based on FairVote's work, and with the help of this team of scholars, three courses for short-term action were recommended:

1. Gaining a clear understanding of state constitutional provisions, judicial philosophies, and election law rulings in all 50 states — looking specifically for openings for structural electoral reform.
2. Assembling a standing team of legal experts who can provide rapid response analyses of pending rulings and serve as a screening committee to gauge the feasibility of structural reform test cases.
3. Exploring test cases in three areas: sore loser laws, fair voting methods as Voting Rights Act remedies, and ballot access.

This report helps to fulfill the first goal of this larger project.

The authors would like to give special credit to the following group of independent legal scholars who have contributed as participants to our reform strategies survey:

- Michael Kang, Emory University
- Steven Mulroy, University of Memphis
- Nicholas Stephanopoulos, University of Chicago
- Daniel Tokaji, Ohio State University
- Alan Morrison, George Washington Law School

Appendix:

Table 1. Right to Vote Provisions:

State:	Provision:	Language:
Alabama	Art. 8, § 177; Amend. 865	"Every citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence."
Alaska	Art. 5, § 1	"Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election."
Arizona	Art. 7, §2	"No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word 'citizen' shall include persons of the male and female sex." (footnote omitted).
Arkansas	Art. 3, § 1	"Except as otherwise provided by this Constitution, any person may vote in an election in this state who is: (1) A citizen of the United States; (2) A resident of the State of Arkansas; (3) At least eighteen (18) years of age; and (4) Lawfully registered to vote in the election. [As amended by Const. Amend. 85.]"
California	Art. 2, § 2 Art. 2, § 2.5	"A United States citizen 18 years of age and resident in this State may vote." "A voter who casts a vote in an election in accordance with the laws of this State shall have that vote counted."
Colorado	Art. 7, § 1 Art. 7, § 1a	"Every citizen of the United States who has attained the age of eighteen years, has resided in this state for such time as may be prescribed by law, and has been duly registered as a voter if required by law shall be qualified to vote at all elections." "Any person who otherwise meets the requirements of law for voting in this state shall not be denied the right to vote in an election because of residence on land situated within this state that is under the jurisdiction of the United States."
Connecticut	Art. 6, §1	"Every citizen of the United States who has attained the age of eighteen years, who is a bona fide resident of the town in which he seeks to be admitted as an elector and who takes such oath, if any, as may be prescribed by law, shall be qualified to be an elector."

Delaware	Art. 5, § 2	"Every citizen of this State of the age of twenty-one years who shall have been a resident thereof one year next preceding an election, and for the last three months a resident of the county, and for the last thirty days a resident of the hundred or election district in which he or she may offer to vote, and in which he or she shall have been duly registered as hereinafter provided for, shall be entitled to vote at such election in the hundred or election district of which he or she shall at the time be a resident, and in which he or she shall be registered . . . . "
Florida	Art. 6, § 2	"Every citizen of the United States who is at least eighteen years of age and who is a permanent resident of the state, if registered as provided by law, shall be an elector of the county where registered."
Georgia	Art. 2, § 1, ¶ II	"Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law shall be entitled to vote at any election by the people."
Hawaii	Art. 1, § 8 Art. 2, § 1	"No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land." "Every citizen of the United States who shall have attained the age of eighteen years, have been a resident of this State not less than one year next preceding the election and be a voter registered as provided by law, shall be qualified to vote in any state or local election."
Idaho	Art. 6, § 2	"Every male or female citizen of the United States, eighteen years old, who has resided in this state, and in the county where he or she offers to vote for the period provided by law, if registered as provided by law, is a qualified elector."
Illinois	Art. 3, §1 Art. 3, § 8	"Every United States citizen who has attained the age of 18 or any other voting age required by the United States for voting in State elections and who has been a permanent resident of this State for at least 30 days next preceding any election shall have the right to vote at such election." "No person shall be denied the right to register to vote or to cast a ballot in an election based on race, color, ethnicity, status as a member of a language minority, national origin, religion, sex, sexual orientation, or income."
Indiana	Art. 2, § 2	"A citizen of the United States, who is at least eighteen (18) years of age and who has been a resident of a precinct thirty (30) days immediately preceding an election may vote in that precinct at the election."
Iowa	Art. 2, § 1	"Every citizen of the United States of the age of twenty-one years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law." (footnote omitted).

Kansas	Art. 5, § 1	"Every citizen of the United States who has attained the age of eighteen years and who resides in the voting area in which he or she seeks to vote shall be deemed a qualified elector."
Kentucky	§ 145	Every citizen of the United States of the age of eighteen years who has resided in the state one year, and in the county six months, and the precinct in which he offers to vote sixty days next preceding the election, shall be a voter . . . ."
Louisiana	Art. 1, § 10	"Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote . . . ."
Maine	Art. 2, § 1	"Every citizen of the United States of the age of 18 years and upwards, excepting persons under guardianship for reasons of mental illness, having his or her residence established in this State, shall be an elector for Governor, Senators and Representatives, in the city, town or plantation where his or her residence has been established, if he or she continues to reside in this State; and the elections shall be by written ballot."
Maryland	Decl. of Rights, Art. 7 Decl. of Rights, Art. 15 Art. 1, § 1	Free and Frequent Elections: "That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." Prohibition on Poll Tax: "That the levying of taxes by the poll is grievous and oppressive, and ought to be prohibited[.]" Right to Vote: "[E]very citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State."
Massachusetts	Pt. 1, Art. 9	"[A]ll the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected . . . ."
Michigan	Art. 2, § 1	"Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution."
Minnesota	Art. 7, § 1	"Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct."

Mississippi	Art. 12, § 241	"Every inhabitant of this state, except idiots and insane persons, who is a citizen of the United States of America, eighteen (18) years old and upward, who has been a resident of this state for one (1) year, and for one (1) year in the county in which he offers to vote, and for six (6) months in the election precinct or in the incorporated city or town in which he offers to vote, and who is duly registered as provided in this article, and who has never been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy, is declared to be a qualified elector, except that he shall be qualified to vote for President and Vice President of the United States if he meets the requirements established by Congress therefor and is otherwise a qualified elector."
Missouri	Art. 8, § 2	"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people . . . ."
Montana	Art. 4, § 2	"Any citizen of the United States 18 years of age or older who meets the registration and residence requirements provided by law is a qualified elector unless he is serving a sentence for a felony in a penal institution or is of unsound mind, as determined by a court."
Nebraska	Art. 1, § 22	"[T]here shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise."
Nevada	Art. 2, § 1	"All citizens of the United States (not laboring under the disabilities named in this constitution) of the age of eighteen years and upwards, who shall have actually, and not constructively, resided in the state six months, and in the district or county thirty days next preceding any election, shall be entitled to vote for all officers that now or hereafter may be elected by the people, and upon all questions submitted to the electors at such election . . . ."
New Hampshire	Pt. 1, Art. 11	"[E]very inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. Every person shall be considered an inhabitant for the purposes of voting in the town, ward, or unincorporated place where he has his domicile."
New Jersey	Art. 2, § 1(3)(a)	"Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people . . . ."
New Mexico	Art. 7, § 1(A)	"Every person who is a qualified elector pursuant to the constitution and laws of the United States and a citizen thereof shall be qualified to vote in all elections in New Mexico . . . ."
New York	Art. 2, § 1	"Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election."

North Carolina	Art. 6, § 1	"Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided."
North Dakota	Art. 2, § 1	"Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector."
Ohio	Art. 5, § 1	"Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections."
Oklahoma	Art. 1, § 6 Art. 3, § 1	"The State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude." "Subject to such exceptions as the Legislature may prescribe, all citizens of the United States, over the age of eighteen (18) years, who are bona fide residents of this state, are qualified electors of this state."
Oregon	Art. 2, § 2	"Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen: (a) Is 18 years of age or older; (b) Has resided in this state during the six months immediately preceding the election, except that provision may be made by law to permit a person who has resided in this state less than 30 days immediately preceding the election, but who is otherwise qualified under this subsection, to vote in the election for candidates for nomination or election for President or Vice President of the United States or elector of President and Vice President of the United States; and (c) Is registered not less than 20 calendar days immediately preceding any election in the manner provided by law."
Pennsylvania	Art. 7, § 1	"Every citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact. 1. He or she shall have been a citizen of the United States at least one month. 2. He or she shall have resided in the State ninety (90) days immediately preceding the election. 3. He or she shall have resided in the election district where he or she shall offer to vote at least sixty (60) days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within sixty (60) days preceding the election."

Rhode Island	Art. 2, § 1	"Every citizen of the United States of the age of eighteen years or over who has had residence and home in this state for thirty days next preceding the time of voting, who has resided thirty days in the town or city from which such citizen desires to vote, and whose name shall be registered at least thirty days next preceding the time of voting as provided by law, shall have the right to vote for all offices to be elected and on all questions submitted to the electors . . . ."
South Carolina	Art. 2, § 4	"Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law."
South Dakota	Art. 7, § 2	"Every United States citizen eighteen years of age or older who has met all residency and registration requirements shall be entitled to vote in all elections and upon all questions submitted to the voters of the state unless disqualified by law for mental incompetence or the conviction of a felony."
Tennessee	Art. 4, § 1	"Every person, being eighteen years of age, being a citizen of the United States, being a resident of the state for a period of time as prescribed by the General Assembly, and being duly registered in the county of residence for a period of time prior to the day of any election as prescribed by the General Assembly, shall be entitled to vote in all federal, state, and local elections held in the county or district in which such person resides."
Texas	Art. 6, § 2	"Every person subject to none of the disqualifications provided by Section 1 of this article or by a law enacted under that section who is a citizen of the United States and who is a resident of this State shall be deemed a qualified voter . . . ."
Utah	Art. 4, § 2	"Every citizen of the United States, eighteen years of age or over, who makes proper proof of residence in this state for thirty days next preceding any election, or for such other period as required by law, shall be entitled to vote in the election."
Vermont	Ch. 2, § 42	"Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a voter of this state: . . . ."
Virginia	Art. 2, § 1	"In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be eighteen years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article."
Washington	Art. 6, § 1	"All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Article VI, section 3 of this Constitution, shall be entitled to vote at all elections."
West Virginia	Art. 4, § 1	"The citizens of the state shall be entitled to vote at all elections held within the counties in which they respectively reside . . . ."
Wisconsin	Art. 3, § 1	"Every United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district."

Wyoming	Art. 6, § 2	"Every citizen of the United States of the age of twenty-one years and upwards, who has resided in the state or territory one year and in the county wherein such residence is located sixty days next preceding any election, shall be entitled to vote at such election, except as herein otherwise provided."

Table 2. Free, Equal, and Open Elections

State:	Provision:	Language:
Arizona	Art. 2, § 21	"All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
Arkansas	Art. 3, § 2	"Elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited, except for the commission of a felony, upon lawful conviction thereof. [As amended by Const. Amend. 85.]"
Colorado	Art. 2, § 5	"All elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
Delaware	Art. 1, § 3	"All elections shall be free and equal."
Illinois	Art. 3, § 3	"All elections shall be free and equal."
Indiana	Art. 2, § 1	"All elections shall be free and equal."
Kentucky	§ 6	"All elections shall be free and equal."
Maryland	Decl. of Rights, Art. 7	"That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage."
Massachusetts	Pt. 1, Art. 9	"All elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments."
Missouri	Art. 1, § 25	"That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
Montana	Art. 2, § 13 Art. 4, § 3	"All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." "The legislature shall . . . insure the purity of elections and guard against abuses of the electoral process."

Nebraska	Art. 1, § 22	"All elections shall be free . . . ."
New Hampshire	Pt. 1, Art. 11	"All elections are to be free . . . ."
New Mexico	Art. 2, § 8	"All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
North Carolina	Art. 1, § 10	"All elections shall be free."
Oklahoma	Art. 3, § 5	"All elections shall be free and equal. No power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage . . . ."
Oregon	Art. 2, § 1	"All elections shall be free and equal."
Pennsylvania	Art. 1, § 5	"Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
South Carolina	Art. 1, § 5	"All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office."
South Dakota	Art. 6, § 19	"Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
Tennessee	Art. 1, § 5	"The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."
Utah	Art. 1, § 17	"All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."
Vermont	Ch. 1, Art. 8	"That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution."
Virginia	Art. 1, § 6	"That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed, or deprived of, or damaged in, their property for public uses, without their own consent, or that of their representatives duly elected, or bound by any law to which they have not, in like manner, assented for the public good."

Washington	Art. 1, § 19	"All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

Table 3. Equal Protection, Privileges or Immunities and Other Related Provisions

State:	Provision:	Language:
Alabama	Art. 1, § 1 Art. 1, § 22	Equality: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Privileges or Immunities: "That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." However, the Supreme Court of Alabama has held that these sections of the Constitution are not the equivalent of an equal protection guarantee. *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999).
Alaska	Art. 1, § 1 Art. 1, § 3 Art. 1, § 7	Inherent Rights/Equal Protection: "This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State." Equal Protection: "No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section." Due Process: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed."
Arizona	Art. 2, § 4 Art. 2, § 13	Due Process: "No person shall be deprived of life, liberty, or property without due process of law." Equal Protection/Privileges or Immunities: "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

		Individual Liberty: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."
Arkansas	Art. 2, § 2 Art. 2, § 3 Art. 2, § 21	Equal Protection/Privileges or Immunities: "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." Fundamental Rights: "No person shall be taken, or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed, or in any manner destroyed, or deprived of his life, liberty or property; except by the judgment of his peers, or the law of the land; nor shall any person, under any circumstances, be exiled from the State."
California	Art. 1, § 1 Art. 1, § 7 Art. 1, § 24	Inalienable Rights: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Equal Protection/Due Process: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . . " Federalism: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"
Colorado	Art. 2, § 3 Art. 2, § 25 Art. 2, § 29	Inalienable Rights: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Due Process: "No person shall be deprived of life, liberty or property, without due process of law." Gender Equality: "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."

Connecticut	Art. 1, § 1 Art. 1, § 20	Equal Protection/Privileges or Immunities: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community." Equal Protection: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."
Delaware	N/A	
Florida	Preamble Art. 1, § 2 Art. 1, § 9	Inherent Rights: "We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, perfect our government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution." Inherent Rights: "All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability." Due Process: "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."
Georgia	Art. 1, § 1, ¶ I Art. 1, § 1, ¶ II Art. 1, § 1, ¶ VII	Due Process: "No person shall be deprived of life, liberty, or property except by due process of law." Equal Protection: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws." Privileges and Immunities: "All citizens of the United States, resident in this state, are hereby declared citizens of this state; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges, and immunities due to such citizenship."

Hawaii	Art. 1, § 2 Art. 1, § 3 Art. 1, § 5 Art. 1, § 21	Inalienable Rights: "All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities." Equality of Sexes: "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section." Equal Protection: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Privileges or Immunities: "The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities."
Idaho	Art. 1, § 1 Art. 1, § 2	Inherent Rights: "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." Inherent Rights/Equal Protection/Privileges or Immunities: "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature."
Illinois	Art. 1, § 1 Art. 1, § 2	Inherent Rights: "All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness." Due Process/Equal Protection: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

Indiana	Art. 1, § 1 Art. 1, § 23	Inherent Rights: "We Declare, that all people are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." Equal Protection/ Privileges or Immunities: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."
Iowa	Art. 1, § 1 Art. 1, § 6	Inherent Rights: "All men and women are, by nature, free and equal, and have certain inalienable rights — among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Equal Protection / Privileges or Immunities: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."
Kansas	Bill of Rights, § 1 Bill of Rights, § 2	Inherent Rights: "All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness." Equal Protection/Privileges or Immunities: "All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency."
Kentucky	Bill of Rights, § 3	Equal Protection/Privileges or Immunities: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation except as provided in this Constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment."
Louisiana	Art. 1, § 3	Equal Protection: "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

Maine	Art. 1, § 1 Art. 1, § 6(A)	Inherent Rights: "All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." Equal Protection: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof."
Maryland	Decl. of Rights, Art. 46	Gender Equality: "Equality of rights under the law shall not be abridged or denied because of sex."
Massachusetts	Pt. 1, Art. 1 Pt. 1, Art. 6	Inherent Rights: "All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." Privileges: "No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . . ."
Michigan	Art. 1, § 1 Art. 1, § 2	Inherent Rights: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Equal Protection: "No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation."
Minnesota	Art. 1, § 1 Art. 1, § 2	Inherent Rights: "Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good." Rights and Privileges: "No member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers."

Mississippi	Art. 3, § 5	Inherent Rights: "All political power is vested in, and derived from, the people; all government of right originates with the people, is founded upon their will only, and is instituted solely for the good of the whole."
Missouri	Art. 1, § 2	Inherent Rights/Equal Protection: "That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."
Montana	Art. 2, § 3 Art. 2, § 4	Inherent Rights: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities." Equal Protection: "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."
Nebraska	Art. 1, § 1 Art. 1, § 3	Inherent Rights: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Equal Protection/Due Process: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws."
Nevada	Art. 1, § 1	Inherent Rights: "All men are by nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and pursuing and obtaining safety and happiness[.]"

New Hampshire	Art. 1 Art. 2 Art. 15	Inherent Rights: "All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good." Inherent Rights/Equal Protection: "All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin." Due Process/Privileges and Immunities: "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land . . . ."
New Jersey	Art. 1, § 1 Art. 1, § 5	Inherent Rights: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Equal Protection: "No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."
New Mexico	Art. 2, § 4 Art. 2, § 18	Inherent Rights: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness." Equal Protection/Due Process: "No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person."
New York	Art. 1, § 1 Art. 1, § 11	Due Process/Privileges and Immunities: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers . . . ." Equal Protection: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state."

		Inherent Rights: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."
North Carolina	Art. 1, § 1 Art. 1, § 19	Equal Protection/Due Process: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin."
North Dakota	Art. 1, § 1 Art. 1, § 12	Inherent Rights: "All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed." Due Process: "No person shall . . . be deprived of life, liberty or property without due process of law."
Ohio	Art. 1, § 1	Inherent Rights: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."
Oklahoma	Art. 2, § 2 Art. 2, § 7	Inherent Rights: "All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry." Due Process: "No person shall be deprived of life, liberty, or property, without due process of law."
Oregon	Art. 1, § 1 Art. 1, §20	Inherent Rights: "We declare that all men, when they form a social compact are equal in right . . . ." Equal Protection: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Pennsylvania	Art. 1, § 1 Art. 1, § 26 Art. 1, § 28	Inherent Rights: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Nondiscrimination: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Gender Equality: "Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."
Rhode Island	Art. 1, § 2	Equal Protection/Due Process: "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."
South Carolina	Art. 1, § 3	Equal Protection/Privileges and Immunities: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."
Tennessee	N/A	
Texas	Art. 1, § 3 Art. 1, § 3a	Inherent Rights: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." Equal Protection: "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative."
Utah	N/A	
Vermont	Ch. 1, Art. 1	Inherent Rights: "That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea, ought to be holden by law, to serve any person as a servant, slave or apprentice, after arriving to the age of twenty-one years, unless bound by the person's own consent, after arriving to such age, or bound by law for the payment of debts, damages, fines, costs, or the like."

Virginia	Art. 1, § 1	Inherent Rights: "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."
Washington	Art. 1, § 12	Privileges or Immunities: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."
West Virginia	Art. 2, § 4 Art. 3, § 1	Equal Representation: "Every citizen shall be entitled to equal representation in the government, and, in all apportionments of representation, equality of numbers of those entitled thereto, shall as far as practicable, be preserved." Inherent Rights: "All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety."
Wisconsin	Art. 1, § 1	Inherent Rights: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."
Wyoming	Art. 1, § 2 Art. 1, § 3 Art. 6, § 1	Equality: "In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal." Equal Political Rights: "Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction." Gender Equality: "The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges. "

Table 4. The Democracy Canon Case Law and Statutes

State:	Case:
Alabama	*Mitchell v. Kinney*, 5 So. 2d 788, 792 (Ala. 1942) (general pro-democracy cannon language referring to voting regulations); *Roe v. Mobile Cty. Appointment Bd.*, 676 So. 2d 1206 (Ala. 1995) (substantial compliance standard for absentee ballots); *Woodall v. City of Gadsden*, 179 So. 2d 759, 761 (Ala. 1965) (substantial compliance for registration); *Waltman v. Rowell*, 913 So. 2d 1083, 1090 (Ala. 2005) (applying substantial compliance, democracy cannon cases to voters who mistakenly voted in wrong area).
Alaska	*Municipality of Anchorage v. Mjos*, 179 P.3d 941, 943 n.1 (Alaska 2008) ("Statutes dealing with the right of voters to choose public officials and the right of citizens to aspire to and hold public office, should receive a liberal construction in favor of assuring the right to exercise freedom of choice in selecting public officials and also the right to aspire to and hold public office.").
Arizona	*Pacuilla v. Cochise Cty. Bd. of Supervisors*, 923 P.2d 833, 834 (Ariz. 1996) (liberal construction of certain provisions related to elections).
Arkansas	*Populist Party of Ark. v. Chesterfield*, 195 S.W.3d 354, 359 (Ark. 2004) ("Any law or party rule, by which this inherent right of the citizen [to be a candidate for public office] is diminished or impaired ought always to receive a liberal construction in favor of the citizen desiring to exercise the right."); *Forrest v. Baker*, 698 S.W.2d 497, 498 (Ark. 1985) (substantial compliance for absentee ballots); *Reed v. Baker*, 495 S.W.2d 849, 852 (Ark. 1973) (liberal construction of election contest statutes in aid of democratic governance).

State:	Case:	Statute:
California	*Wilks v. Mouton*, 722 P.2d 187, 196 (Cal. 1986) ("Noncompliance with directory provisions of the Elections Code will not nullify a vote unless the irregularity prevented 'the fair expression of popular will'").	California has a number of statutory liberal construction rules for its election statutes. CAL. ELEC. CODE § 15342.5 (recount); CAL. ELEC. CODE § 14312 (provisional ballots); CAL. ELEC. CODE § 19001 (certification of voting systems); CAL. ELEC. CODE § 10200 (municipal elections); CAL. ELEC. CODE § 3000 (vote by mail).
Colorado	*Moran v. Carlstrom,* 775 P.2d 1176, 1180 (Colo. 1989) ("statutes tending to limit a voter's exercise 'should be liberally construed in his favor'") (quoting *Nicholls v. Barrick*, 62 P. 202, 205 (Colo. 1900)); *Erickson v. Blair,* 670 P.2d 749, 754 (Colo. 1983) (substantial compliance in absentee balloting).	COLO. REV. STAT. § 1-1-103(1) ("This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections.").
Connecticut	*Dombkowski v. Messier*, 319 A.2d 373, 374 (Conn. 1972) (clear statement rule for voting restrictions); *but see Butts v. Bysiewicz*, 5 A.3d 932, 938 n.5 (Conn. 2010) (limiting *Dombkowski* to actual disenfranchisement).	
Delaware	*Bartley v. Davis*, No. CIV.A. 8561, 1986 WL 8810, at *9 (Del. Ch. Aug. 14, 1986), aff'd, 519 A.2d 662 (Del. 1986) ("In this inquiry one must look beneath the surface of the statutory words to try to determine the purposes underlying the statute. In doing so we start with an observation of elemental importance in this case. Election laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon-indeed giving vitality to-the most fundamental of our rights. Thus, in a case of this kind the right of the public to an open, effective primary election is a right that enters importantly into the analysis.").	

Florida	*Palm Beach Cty. Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227 (Fla. 2000) ("[T]he will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases").	
Georgia	*Patten v. Miller*, 8 S.E.2d 757, 769 (Ga. 1940) (clear statement rule for disqualifications for running for office).	
Hawaii	*Thirty Voters of Kauai Cty. v. Doi*, 599 P.2d 286, 290 (Haw. 1979) (an election will not be invalidated if there is substantial compliance with statutes).	
Illinois	*Pullen v. Mulligan*, 561 N.E.2d 585, 596 (Ill. 1990) (purpose of elections to obtain accurate expression of intent of voters; substantial compliance with certain balloting procedures is OK to effectuate this result).	
Indiana	*Curley v. Lake Cty. Bd. of Elections & Registration,* 896 N.E.2d 24, 34 (Ind. Ct. App. 2008) ("In the absence of fraud, election statutes generally will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disenfranchisement, and to uphold the will of the electorate.") (citing *Brown v. Grzeskowiak*, 101 N.E.2d 639, 646 (Ind. 1951)).	
Iowa	*Lee v. Rand*, 299 N.W.2d 486, 488 (Iowa 1980) ("[S]tatutes regulating the right to vote must be construed liberally in favor of giving effect to the voter's choice and that where the voter's intent can be fairly ascertained from his ballot, the vote should be counted.").	IOWA CODE § 48A.1 ("It is the intent of the general assembly to facilitate the registration of eligible residents of this state through the widespread availability of voter registration services. This chapter and other statutes relating to voter registration are to be liberally construed toward this end."); IOWA CODE § 53.51 ("This subchapter shall be liberally construed in order to provide means and opportunity for qualified voters of the state of Iowa serving in the armed forces of the United States to vote.").

Kansas	*Simpson v. Osborn*, 34 P. 747, 749 (Kan. 1893) (liberal construction; goal of law is to enfranchise voters); *Cure v. Bd. of Cty. Comm'rs*, 952 P.2d 920, 923 (Kan. 1998) (substantial compliance all that is necessary when upholding the will of the voters).	KAN. STAT. ANN. § 25-439 ("No mere informality in the manner of carrying out or executing the provisions of this act shall invalidate any election held under it or authorize the rejection of the returns thereof. The provisions of this act shall be construed liberally for the purpose of effectuating its purposes.").
Kentucky	*Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky. 1955) ("It is a fundamental principle that the courts will construe election statutes liberally in favor of the citizens whose right to choose their public officers is challenged."); *Heleringer v. Brown*, 104 S.W.3d 397, 403 (Ky. 2003) ("The idea of liberal construction in favor of broad voter participation is deeply embedded in Kentucky law.")	
Louisiana	*Adkins v. Huckabay*, 755 So. 2d 206, 216 (La. 2000) (liberally construing absentee ballot laws to effectuate the will of the voters).	
Maine	*Kelly v. Curtis*, 287 A.2d 426, 428 (Me. 1972) (liberal construction of statutes related to referenda).	
Massachusetts	*McCavitt v. Registrars of Voters of Brockton*, 434 N.E.2d 620, 624 (Mass. 1982) ("[V]oting disputes, where at all possible, in favor of the voter. The object of election laws is to secure the rights of duly qualified electors and not to defeat them. This must be borne in mind in the construction of such statutes, and the presumption is that they are enacted to prevent fraud and to secure freedom of choice, and not by technical obstructions to make the right of voting insecure.") (internal citations and quotation marks omitted); *Colten v. City of Haverhill*, 564 N.E.2d 987, 991 (Mass. 1991) (substantial compliance in absentee balloting).	
Minnesota	*White v. Sanderson*, 76 N.W. 1021, 1022 (Minn. 1898); *Silberstein v. Prince*, 149 N.W. 653, 654 (Minn. 1914) ("Indeed, it is a rule of universal application that all statutes tending to limit the citizen in the exercise of his right of suffrage must be construed liberally in his favor."); *but see In re Contest of Gen. Election Held on Nov. 4, 2008*, for *the Purpose of Electing a U.S. Senator from Minn.*, 767 N.W.2d 453, 462 n.11 (Minn. 2009) (absentee voting is a privilege limitable by the legislature).	
Mississippi	*Wilbourn v. Hobson*, 608 So. 2d 1187, 1193 (Miss. 1992) ("In determining the effect of irregularities through mistakes of voters and election officials, all statutes limiting the voter in the exercise of his right of suffrage are construed liberally in his favor, in order to ascertain the will of the majority of the voters.") (quoting *Guice v. McGehee*, 124 So. 643, 644 (Miss. 1929)).	

Missouri	*Bowers v. Smith*, 20 S.W. 101, 103 (Mo. 1892) ("All statutes tending to limit the citizen in his exercise of this right (of suffrage) should be liberally construed in his favor.") (internal quotation marks omitted) (quoting *Owens v. State*, 64 Tex. 500 (Tex. 1885)); *Mo. Prot. & Advocacy Servs. v. Carnahan*, 499 F.3d 803, 806 (8th Cir. 2007) ("Missouri's election laws must be liberally construed in aid of the right of suffrage") (internal quotation marks omitted) (citing *Nance v. Kearbey*, 158 S.W. 629, 631 (Mo. 1913) (en banc))).	
Montana	*Stackpole v. Hallahan*, 40 P. 80, 85 (Mont. 1895) ("Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favor, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be set aside, except for causes plainly within the purview of the statute.") (quoting *State v. Saxon*, 12 So. 218 (Fla. 1892)).	MONT. CODE ANN. § 13-15-102 ("No declaration of an election result, commission, or certificate shall be withheld because of a defect or informality in the returns of any election if it can be determined with reasonable certainty the office intended and the person elected.")
Nebraska	*Quigley v. Lebsack*, 362 N.W.2d 31, 33 (Neb. 1985) ("A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended.").	NEB. REV. STAT. § 32-102 ("The act shall be liberally construed so that the will of the registered voters is not defeated by an informality or a failure to comply with the act with respect to the giving of any notice or the conducting of any election or the certifying of the results of the election.").
Nevada	*Cirac v. Lander Cty.*, 602 P.2d 1012, 1016 (Nev. 1979) (liberal construction for petitioning regulations); *Buckner v. Lynip*, 41 P. 762, 766 (Nev. 1895) (holding that secret ballot law should be liberally construed in favor of voters and enfranchisement).	NEV. REV. STAT. § 293.127 (liberal construction to ensure vote for disabled and elderly, to uphold will of voters).

New Jersey	*N. J. Democratic Party v. Samson*, 814 A.2d 1028, 1033 (N.J. 2002) ("Election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons.") (quoting *Kilmurray v. Gilfert*, 91 A.2d 865 (N.J. 1952)).	
New York	*Fallon v. Dwyer*, 90 N.E. 942, 943 (N.Y. 1910) (giving liberal construction to regulations on the marking of ballots); *St. John v. Bd. of Elections of Albany*, 145 Misc. 2d 324, 328 (N.Y. Sup. Ct. 1989) (favoring right to vote over technical compliance with registration law).	
North Dakota	*Mittelstadt v. Bender*, 210 N.W.2d 89, 95 (N.D. 1973) (finding that "statutes are to be liberally construed to effect their objects and promote justice" and that "the object of [absentee balloting provisions] is to extend the vote to qualified electors rather than to restrict that right."); *Homer Twp. v. Zimney*, 490 N.W.2d 256, 259 n.2 (N.D. 1992) (if challenge follows an election, only substantial compliance with election laws necessary).	
Ohio	*State ex rel. Myles v. Brunner*, 899 N.E.2d 120, 124 (Ohio 2008) ("[W]e must avoid unduly technical interpretations that impede the public policy favoring free, competitive elections.") (internal quotation marks omitted); *Martin v. Porter*, 353 N.E.2d 919, 923 (Ohio Com. Pl. 1976) (results of an election should not be disturbed if there was substantial compliance with statutes) (citing *Mehling v. Moorehead*, 14 N.E.2d 15 (Ohio 1938)).	
Oklahoma	*Town of Eufaula v. Gibson*, 98 P. 565 (Okla. 1908) (liberal construction of balloting statutes favoring enfranchisement; calling for new election where ballots unintelligible).	
Oregon	*State ex rel. Carson v. Kozer,* 217 P. 827, 829 (Or. 1923) (initiative and referendum laws construed liberally).	OR. REV. STAT. § 247.005 ("It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise.").

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Pennsylvania	*In re Vodvarka*, 140 A.3d 639, 641 (Pa. 2016) ("[T]he Pennsylvania Election Code must be liberally construed to protect a candidate's right to run for office and the voters' right to elect the candidate of their choice.") (internal quotation marks omitted); *but see In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("At least where the Legislature has attached specific consequences to particular actions or omissions, Pennsylvania courts may not mitigate the legislatively prescribed outcome through recourse to equity.").	
South Carolina	*Knight v. State Bd. of Canvassers*, 374 S.E.2d 685, 686 (S.C. 1988) ("[T]he general rule in this state is that this Court will employ every reasonable presumption in favor of sustaining a contested election and that mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election.").	S.C. CODE ANN. § 7-15-20 (liberal construction for absentee ballot laws).
South Dakota		S.D. CODIFIED LAWS § 12-6-64 (liberal construction for laws pertaining to primaries); S.D. CODIFIED LAWS § 12-19-34 (liberal construction for laws to avoid invalidating an election).
Texas	*Owens v. State ex rel. Jennett*, 64 Tex. 500, 509 (Tex. 1885) ("All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor."); *Lewis v. Crump*, 34 S.W.2d 616, 618 (Tex. App. 1930) (citing *Owens*).	
Wisconsin	*Lanser v. Koconis*, 214 N.W.2d 425, 427 (Wis. 1974) (substantial compliance in absentee balloting); *McNally v. Tollander*, 302 N.W.2d 440, 444 (Wis. 1981) (substantial compliance standard for voting procedures); *Matter of Hayden*, 313 N.W.2d 869, 874 (Wis. Ct. App. 1981) ("Absent connivance, fraud or undue influence, substantial compliance with the statutory voting procedures is sufficient.").	WIS. STAT. § 5.01(1) ("Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.").

Table 5. Cases Addressing Lockstepping

State:	Lockstepping?:	Case:
Alaska	Unclear	*Sonneman v. State*, 969 P.2d 632, 637-38 (Alaska 1998) (applying the *Anderson-Burdick* federal test but not rejecting the possibility of a broader state test); *but see Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982) (striking down a ballot access restriction under strict scrutiny) ("Unless the provisions of the Alaska Constitution offer broader protection than their federal counterparts, the statutes must stand. . . . [W]e are not necessarily limited by [federal] precedents in interpreting Alaska's constitution.")
Arkansas	No	*Martin v. Kohls*, 444 S.W.3d 844, 853 (Ark. 2014) ("Appellants cite numerous cases [including *Crawford*] from other jurisdictions declaring a voter's proof of identity simply as much-needed regulations to verify voter registration. However, these cases are inapposite to the present case because those courts interpreted the United States Constitution or their respective states' constitutions, and here, we address the present issue solely under the Arkansas Constitution.") (internal citations omitted).
California	Yes	*Edelstein v. City and County of San Francisco*, 56 P.3d 1029, 1031 (Cal. 2002) ("Generally, when we interpret a provision of the California Constitution that is similar to a provision of the federal Constitution, we will not depart from the United States Supreme Court's construction of the similar federal provision unless we are given cogent reasons to do so. And, specifically, [i]n analyzing constitutional challenges to election laws, this court has followed closely the analysis of the United States Supreme Court.") (internal quotation marks and citations omitted).
Colorado	Yes	*MacGuire v. Houston*, 717 P.2d 948, 954-55 (Colo. 1986) (en banc) ("MacGuire suggests that this court construe the Colorado Constitution as providing greater protection than required by the United States Constitution because sections 1 and 5 of article II of the Colorado Constitution protect the right of participation and provide for free and open elections. We decline to do so."); *see also Colo. Common Cause v. Davidson*, No. 04CV7709, 2004 WL 2360485, at *1 (Colo. Dist. Ct. Oct. 18, 2004) ("In fact, even though the state constitutional right to vote is express, and therefore might arguably admit to a broader, more protective, interpretation than the implied federal right to vote, our Supreme Court has expressly declined to read the state right any more broadly than the federal right.").
Delaware	No	*Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 813 (Del. Ch. 2015) ("In this case, a review of the factors suggested in [the Delaware Supreme Court case] *Jones* leads me to conclude that the Elections Clause should not be interpreted in lockstep with the federal jurisprudence that has developed under the Fourteenth Amendment. The Elections Clause has independent content that is more protective of electoral rights than the federal regime."); *see also Jones v. State*, 745 A.2d 856 (Del. 1999) (outlining the factors Delaware courts consider when deciding lockstepping questions).

Georgia	Yes	*Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67, 74-75 (Ga. 2011) ("That this Court has recognized greater protection extended under the Georgia Constitution than under the federal constitution in a number of other areas is not relevant. We thus find applicable the test set forth by the United States Supreme Court in analyzing the voting laws of other states."(footnote omitted)); *see also Favorito v. Handel*, 684 S.E.2d 257, 260 (Ga. 2009)(same).
Idaho	No	*Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000) ("The *Burdick* case is, however, distinguishable from the present case. First, *Burdick* did not deal with the Idaho Constitution and instead was decided under the United States Constitution. Secondly, the statute at issue in *Burdick* involved a prohibition on write-in voting, not a legend printed on the ballot itself by the state. Idaho Code § 34–907B, unlike the statute in *Burdick*, is not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied.").
Illinois	Yes	*Nevitt v. Langfelder*, 623 N.E.2d 281, 284 (Ill. 1993) ("[T]he Federal and State equal protection guarantees are determined by the same standards, and our result in this case would be no different under Federal law.")
Indiana	Maybe	*League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E. 2d 758, 763-767 (Ind. 2010) (relying on federal courts' assessment of a challenge to Indiana's Voter ID law in a state challenge to that law, though noting that "[a] federal court's interpretation of Indiana law is not binding on Indiana state courts.").
Michigan	Yes	*In re Request for Advisory Op. Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 463 (Mich. 2007) (adopting the *Anderson-Burdick* test as state constitutional test) ("The Burdick test strikes the appropriate balance between protecting a citizen's right to vote under art. 1, § 2 and protecting against fraudulent voting under art. 2, § 4.")
Minnesota	Yes	*Kahn v. Griffin*, 701 N.W.2d 815, 833–34 (Minn. 2005)("We conclude that plaintiffs have failed to provide any principled basis for us to reach a clear and strong conviction that, under the facts and circumstances of this case, we should depart from the concept of uniformity by holding that the Minnesota Constitution provides greater protection to the right to vote than does the U.S. Constitution. Therefore, we hold that the Minnesota Constitution does not provide greater protection to the right to vote . . . .").
Missouri	No	*Weinschenk v. State*, 203 S.W.3d 201, 215-16 (Mo. 2006) (en banc) ("In light of the substantial burden that the Photo–ID Requirement places upon the right to vote, the statute is subject to strict scrutiny. This is consistent with the past decisions of Missouri courts, which have uniformly applied strict scrutiny to statutes impinging upon the right to vote. . . . Appellants' argument that this Court should not apply strict scrutiny but should apply a "flexible" test for examining voting restrictions such as that announced by the United States Supreme Court in *Burdick v. Takushi* also is not persuasive. Here, the issue is constitutionality under Missouri's Constitution, not under the United States Constitution.")(internal citations omitted).

Tennessee	Yes	*City of Memphis v. Hargett*, 414 S.W.3d 88, 109 (Tenn. 2013) ("This Court has consistently held that the class legislation clause confers upon individuals the same protections as the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."); *see also id*. at 114 (Koch, J., concurring) ("[W]e are at a constitutional crossroad. Were we to find that the Constitution of Tennessee's protection of the right to vote is similar to the United States Constitution's protection of the right to vote, we could adopt the standard of review and analysis employed by the United States Supreme Court in *Crawford v. Marion County Election Board*. If, however, we were to find that the Constitution of Tennessee provides different or broader protection of the right to vote than the United States Constitution, then it would be our responsibility to fashion a standard of review that is consistent with the Constitution of Tennessee. The parties did not address these matters in their briefs or oral arguments. Fortunately, this Court has previously addressed similar issues. . . . [Its] standard bears a strong resemblance to the United States Supreme Court's 'excessively burdensome requirements' standard in *Crawford*.")
Texas	Yes	*Andrade v. NAACP of Austin*, 345 S.W.3d 1, 4 (Tex. 2011) ("[T]he federal analytical approach applies to equal protection challenges under the Texas Constitution.").
Washington	Maybe	*Madison v. State*, 163 P.3d 757, 775 (Wash. 2007) (en banc) ("The concurrence in the dissent would be hard pressed to find a body of cases historically applying an independent state constitutional analysis under article I, section 12 that is not coextensive with the equal protection clause in any circumstances other than a grant of positive favoritism to a minority class."); *but see Foster v. Sunnyside Valley Irrigation Dist.*, 687 P.2d 841, 846 (Wash. 1984) (en banc) (rejecting federal precedent in favor of more expansive protection of the right to vote in special purpose districts) ("The Washington Constitution, unlike the federal constitution, specifically confers upon its citizens the right to 'free and equal' elections. Const. art. 1, § 19. Because we find that the Washington constitution goes further to safeguard this right than does the federal constitution, we base our decision here upon the Washington constitution.").

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